MICHIGAN REPORTS

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IN THE

SUPREME COURT

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DANILO ANSELMO

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SUPREME COURT

	TERM EXPIRES JANUARY 1 OF
CHIEF JUSTICE	
CLIFFORD W. TAYLOR, LAINGSBURG	2009

JUSTICES	
MICHAEL F. CAVANAGH, EAST LANSING	2007
ELIZABETH A. WEAVER, GLEN ARBOR	2011
MARILYN KELLY, BLOOMFIELD HILLS	2013
MAURA D. CORRIGAN, GROSSE POINTE PARK	2007
ROBERT P. YOUNG, JR., GROSSE POINTE PARK	2011
STEPHEN J. MARKMAN, MASON	2013

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STATE COURT ADMINISTRATOR: CARL L. GROMEK

CLERK: CORBIN R. DAVIS
CRIER: DAVID G. PALAZZOLO
REPORTER OF DECISIONS: DANILO ANSELMO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
BRIAN K. ZAHRA, Northville	2007
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2007
MARK J. CAVANAGH, Royal Oak	2009
JANET T. NEFF, Grand Rapids	2007
KATHLEEN JANSEN, St. Clair Shores	2007
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
HENRY WILLIAM SAAD, Bloomfield Hills	2009
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2007
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
MICHAEL R. SMOLENSKI, Grand Rapids	2007
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
JESSICA R. COOPER, Beverly Hills	2007
KIRSTEN FRANK KELLY, Grosse Pointe Park	2007
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
PAT M. DONOFRIO, Clinton Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2007
ALTON T. DAVIS, Grayling	2007
DEBORAH A. SERVITTO, Mt. Clemens	2007

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,....................................	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,.................	2007
	JOHN M. DONAHUE, St. Joseph,...................................	2011
	CHARLES T. LaSATA, Benton Harbor,...........................	2011
	PAUL L. MALONEY, St. Joseph, ...	2009
3.	DEBORAH ROSS ADAMS, Detroit, ...	2007
	DAVID J. ALLEN, Detroit,..	2009
	WENDY M. BAXTER, Detroit,...	2007
	ANNETTE J. BERRY, Plymouth, ...	2007
	GREGORY D. BILL, Northville Twp.,.............................	2007
	SUSAN D. BORMAN, Detroit,..	2009
	ULYSSES W. BOYKIN, Detroit, ...	2009
	MARGIE R. BRAXTON, Detroit, ...	2011
	MEGAN MAHER BRENNAN, Grosse Pointe Park,........	2007
	HELEN E. BROWN, Grosse Pointe Park,.......................	2009
	BILL CALLAHAN, Detroit, ...	2009
	JAMES A. CALLAHAN, Grosse Pointe, ...	2011
	MICHAEL J. CALLAHAN, Belleville, ...	2009
	JAMES R. CHYLINSKI, Grosse Pointe Woods, ...	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,....................	2007
	DAPHNE MEANS CURTIS, Detroit,..............................	2009
	CHRISTOPHER D. DINGELL, Trenton,........................	2009
	GERSHWIN ALLEN DRAIN, Detroit, ...	2011
	MAGGIE DRAKE, Detroit,..	2011
	PRENTIS EDWARDS, Detroit, ...	2007
	CHARLENE M. ELDER, Dearborn, ...	2007
	VONDA R. EVANS, Dearborn, ...	2009
	EDWARD EWELL, Jr., Detroit, ...	2007
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods, ...	2011
	SHEILA ANN GIBSON, Detroit, ...	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,.............................	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms, ...	2009

		Term Expires January 1 of
	DAVID ALAN GRONER, Grosse Pointe Park, ...	2011
	RICHARD B. HALLORAN, Jr., Detroit,.........................	2007
	AMY PATRICIA HATHAWAY, Grosse Pointe Park, ...	2007
	CYNTHIA GRAY HATHAWAY, Detroit,.........................	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park, ...	2011
	MICHAEL M. HATHAWAY, Detroit, ...	2011
	THOMAS EDWARD JACKSON, Detroit, ...	2007
	VERA MASSEY JONES, Detroit, ...	2009
	MARY BETH KELLY, Grosse Ile,....................................	2009
	TIMOTHY MICHAEL KENNY, Livonia, ...	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,...............	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods, ...	2011
	KATHLEEN M. McCARTHY, Dearborn, ...	2007
	WADE H. McCREE, Detroit, ...	2007
	WARFIELD MOORE, Jr., Detroit,..................................	2009
	BRUCE U. MORROW, Detroit,..	2011
	JOHN A. MURPHY, Plymouth Twp., ...	2011
	MARIA L. OXHOLM, Detroit,..	2007
	LITA MASINI POPKE, Canton, ...	2011
	DANIEL P. RYAN, Redford,...	2007
	MICHAEL F. SAPALA, Grosse Pointe Park, ...	2007
	RICHARD M. SKUTT, Detroit, ...	2007
	LESLIE KIM SMITH, Northville Twp.,..........................	2007
	VIRGIL C. SMITH, Detroit, ...	2007
	JEANNE STEMPIEN, Northville,..................................	2011
	CYNTHIA DIANE STEPHENS, Detroit, ...	2007
	CRAIG S. STRONG, Detroit,...	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,....................	2011
	DEBORAH A. THOMAS, Detroit,...................................	2007
	ISIDORE B. TORRES, Grosse Pointe Park,....................	2011
	MARY M. WATERSTONE, Detroit,................................	2007
	CAROLE F. YOUNGBLOOD, Grosse Pointe,..................	2007
	ROBERT L. ZIOLKOWSKI, Northville,.........................	2009
4.	EDWARD J. GRANT, Jackson,..	2011
	JOHN G. McBAIN, Jr., Rives Junction,...........................	2009
	CHARLES A. NELSON, Jackson,.....................................	2007
	CHAD C. SCHMUCKER, Jackson,...................................	2011
5.	JAMES H. FISHER, Hastings, ...	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills, ...	2009
	MARTHA ANDERSON, Troy,..	2009
	STEVEN N. ANDREWS, Bloomfield Hills, ...	2009
	RAE LEE CHABOT, Franklin, ...	2011
	MARK A. GOLDSMITH, Huntington Woods, ...	2007

		TERM EXPIRES JANUARY 1 OF
	NANCI J. GRANT, BLOOMFIELD HILLS,	2009
	DENISE LANGFORD-MORRIS, WEST BLOOMFIELD,	2007
	CHERYL A. MATTHEWS, SYLVAN LAKE,	2011
	JOHN JAMES McDONALD, FARMINGTON HILLS,	2011
	FRED M. MESTER, BLOOMFIELD HILLS,	2009
	RUDY J. NICHOLS, CLARKSTON,	2009
	COLLEEN A. O'BRIEN, ROCHESTER HILLS,	2011
	DANIEL PATRICK O'BRIEN, HOLLY,	2011
	WENDY LYNN POTTS, BIRMINGHAM,	2007
	GENE SCHNELZ, NOVI,	2009
	EDWARD SOSNICK, BLOOMFIELD HILLS,	2007
	DEBORAH G. TYNER, FRANKLIN,	2007
	MICHAEL D. WARREN, JR., BEVERLY HILLS,	2007
	JOAN E. YOUNG, BLOOMFIELD VILLAGE,	2011
7.	DUNCAN M. BEAGLE, FENTON,	2011
	JOSEPH J. FARAH, GRAND BLANC,	2011
	JUDITH A. FULLERTON, FLINT,	2007
	JOHN A. GADOLA, FENTON,	2009
	ARCHIE L. HAYMAN, FLINT,	2007
	GEOFFREY L. NEITHERCUT, FLINT,	2007
	DAVID J. NEWBLATT, LINDEN,	2011
	MICHAEL J. THEILE, FLUSHING,	2007
	RICHARD B. YUILLE, FLINT,	2009
8.	DAVID A. HOORT, PORTLAND,	2011
	CHARLES H. MIEL, STANTON,	2009
9.	STEPHEN D. GORSALITZ, PORTAGE,	2011
	J. RICHARDSON JOHNSON, PORTAGE,	2007
	RICHARD RYAN LAMB, KALAMAZOO,	2007
	PHILIP D. SCHAEFER, PORTAGE,	2011
	WILLIAM G. SCHMA, KALAMAZOO,	2009
10.	FRED L. BORCHARD, SAGINAW,	2011
	WILLIAM A. CRANE, SAGINAW,	2011
	LYNDA L. HEATHSCOTT, SAGINAW,	2007
	DARNELL JACKSON, SAGINAW,	2007
	ROBERT L. KACZMAREK, FREELAND,	2009
11.	CHARLES H. STARK, MUNISING,	2009
12.	GARFIELD W. HOOD, PELKIE,	2009
13.	THOMAS G. POWER, TRAVERSE CITY,	2011
	PHILIP E. RODGERS, JR., TRAVERSE CITY,	2009
14.	JAMES M. GRAVES, JR., MUSKEGON,	2007
	TIMOTHY G. HICKS, MUSKEGON,	2011
	WILLIAM C. MARIETTI, NORTH MUSKEGON,	2011
	JOHN C. RUCK, WHITEHALL,	2009

		TERM EXPIRES JANUARY 1 OF
15.	MICHAEL H. CHERRY, COLDWATER,	2009
16.	JAMES M. BIERNAT, SR., CLINTON TWP.,	2011
	RICHARD L. CARETTI, FRASER,	2011
	MARY A. CHRZANOWSKI, HARRISON TWP.,	2011
	DIANE M. DRUZINSKI, SHELBY TWP.,	2009
	JOHN C. FOSTER, CLINTON TWP.,	2007
	PETER J. MACERONI, CLINTON TWP.,	2009
	DONALD G. MILLER, HARRISON TWP.,	2007
	EDWARD A. SERVITTO, JR., WARREN,	2007
	MARK S. SWITALSKI, RAY TWP.,	2007
	MATTHEW S. SWITALSKI, CLINTON TWP.,	2009
	ANTONIO P. VIVIANO, CLINTON TWP.,	2011
	TRACEY A. YOKICH, ST. CLAIR SHORES,	2013
17.	GEORGE S. BUTH, GRAND RAPIDS,	2011
	KATHLEEN A. FEENEY, ROCKFORD,	2009
	DONALD A. JOHNSTON, III, GRAND RAPIDS,	2007
	DENNIS C. KOLENDA, ROCKFORD,	2007
	DENNIS B. LEIBER, GRAND RAPIDS,	2007
	STEVEN MITCHELL PESTKA, GRAND RAPIDS,	2011
	JAMES ROBERT REDFORD, EAST GRAND RAPIDS,	2011
	PAUL J. SULLIVAN, GRAND RAPIDS,	2009
	DANIEL V. ZEMAITIS, GRAND RAPIDS,	2009
18.	WILLIAM J. CAPRATHE, BAY CITY,	2011
	KENNETH W. SCHMIDT, BAY CITY,	2007
	JOSEPH K. SHEERAN, ESSEXVILLE,	2009
19.	JAMES M. BATZER, MANISTEE,	2009
20.	CALVIN L. BOSMAN, GRAND HAVEN,	2011
	JON H. HULSING, JENISON,	2007
	EDWARD R. POST, GRAND HAVEN,	2011
	JON VAN ALLSBURG, HOLLAND,	2013
21.	PAUL H. CHAMBERLAIN, BLANCHARD,	2011
	MARK H. DUTHIE, MT. PLEASANT,	2013
22.	ARCHIE CAMERON BROWN, ANN ARBOR,	2011
	TIMOTHY P. CONNORS, ANN ARBOR,	2007
	MELINDA MORRIS, ANN ARBOR,	2007
	DONALD E. SHELTON, SALINE,	2009
	DAVID S. SWARTZ, ANN ARBOR,	2009
23.	RONALD M. BERGERON, STANDISH,	2009
	WILLIAM F. MYLES, EAST TAWAS,	2009
24.	DONALD A. TEEPLE, SANDUSKY,	2009
25.	THOMAS L. SOLKA, MARQUETTE,	2011
	JOHN R. WEBER, MARQUETTE,	2009
26.	JOHN F. KOWALSKI, ALPENA,	2009

		Term Expires January 1 of
27.	ANTHONY A. MONTON, Pentwater,	2007
	TERRENCE R. THOMAS, Newaygo,	2009
28.	CHARLES D. CORWIN, Cadillac,	2009
29.	JEFFREY L. MARTLEW, DeWitt,	2011
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2007
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2007
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009
31.	JAMES P. ADAIR, Port Huron,	2007
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Corunna,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2007
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2007
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2007
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2007
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	PAUL J. CLULO, Midland,	2009
	THOMAS L. LUDINGTON, Sanford,	2007
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2007
	DAVID READER, Howell,	2011
45.	PAUL E. STUTESMAN, Three Rivers,	2007
46.	JANET M. ALLEN, Gaylord,	2007
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011

		Term Expires January 1 of
48.	HARRY A. BEACH, Otsego,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2007
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2007
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Bad Axe,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2007
55.	THOMAS R. EVANS, Beaverton,	2007
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH, Monroe,	2009
	TERRENCE P. BRONSON, Monroe,	2007
	JACK VITALE, Monroe,	2011
2A.	NATALIA M. KOSELKA, Adrian,	2011
	JAMES E. SHERIDAN, Adrian,	2009
2B.	DONALD L. SANDERSON, Hillsdale,	2009
3A.	DAVID T. COYLE, Coldwater,	2009
3B.	JEFFREY C. MIDDLETON, Three Rivers,	2009
	WILLIAM D. WELTY, Three Rivers,	2007
4.	PAUL E. DEATS, Edwardsburg,	2009
5.	GARY J. BRUCE, St. Joseph,	2011
	ANGELA PASULA, Stevensville,	2009
	SCOTT SCHOFIELD, Niles,	2009
	LYNDA A. TOLEN, Stevensville,	2007
	DENNIS M. WILEY, St. Joseph,	2011
7.	ARTHUR H. CLARKE, III, South Haven,	2009
	ROBERT T. HENTCHEL, Paw Paw,	2011
8-1.	QUINN E. BENSON, Kalamazoo,	2009
	ANNE E. BLATCHFORD, Kalamazoo,	2011
	PAUL J. BRIDENSTINE, Kalamazoo,	2007
	CAROL A. HUSUM, Kalamazoo,	2011
8-2.	ROBERT C. KROPF, Portage,	2009
8-3.	RICHARD A. SANTONI, Kalamazoo,	2009
	VINCENT C. WESTRA, Kalamazoo,	2011
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	2011
	JOHN R. HOLMES, Battle Creek,	2007
	FRANKLIN K. LINE, Jr., Marshall,	2009
	MARVIN RATNER, Battle Creek,	2009
12.	CHARLES J. FALAHEE, Jr., Jackson,	2009
	JOSEPH S. FILIP, Jackson,	2011
	JAMES M. JUSTIN, Jackson,	2007
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009
	J. CEDRIC SIMPSON, Ypsilanti,	2007
	KIRK W. TABBEY, Saline,	2011

		TERM EXPIRES JANUARY 1 OF
14B.	JOHN B. COLLINS, YPSILANTI,	2009
15.	JULIE CREAL GOODRIDGE, ANN ARBOR,	2007
	ELIZABETH POLLARD HINES, ANN ARBOR,	2011
	ANN E. MATTSON, ANN ARBOR,	2009
16.	ROBERT B. BRZEZINSKI, LIVONIA,	2009
	KATHLEEN J. McCANN, LIVONIA,	2007
17.	KAREN KHALIL, REDFORD,	2011
	CHARLOTTE L. WIRTH, REDFORD,	2009
18.	C. CHARLES BOKOS, WESTLAND,	2009
	GAIL McKNIGHT, WESTLAND,	2007
19.	WILLIAM C. HULTGREN, DEARBORN,	2011
	MARK W. SOMERS, DEARBORN,	2009
	RICHARD WYGONIK, DEARBORN,	2007
20.	LEO K. FORAN, DEARBORN HEIGHTS,	2007
	MARK J. PLAWECKI, DEARBORN HEIGHTS,	2009
21.	RICHARD L. HAMMER, JR., GARDEN CITY,	2009
22.	SYLVIA A. JAMES, INKSTER,	2007
23.	GENO SALOMONE, TAYLOR,	2007
	WILLIAM J. SUTHERLAND, TAYLOR,	2009
24.	JOHN T. COURTRIGHT, ALLEN PARK,	2009
	RICHARD A. PAGE, ALLEN PARK,	2011
25.	DAVID A. BAJOREK, LINCOLN PARK,	2009
	DAVID J. ZELENAK, LINCOLN PARK,	2011
26-1.	RAYMOND A. CHARRON, RIVER ROUGE,	2009
26-2.	MICHAEL F. CIUNGAN, ECORSE,	2009
27.	RANDY L. KALMBACH, WYANDOTTE,	2007
28.	JAMES A. KANDREVAS, SOUTHGATE,	2009
29.	LAURA REDMOND MACK, WAYNE,	2011
30.	BRIGETTE R. OFFICER, HIGHLAND PARK,	2011
31.	PAUL J. PARUK, HAMTRAMCK,	2009
32A.	ROGER J. LA ROSE, HARPER WOODS,	2009
33.	JAMES KURT KERSTEN, TRENTON,	2009
	MICHAEL K. McNALLY, TRENTON,	2007
	EDWARD J. NYKIEL, GROSSE ILE,	2011
34.	TINA BROOKS GREEN, NEW BOSTON,	2007
	BRIAN A. OAKLEY, ROMULUS,	2011
	DAVID M. PARROTT, BELLEVILLE,	2009
35.	MICHAEL J. GEROU, PLYMOUTH,	2011
	RONALD W. LOWE, CANTON,	2007
	JOHN E. MACDONALD, NORTHVILLE,	2009
36.	LYDIA NANCE ADAMS, DETROIT,	2011
	ROBERTA C. ARCHER, DETROIT,	2007
	MARYLIN E. ATKINS, DETROIT,	2007
	JOSEPH N. BALTIMORE, DETROIT,	2009
	NANCY McCAUGHAN BLOUNT, DETROIT,	2009
	IZETTA F. BRIGHT, DETROIT,	2011
	RUTH C. CARTER, DETROIT,	2007

		Term Expires January 1 of
	DONALD COLEMAN, Detroit,	2007
	NANCY A. FARMER, Detroit,	2007
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2007
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2007
	KENNETH J. KING, Detroit,	2009
	DEBORAH L. LANGSTON, Detroit,	2007
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2007
	B. PENNIE MILLENDER, Detroit,	2011
	CYLENTHIA L. MILLER, Detroit,	2007
	JEANETTE O'BANNER-OWENS, Detroit,	2009
	MARK A. RANDON, Detroit,	2009
	KEVIN F. ROBBINS, Detroit,	2007
	DAVID S. ROBINSON, Jr., Detroit,	2007
	C. LORENE ROYSTER, Detroit,	2007
	RUDOLPH A. SERRA, Detroit,	2007
37.	JOHN M. CHMURA, Warren,	2007
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2007
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2007
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2007
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Twp.,	2007
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2007
41B.	LINDA DAVIS, Clinton Twp.,	2009
	SEBASTIAN LUCIDO, Clinton Twp.,	2007
	SHEILA A. MILLER, Clinton Twp.,	2009
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2007
43.	KEITH P. HUNT, Ferndale,	2007
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009

		Term Expires January 1 of
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2007
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	STEPHEN C. COOPER, Southfield,	2011
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2007
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2007
	KIMBERLY SMALL, West Bloomfield,	2009
50.	LEO BOWMAN, Pontiac,	2007
	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2007
52-1.	ROBERT BONDY, Milford,	2007
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2007
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2007
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2007
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2005
	L. SUZANNE GEDDIS, Brighton,	2011
	A. JOHN PIKKARAINEN, Brighton,	2007
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2007
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2007
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	THOMAS P. BOYD, Okemos,	2007
56A.	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2007
56B.	GARY R. HOLMAN, Hastings,	2007
57.	STEPHEN E. SHERIDAN, Saugatuck,	2007
	JOSEPH S. SKOCELAS, Plainwell,	2007

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58.	SUSAN A. JONAS, SPRING LAKE,	2009
	RICHARD J. KLOOTE, GRAND HAVEN,	2007
	BRADLEY S. KNOLL, HOLLAND,	2009
	KENNETH D. POST, ZEELAND,	2011
59.	PETER P. VERSLUIS, GRAND RAPIDS,	2011
60.	HAROLD F. CLOSZ, III, NORTH MUSKEGON,	2009
	FREDRIC A. GRIMM, JR., NORTH MUSKEGON,	2009
	MICHAEL JEFFREY NOLAN, TWIN LAKE,	2007
	ANDREW WIERENGO, MUSKEGON,	2011
61.	PATRICK C. BOWLER, GRAND RAPIDS,	2009
	DAVID J. BUTER, GRAND RAPIDS,	2009
	J. MICHAEL CHRISTENSEN, GRAND RAPIDS,	2011
	JEANINE NEMESI LaVILLE, GRAND RAPIDS,	2007
	BEN H. LOGAN, II, GRAND RAPIDS,	2007
	DONALD H. PASSENGER, GRAND RAPIDS,	2011
62A.	PABLO CORTES, WYOMING,	2007
	STEVEN M. TIMMERS, GRANDVILLE,	2007
62B.	WILLIAM G. KELLY, KENTWOOD,	2009
63-1.	STEVEN R. SERVAAS, ROCKFORD,	2009
63-2.	SARA J. SMOLENSKI, EAST GRAND RAPIDS,	2009
64A.	RAYMOND P. VOET, IONIA,	2009
64B.	DONALD R. HEMINGSEN, SHERIDAN,	2009
65A.	RICHARD D. WELLS, DEWITT,	2009
65B.	JAMES B. MACKIE, ALMA,	2009
66.	WARD L. CLARKSON, CORUNNA,	2007
	TERRANCE P. DIGNAN, OWOSSO,	2009
67-1.	DAVID J. GOGGINS, FLUSHING,	2009
67-2.	JOHN L. CONOVER, DAVISON,	2009
	RICHARD L. HUGHES, OTISVILLE,	2011
67-3.	LARRY STECCO, FLUSHING,	2009
67-4.	MARK C. McCABE, FENTON,	2009
	CHRISTOPHER ODETTE, GRAND BLANC,	2007
68.	WILLIAM H. CRAWFORD, II, FLINT,	2007
	HERMAN MARABLE, JR., FLINT,	2007
	MICHAEL D. McARA, FLINT,	2009
	NATHANIEL C. PERRY, III, FLINT,	2009
	RAMONA M. ROBERTS, FLINT,	2011
70-1.	TERRY L. CLARK, SAGINAW,	2007
	M. RANDALL JURRENS, SAGINAW,	2011
	M. T. THOMPSON, JR., SAGINAW,	2009
70-2.	CHRISTOPHER S. BOYD, SAGINAW,	2011
	ALFRED T. FRANK, SAGINAW,	2009
	KYLE HIGGS TARRANT, SAGINAW,	2007
71A.	LAURA CHEGER BARNARD, METAMORA,	2009
	JOHN T. CONNOLLY, LAPEER,	2007
71B.	KIM DAVID GLASPIE, CASS CITY,	2009
72.	RICHARD A. COOLEY, JR., PORT HURON,	2011
	DAVID C. NICHOLSON, PORT HURON,	2007

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	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	KARL E. KRAUS, Bad Axe,	2009
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2007
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	ROBERT L. DONOGHUE, Midland,	2007
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2007
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

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RUSSELL F. ETHRIDGE, GROSSE POINTE,	2008
CARL F. JARBOE, GROSSE POINTE PARK,	2010
LYNNE A. PIERCE, GROSSE POINTE WOODS,	2008
MATTHEW R. RUMORA, GROSSE POINTE FARMS,	2010

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County		Term Expires January 1 of
Alcona	JAMES H. COOK	2007
Alger/Schoolcraft	WILLIAM W. CARMODY	2007
Allegan	MICHAEL L. BUCK	2007
Alpena	DOUGLAS A. PUGH	2007
Antrim	NORMAN R. HAYES	2007
Arenac	JACK WILLIAM SCULLY	2007
Baraga	TIMOTHY S. BRENNAN	2007
Barry	WILLIAM M. DOHERTY	2007
Bay	KAREN TIGHE	2007
Benzie	NANCY A. KIDA	2007
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2007
Branch	FREDERICK L. WOOD	2007
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2007
Cass	SUSAN L. DOBRICH	2007
Cheboygan	ROBERT JOHN BUTTS	2007
Chippewa	LOWELL R. ULRICH	2007
Clare/Gladwin	THOMAS P. McLAUGHLIN	2007
Clinton	LISA SULLIVAN	2007
Crawford	JOHN G. HUNTER	2007
Delta	ROBERT E. GOEBEL, Jr.	2007
Dickinson	THOMAS D. SLAGLE	2007
Eaton	MICHAEL F. SKINNER	2007
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2007
Genesee	JENNIE E. BARKEY	2007
Genesee	ROBERT E. WEISS	2007
Gogebic	JOEL L. MASSIE	2007
Grand Traverse	DAVID L. STOWE	2007
Gratiot	JACK T. ARNOLD	2007
Hillsdale	MICHAEL E. NYE	2007
Houghton	CHARLES R. GOODMAN	2007

Huron	DAVID L. CLABUESCH	2007
Ingham	R. GEORGE ECONOMY	2007
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2007
Iosco	JOHN D. HAMILTON	2007
Iron	C. JOSEPH SCHWEDLER	2007
Isabella	WILLIAM T. ERVIN	2007
Jackson	SUSAN E. VANDERCOOK	2007
Kalamazoo	CURTIS J. BELL, JR.	2007
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2007
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2007
Kent	JANET A. HAYNES	2009[1]
Kent	G. PATRICK HILLARY	2007
Kent	DAVID M. MURKOWSKI	2009[2]
Keweenaw	JAMES G. JAASKELAINEN	2007
Lake	MARK S. WICKENS	2007
Lapeer	JUSTUS C. SCOTT	2007
Leelanau	JOSEPH E. DEEGAN	2007
Lenawee	MARGARET MURRAY-SCHOLZ NOE	2007
Livingston	SUSAN L. RECK	2007
Luce/Mackinac	THOMAS B. NORTH	2007
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2007
Manistee	JOHN R. DeVRIES	2007
Marquette	MICHAEL J. ANDEREGG	2007
Mason	MARK D. RAVEN	2007
Mecosta/Osceola	LaVAIL E. HULL	2007
Menominee	WILLIAM A. HUPY	2007
Midland	DORENE S. ALLEN	2007
Missaukee	CHARLES R. PARSONS	2007
Monroe	JOHN A. HOHMAN, JR.	2007
Monroe	PAMELA A. MOSKWA	2009
Montcalm	EDWARD L. SKINNER	2007
Montmorency	JOHN E. FITZGERALD	2007
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2007
Newaygo	GRAYDON W. DIMKOFF	2007
Oakland	BARRY M. GRANT	2009

[1] To August 1, 2006.

[2] From August 21, 2006.

Oakland	LINDA S. HALLMARK	2007
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	WALTER A. URICK	2007
Ogemaw	EUGENE I. TURKELSON	2007
Ontonagon	JOSEPH D. ZELEZNIK	2007
Oscoda	KATHRYN JOAN ROOT	2007
Otsego	MICHAEL K. COOPER	2007
Ottawa	MARK A. FEYEN	2007
Presque Isle	KENNETH A. RADZIBON	2007
Roscommon	DOUGLAS C. DOSSON	2007
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2007
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN R. MONAGHAN	2007
St. Joseph	THOMAS E. SHUMAKER	2007
Sanilac	R. TERRY MALTBY	2007
Shiawassee	JAMES R. CLATTERBAUGH	2007
Tuscola	W. WALLACE KENT, Jr.	2007
Van Buren	FRANK D. WILLIS	2007
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	DARLENE A. O'BRIEN	2007
Wayne	JUNE E. BLACKWELL-HATCHER	2007
Wayne	FREDDIE G. BURTON, Jr.	2007
Wayne	JUDY A. HARTSFIELD	2007
Wayne	JAMES E. LACEY	2007
Wayne	MILTON L. MACK, Jr.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wexford	KENNETH L. TACOMA	2007

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Branch	Coldwater	15
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Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
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ADMINISTRATIVE ORDER No. 2006-6

PROHIBITION ON "BUNDLING" CASES

Entered August 9, 2006 effective immediately (File No. 2003-47)—REPORTER.

On order of the Court, the need for immediate action having been found, the following Administrative Order is adopted, effective immediately. Public comments on this administrative order, however, may be submitted to the Supreme Court Clerk in writing or electronically until December 1, 2006, at: P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-47. Your comments will be posted, along with the comments of others, at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

The Court has determined that trial courts should be precluded from "bundling" asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

For purposes of this Administrative Order, "asbestos-related disease personal injury actions" include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery.

Staff Comment: This Administrative Order prohibits the practice of "bundling," or joining, asbestos-related personal injury actions in order to maximize the number of cases settled. The order does not, however, preclude consolidation for discovery purposes.

The purpose of this order is to ensure that cases filed by plaintiffs who exhibit physical symptoms as a result of exposure to asbestos are settled or tried on the merits of that case alone. Bundling can result in seriously ill plaintiffs receiving less for their claim in settlement than they might otherwise have received if their case was not joined with another case or other cases.

The order is designed to preclude both the practice of settling cases in which plaintiffs with symptoms and plaintiffs without symptoms are settled together, as well as the practice of settling cases in which the plaintiffs are similarly situated (either with or without symptoms allegedly related to asbestos exposure.)

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

MARKMAN, J. (*concurring*). This Court, having conducted two public administrative hearings on asbestos litigation, and having considered for more than three years whether, and how, to respond to such litigation, I join fully in this administrative order for the following reasons: (1) unlike other remedial proposals, such as the establishment of an inactive asbestos docket, I believe that this "antibundling" administrative order indisputably falls within the scope of our judicial powers; (2) this administrative order will, in my judgment, help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as "leverage" for the resolution of other cases; (3) this administrative order will, I believe, advance the interests of the most seriously ill asbestos plaintiffs whose interests

have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments for claims made by less seriously ill claimants, Behrens & Lopez, *Unimpaired asbestos dockets*, 24 Rev Litig 253, 259-260 (2005); (4) at our most recent public administrative hearing on May 6 of this year, all who spoke agreed that each claim should be decided on its own merits and that serious claims should not be used to leverage settlements in less serious cases; and (5) this administrative order will better enable the Legislature, which is considering asbestos litigation, to undertake an assessment of the true costs of asbestos litigation. At present, these costs have been camouflaged by the "bundling" process, at the expense of fundamental due process rights.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). For some time this Court has had on its administrative agenda consideration of the adoption of a docket-management system for asbestos-related litigation. We are also well aware that the Legislature is considering legislation in connection with this area. Today, before knowing what long-range plan or system, if any, is appropriate for this area of litigation, the Court, putting the cart before the horse, reaches out and meddles with the settlement practices currently in place. The comments the Court has thus far received do not evidence any crisis-proportion problems[1] and the true

[1] Just two months ago, the Court received the following comment from an assistant general counsel for Consumers Energy Company: I write in response to the Proposed Administrative Order regarding Asbestos-Related Disease Litigation that was published in the Michigan Bar Journal I received in today's mail. I am an Assistant General Counsel of Consumers Energy Company in charge of litigation. I have personally handled more than 180 asbestos cases on behalf of Consumers Energy Company. We do not support either alternative in the proposed Admin-

resulting costs to the system of today's order remain unknown. Accordingly, I cannot agree with this order.

WEAVER, J. (*dissenting*). I dissent from the precipitous adoption of this "antibundling" order, which precludes "bundling" of asbestos-related cases for settlement and trial purposes. This haste, without sufficient information, is unrestrained and unwise.

"Bundling" refers to the trial court procedure of grouping asbestos cases together for trial and settlement purposes, using stronger cases as leverage to settle cases grouped together.

The Court does not know enough about how this "antibundling" order will affect current trial court operations, particularly in Wayne County and other counties from which asbestos-related cases originate. The Court needs to be certain that the attempted solution to due process concerns does not create even greater due process concerns and other problems.

It is undisputed that adopting this "antibundling" order will increase the number of asbestos cases that are litigated, as opposed to settled. Judge Robert J. Colombo, currently the only circuit judge in Michigan who hears asbestos-related cases, has informed this Court that, in his opinion, adopting any "antibundling" order will require ten additional judges to handle the increased caseload.

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istrative Order. There are already sufficient safeguards in place to avoid fraudulent claims based on the information that a plaintiff is required to produce in discovery in every case (social security records, medical diagnosis, standard interrogatory answers etc.). The proposed Administrative Order would in our view create a quagmire and accomplish little. In slang terms, this is an example of "if it ain't broke—don't fix it". I also find the Proposed Administrative Order to be quite surprising from this Michigan Supreme Court. It strikes me as going way beyond a procedural matter and looks an awful lot like judicial legislating.

If the "antibundling" order does require ten additional judges, it would represent a significant financial burden on the state and on Wayne County. The majority has not addressed how the increased caseload will be financed, or who will bear the increased financial burden.

Further, the majority has not addressed how the increased caseload will be managed. Judge Colombo has asserted that ten new judgeships would be needed. The majority has not addressed how ten new judgeships would be created and funded. Even if the ten new judgeships are created, the majority has not addressed how the increased caseload would be managed during the minimum of at least one year that it would take to create and implement new judgeships. Finally, the majority has not addressed how the increased caseload will be managed if those new judgeships are not created.

Currently, the asbestos docket represents one quarter of one judge's docket. The dockets of the other 68 judges in the Wayne Circuit Court and the Wayne County Probate Court handle the civil, criminal, and child and family cases.

The majority order cites "fundamental due process rights" in asbestos cases as a reason to immediately implement the "antibundling" order. But determining whether asbestos litigants' due process rights have been violated requires a complex and in-depth analysis, rather than simply stating, as the majority does, that rights have been violated.

Further, the immediate increase in the asbestos docket will affect the distribution of court resources, including the trial judges' time spent on all other cases. There will be fewer resources available for civil, criminal, and child and family cases, because the resources will be diverted to manage the new increased asbestos

docket. Depriving civil, criminal, and child and family cases the proper resources to adjudicate them could create its own new set of due process problems.

It is true that this Court has had an administrative file on the asbestos docket open for more than three years. However, the information submitted by Judge Colombo, that, in his opinion, precluding bundling would increase the caseload so as to require ten additional judges, was only recently made available.

This Court should have further investigated the issues surrounding, and the potential effects of, any "antibundling" order before issuing this order.

Even though this Court has had the file on asbestos issues open for over three years, by immediately adopting this "antibundling" order, this Court is acting precipitously, without restraint, and therefore unwisely.

KELLY, J. (*dissenting*). Today's decision to outlaw the bundling of asbestos-diseases cases in Michigan courts is both ill-advised and indefensible. The decision purports to restore due process to litigants. It does not. Instead, it makes a mockery of due process and creates serious problems. It virtually ensures that justice will be so delayed for many diseased plaintiffs that they will never live to see their case resolved. It promises to force a sizable and needless increase in the funds required to operate the circuit courts at a time when the state's economy is far from robust. And, until new funds have been raised, unbundled asbestos-diseases cases will clog our courts' dockets. The congestion will bring with it years of delay to individuals sick and dying of work-related lung diseases.

It is not merely plaintiffs who will be burdened by the newly created problems. Unbundling will increase the cost to Michigan businesses of defending asbestos-diseases claims that they believe to be baseless. Reliable

expert information and unrebutted statements to this Court project that unbundling in Michigan will require the addition of at least ten new circuit court judges. The cost to taxpayers will be in the millions of dollars. And delays of four to six years will occur in resolving asbestos-diseases cases pending the addition of these new judges. Given the benefits of the current system to both sides and to the taxpayers of the state, I would retain it.

The current system functions in this manner: A judge groups asbestos-diseases cases on the basis of a commonality among them. For instance, cases in which the plaintiffs claim harmful exposure to asbestos in one workplace are grouped together. The judge then tries one claim that is representative of the group. The results of the trial are extrapolated to the rest of the claimants. The extrapolation provides a remedy for all deserving claimants in the group, not just the most seriously ill. The effect is that almost all claims in the group are settled without the time and expenses engendered if each were to receive a full trial. It efficiently allows the court to resolve large numbers of cases in a short time. Claimants obtain a recovery more quickly than traditionally, and defendants save the expense of numerous trials.

Critics of this system claim that bundling can result in seriously ill plaintiffs receiving less for their claims in settlement than they might have received in an individual trial. Proponents of the system respond that, in traditional settlements or trials, most plaintiffs, especially those suffering from serious injuries, recover only a fraction of their actual losses.[1] Critics insist that the

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[1] Hensler, *Symposium: Conflict of laws and complex litigation issues in mass tort litigation: Resolving mass toxic torts: Myths and realities*, 1989 U Ill L R, 89, 101 (1989).

current system permits part of the finite amount of funds available for diseased claimants to go to the less seriously injured. Proponents respond that the amount of settlement monies going, perhaps needlessly, to those less seriously injured is more than offset by the savings in litigation expenses occasioned by bundling.

Critics also assert that bundling violates due process requirements. But the Ninth Circuit Court of Appeals has reached the opposite conclusion. It approved bundling, finding that it complies with due process requirements.[2] In fact, some legal scholars believe that, in the handling of these cases, claimants will lose, not regain, their due process rights if judges are unable to bundle them.[3] Nonetheless, today the Michigan Supreme Court has apparently rejected the Ninth Circuit's reasoning. Justice Markman explicitly concludes that this administrative order helps to restore "traditional principles of due process."

One can only express dismay at the majority's decision to prohibit the bundling of asbestos-diseases cases in Michigan. Rather than restore due process as it pretends, the order seems designed to precipitate a crisis. The existing system has functioned reasonably well for years. And there is no indication that future problems will arise with it. Asbestos-diseases cases are not increasing in number and are not expected to increase in our state. But today's Supreme Court order will create an inability of the courts to resolve them expeditiously. For what purpose?

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[2] *Hilao v Estate of Marcos*, 103 F3d 767, 786-787 (CA 9, 2004).

[3] See Saks and Blanck, *Justice improved: The unrecognized benefits of aggregation and sampling in the trial of mass torts,* 44 Stan L Rev 815, 839 (April, 1992).

Supreme Court Cases

COWLES v BANK WEST

Docket No. 127564. Argued May 2, 2006 (Calendar No. 4). Decided July 27, 2006. Rehearing denied 477 Mich 1209.

Kristine Cowles brought a class action in the Kent Circuit Court against Bank West, alleging that the defendant engaged in the unauthorized practice of law in violation of the Michigan Consumer Protection Act (MCPA), 445.901 *et seq*., when it prepared residential loan documents for a fee. The plaintiff's first amended complaint added a claim alleging that the document preparation fee violated § 1638 of the Truth in Lending Act (TILA), 15 USC 1638. The court, Donald A. Johnston, J., granted summary disposition for the defendant on the plaintiff's TILA claim. The plaintiff then filed a second amended complaint alleging another TILA claim under 15 USC 1605(a) and Regulation Z, 12 CFR 226.4(c)(7). The court certified the class and made the plaintiff the class representative. The defendant filed a motion for reconsideration of the decision to certify the class, asserting that the plaintiff's individual TILA § 1605 claim was barred by the applicable one-year statute of limitations and she therefore could not represent the class on that claim. The defendant also sought summary disposition on the merits of the TILA § 1605 claim. Before the court ruled on the motions, Karen B. Paxson, a member of the class, was allowed to intervene and act as class representative for the TILA § 1605 claim. The court then granted the defendant's motion for reconsideration, ruling that the limitations period had run on plaintiff Cowles's TILA § 1605 claim, and it granted summary disposition on all of the plaintiffs' other claims except plaintiff Paxson's TILA § 1605 claim. The defendant and plaintiff Paxson separately moved for summary disposition on the TILA claim. The court held that the period of limitations had expired on Paxson's TILA claim because the claim accrued more than one year before plaintiff Cowles pleaded it in her second amended complaint, and that complaint did not relate back to the original pleading filed by plaintiff Cowles. The plaintiffs' application for leave to appeal was granted by the Court of Appeals, but the appeal was held in abeyance pending the Supreme Court's decision in *Dressel v Ameribank*, 468 Mich 557 (2003). The ruling in that case resolved the plaintiffs' unauthorized practice of law claim, which

the Court of Appeals then dismissed in an order. The Court of Appeals, GAGE, P.J., and ZAHRA, J. (O'CONNELL, J., dissenting), affirmed in part, reversed in part, and remanded the matter to the circuit court for further proceedings. 263 Mich App 213 (2004). The Court of Appeals affirmed the grant of summary disposition on the MCPA claims, but held that the trial court improperly dismissed Paxson's TILA § 1605 claim, holding that the period of limitations on Paxson's claim was tolled by the filing of Cowles's initial complaint. The Court of Appeals also held that amendments to a class-action complaint adding claims arising out of the conduct, transaction, or occurrence alleged in the original complaint relate back to the date of the initial filing when the period of limitations was tolled. The Court of Appeals also held that summary disposition on the merits of the TILA claim was inappropriate because there was a question of material fact concerning whether the fee was bona fide. The Supreme Court granted the defendant's application for leave to appeal. 474 Mich 886 (2005).

In an opinion by Justice CAVANAGH, joined by Justices WEAVER, KELLY, and MARKMAN, the Supreme Court *held*:

The filing of a complaint asserting a class action tolls the period of limitations under MCR 3.501(F) for a putative class member's claim when that claim was not pleaded in the initial class-action complaint but arose out of the same factual and legal nexus. The filing of such a complaint is sufficient to toll the period of limitations as long as the defendant has notice of both the claim being brought and the number and generic identities of the potential plaintiffs. The holding of the Court of Appeals, that in this particular case Paxson's claim was not time-barred and therefore was improperly dismissed on statute of limitations grounds, must be affirmed. Whether the amendment to the class-action complaint adding Paxson's claim related back to the date of the initial filing need not be decided in this case because Paxson's claim was not time-barred. The portion of the Court of Appeals opinion regarding such relation back must be vacated. The Court of Appeals properly found that summary disposition with regard to the merits of Paxson's claim was improper because a question of fact existed. That part of the judgment of the Court of Appeals must be affirmed, and the matter must be remanded to the trial court for further proceedings.

1. The filing of Cowles's initial complaint within the TILA period of limitations for Paxson's claim, but outside the TILA period of limitations for Cowles's claim, was sufficient to toll the period of limitations for Paxson's claim on the previously unpleaded TILA claim under MCR 3.501(F). Under MCR 3.501(F), a

complaint asserting a class action tolls the period of limitations for a class member's claim that arises out of the same factual and legal nexus as long as the defendant has notice of the class member's claim and the number and generic identities of the potential plaintiffs.

2. A document preparation fee is not bona fide, authentic, or genuine if it includes charges for items other than document preparation. Although the fee was reasonable, there is a question of material fact concerning whether it was bona fide. Therefore, summary disposition would be inappropriate with regard to this issue.

Affirmed in part, vacated in part, and remanded to the trial court.

Justice CORRIGAN, joined by Chief Justice TAYLOR and Justice YOUNG, dissenting, stated that Cowles's filing of the initial complaint, alleging solely state law claims, did not toll the one-year period of limitations for Paxson's federal TILA claim. Paxson's intervention does not alter this conclusion because she intervened after the period of limitations had run on her TILA claim. Moreover, Paxson's TILA claim, which was not and could not have been brought by Cowles as the initial class representative, does not relate back to the filing of the original complaint under MCR 2.118(D), an issue the majority failed to address. The judgment of the Court of Appeals should be reversed, and the trial court's grant of summary disposition to the defendant should be reinstated.

LIMITATION OF ACTIONS — CLASS ACTIONS — TOLLING.

A complaint asserting a class action tolls the period of limitations for a class member's claim that arises out of the same factual and legal nexus if the defendant has notice of the class member's claim and the number and generic identities of the potential plaintiffs (MCR 3.501[F]).

Drew, Cooper & Anding (by *John E. Anding* and *Christopher G. Hastings*) for the plaintiffs.

Warner Norcross & Judd LLP (by *William K. Holmes, Molly E. McManus,* and *John J. Bursch*) for the defendant.

CAVANAGH, J. The trial court in this class action dismissed intervening plaintiff Karen Paxson's claim

against defendant Bank West under the Truth in Lending Act (TILA), 15 USC 1601 *et seq.,* on the basis that it was barred by the statute of limitations. The Court of Appeals reversed, holding, among other things, that the period of limitations applicable to Paxson's claim was tolled under MCR 3.501(F) and that the claim was subject to the rule of relation back of amendments under MCR 2.118(D). Having concluded that Paxson's claim was not time-barred, the Court of Appeals then held that summary disposition on the merits of Paxson's TILA claim was improper because a question of fact exists concerning whether defendant's document preparation fee was "bona fide" under applicable federal law.

In this matter of first impression, we must first decide whether the filing of a class-action complaint tolls the period of limitations under MCR 3.501(F) for a putative class member's claim when that claim was not pleaded in the initial class-action complaint but arose out of the same factual and legal nexus. We hold that the filing of such a complaint is sufficient to toll the period of limitations as long as the defendant has notice of both the claim being brought and the number and generic identities of the potential plaintiffs. Accordingly, we affirm the Court of Appeals decision that, in this particular case, the intervening plaintiff's claim was not time-barred and, therefore, was improperly dismissed on statute of limitations grounds.

Because the claim was not time-barred in this particular case, we need not decide whether the amendment to the class-action complaint adding this claim related back to the date of the initial filing. Thus, we vacate that portion of the opinion of the Court of Appeals.

Finally, in light of our conclusion that Paxson's claim was not time-barred, we must also address whether

summary disposition was nonetheless warranted under MCR 2.116(C)(10) on the merits of Paxson's claim. We agree with the Court of Appeals that summary disposition would be improper because a question of fact exists over whether the document preparation fee was "bona fide." Therefore, we affirm in part, vacate in part, and remand for further proceedings in the trial court consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On February 7, 1997, plaintiff Kristine Cowles obtained a residential real estate mortgage loan from defendant Bank West. In connection with this loan, defendant charged Cowles a $250 document preparation fee. The fee was reported on line 1105 of Cowles's United States Department of Housing and Urban Development statement, also known as a HUD-1 settlement statement.

On February 9, 1998, intervening plaintiff Karen Paxson obtained a residential refinancing loan from defendant. Defendant similarly charged Paxson a $250 document preparation fee.

On July 1, 1998, Cowles filed a class-action complaint against defendant, alleging several claims concerning the document preparation fee. The class was defined to include all consumers who obtained real estate loans in Michigan from defendant and who were charged and paid or financed the document preparation fee in the six-year period before the filing of Cowles's class-action complaint. In the complaint, Cowles claimed that defendant's charging of a document preparation fee in connection with the services defendant provided constituted the unauthorized practice of law. Further, the complaint alleged that the document preparation fee violated certain provi-

sions of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Additionally, the class-action complaint asserted claims of replevin, unjust enrichment, innocent misrepresentation, and negligent misrepresentation.

On August 20, 1998, Cowles amended her complaint to add a claim that the document preparation fee also violated § 1638 of TILA, 15 USC 1638, because the fee was improperly identified on the TILA disclosure form. Cowles alleged that the document preparation fee was identified on the TILA disclosure form as a fee "paid to others on your behalf." But Cowles claimed that defendant retained the fee and did not actually pay it to others. Further, the amended complaint claimed that the document preparation fee exceeded the cost associated with the actual preparation of the final papers. The trial court granted defendant's motion for summary disposition on this TILA claim. Plaintiffs did not appeal that ruling in the Court of Appeals, and they have not appealed that ruling in this Court.

Subsequently, on February 16, 1999, Cowles filed a second amended complaint, adding a claim that defendant's failure to disclose the document preparation fee resulted in a different TILA violation under 15 USC 1605(a)[1]

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[1] 15 USC 1605(a) provides:

> Determination of finance charge.
>
> (a) "Finance charge" defined. Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and

and Regulation Z, 12 CFR 226.4(c)(7).[2] Cowles claimed that defendant violated § 1605 and Regulation Z because the document preparation fee, as a finance charge, was not included in the loan's annual percent-

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amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.

[2] 12 CFR 226.4 provides in relevant part:

(c) Charges excluded from the finance charge. The following charges are not finance charges:

* * *

(7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:

(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

(iii) Notary and credit report fees.

age rate (APR). Further, Cowles alleged that the document preparation fee did not relate to document preparation. The trial court then certified the class as described in Cowles's second amended complaint, and Cowles acted as the class representative.[3] Notice was subsequently sent to the class members, and a list of all class members who opted out of the class was then filed in the trial court. Notably, Paxson did not opt out of the class.

Defendant moved in the trial court for reconsideration of the court's decision to certify the class as described in Cowles's second amended complaint. Defendant asserted that Cowles's individual TILA claim under § 1605 was time-barred by the applicable statute of limitations, 15 USC 1640(e),[4] because the § 1605

> (iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest infestation or flood hazard determinations.
>
> (v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

[3] The order initially granting class certification defined the class as follows:

> All persons who obtained a real estate loan [secured by a first mortgage] from Bank West covering real property located within the State of Michigan; who were charged and who paid and/or financed a "document preparation" fee in connection with the transaction; which fee was imposed by Bank West or its agents and was disclosed on Line 1105 of the HUD-1 (including HUD-1A) Settlement Statement; and which fee was paid to or otherwise inured to the benefit of Bank West; and/or which fee was not disclosed as a part of the Finance Charge in the Federal Truth-In-Lending Disclosures.

[4] 15 USC 1640(e) provides in relevant part: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

claim was pleaded more than one year after Cowles closed on her loan. Accordingly, defendant maintained that Cowles could not represent the class with respect to the § 1605 claim. Moreover, defendant moved for summary disposition of the § 1605 claim, as well as the other claims contained in the second amended complaint.

After defendant filed its motion for reconsideration, Paxson moved to intervene and serve as the class representative for the § 1605 claim. Paxson's motion to intervene was granted, and she filed a complaint as an intervening plaintiff. The trial court granted defendant's motion for summary disposition on Cowles's § 1605 claim, reasoning that Cowles's § 1605 claim was time-barred. Further, the trial court granted defendant summary disposition of all claims contained in the second amended complaint, *except* Paxson's § 1605 claim.

Paxson and defendant then filed cross-motions for summary disposition on the § 1605 TILA claim. The trial court opined that Paxson's § 1605 claim was meritorious. But the trial court ultimately ruled that the claim was time-barred under § 1640(e) because it was pleaded in the second amended complaint more than one year after Paxson's claim accrued—the date she closed on her loan. The trial court concluded that Paxson's claim was not tolled from the time Cowles filed the initial class-action complaint and that the second amended complaint did not relate back to the date of the initial complaint. Thus, the trial court revoked class certification with respect to the TILA claim brought under § 1605. Paxson appealed.

In a split, published decision, the Court of Appeals affirmed in part, reversed in part, and remanded the matter to the trial court. *Cowles v Bank West*, 263 Mich

App 213; 687 NW2d 603 (2004). Relying on *Newton v Bank West*, 262 Mich App 434; 686 NW2d 491 (2004), the Court of Appeals affirmed the trial court's grant of summary disposition on the MCPA claims because defendant's residential mortgage loan transactions were exempt from the MCPA by virtue of MCL 445.904(1)(a).[5] But the Court of Appeals held that the trial court improperly dismissed Paxson's TILA claim under § 1605 on statute of limitations grounds. The Court of Appeals observed that whether the amendment of a class-action complaint to add new theories of liability relates back to the filing of the initial complaint for purposes of the period of limitations was an issue of first impression. Nonetheless, the Court of Appeals reasoned that under MCR 3.501(F), the period of limitations for Paxson's TILA claim was tolled by the filing of the initial complaint. The Court of Appeals concluded that tolling was proper because Paxson was a member of the class described in the original complaint, the class was ultimately certified, and none of the circumstances set forth in MCR 3.501(F)(2) occurred that could have caused the period of limitations to resume running against Paxson or any other class member.

Next, the Court of Appeals concluded that amendments to a class-action complaint adding claims arising out of the conduct, transaction, or occurrence alleged in the original complaint relate back to the date of the initial filing when the period of limitations was tolled. The Court of Appeals reasoned that nothing in the

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[5] The Court of Appeals also dismissed plaintiffs' unauthorized practice of law claim. The Court of Appeals held this issue in abeyance pending this Court's decision in *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003). In *Dressel*, we held that a bank does not engage in the unauthorized practice of law when it completes standard mortgage forms and charges a fee for this service. Thus, in light of *Dressel*, the Court of Appeals dismissed the unauthorized practice of law claim by an order.

court rules dealing with representative actions suggests that those rules are comprehensive. Accordingly, the Court of Appeals turned to MCR 2.118(D), the general court rule that provides that an amendment adding a claim relates back to the date of the original pleading if the claim added in the amendment arose of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. According to the Court of Appeals, because the cause of action in this case was always to recover damages related to the document preparation fee charged in connection with residential mortgage loans, the TILA claim brought under § 1605 related to the same conduct or transaction as pleaded in Cowles's initial class-action complaint.

Further, the Court of Appeals opined that nothing in the United States Supreme Court's precedent dealing with the tolling doctrine compels the conclusion that the relation-back rule is inapplicable in the class-action context. See, e.g., *American Pipe & Constr Co v Utah*, 414 US 538; 94 S Ct 756; 38 L Ed 2d 713 (1974), and *Crown, Cork & Seal Co, Inc v Parker*, 462 US 345; 103 S Ct 2392; 76 L Ed 2d 628 (1983). Rather, the Court of Appeals reasoned that Paxson and other members of the potential class were entitled to rely on the existence of the class action and attendant tolling provisions to protect their rights with respect to claims associated with the document preparation fee. Moreover, the Court of Appeals concluded that if it were to hold otherwise, class members for whom the period of limitations may expire could only protect their rights by intervening or filing separate actions—something the class-action mechanism was intended to avoid.

Additionally, in responding to the Court of Appeals dissent, the Court of Appeals majority opined that its ruling would not unfairly disadvantage defendant be-

cause the relation-back doctrine is limited in application and Paxson was not trying to "piggyback" her claim, observing that there were "no new, repetitive actions filed by any of the plaintiffs in the class." *Cowles*, *supra* at 230. Further, the Court of Appeals observed that if Paxson had filed an individual lawsuit on July 1, 1998—the date of Cowles's initial complaint —alleging the unauthorized practice of law, and later moved to amend to add the TILA claim, there would be no question that the claim would relate back to the date of her original pleading, regardless of whether the period of limitations on the TILA claim had expired. Thus, the Court of Appeals held that MCR 2.118(D) applied in this instance and, thus, Paxson's TILA claim related back to the date of the initial complaint.

In light of its conclusion that Paxson's TILA claim was improperly dismissed, the Court of Appeals next addressed whether summary disposition was nevertheless warranted under MCR 2.116(C)(10). Specifically, the Court of Appeals addressed defendant's argument that the document preparation fee was properly disclosed under Regulation Z, 12 CFR 226.4(c)(7), because the fee was bona fide and reasonable in amount. While the Court of Appeals agreed that there was no question of material fact with respect to the reasonableness of the fee, the Court of Appeals determined that there was a question of material fact whether the fee was bona fide. Pointing to defendant's president's testimony, the Court of Appeals reasoned that there was evidence presenting a material question of fact whether the fee was for a variety of services necessary to take the loan from application to closing or whether the fee was solely for document preparation. Therefore, the Court of Appeals concluded that summary disposition on the merits of the TILA claim was inappropriate.

Defendant sought leave to appeal, and this Court granted leave to appeal. 474 Mich 886 (2005).

II. STANDARD OF REVIEW

The question whether the filing of a class-action complaint tolls the period of limitations for a class member's claim that was not pleaded in the class-action complaint but arose out of the same factual and legal nexus is a question of law. This Court reviews questions of law de novo. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). Further, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC,* 474 Mich 36, 40; 709 NW2d 589 (2006).

III. ANALYSIS

A. TOLLING

In general, periods of limitations are tolled with regard to all class members upon the filing of a complaint asserting a class action. MCR 3.501(F) provides:

> Statutes of Limitations.
>
> (1) 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.
>
> (2) The statute of limitations resumes running against class members other than representative parties and intervenors:
>
> (a) on the filing of a notice of the plaintiff's failure to move for class certification under subrule (B)(2);
>
> (b) 28 days after notice has been made under subrule (C)(1) of the entry, amendment, or revocation of an order of certification eliminating the person from the class;
>
> (c) on entry of an order denying certification of the action as a class action;

> (d) on submission of an election to be excluded;
>
> (e) on final disposition of the action.
>
> (3) 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.

Here, the periods of limitations for Cowles's TILA claim expired on February 7, 1998, one year after she closed on her residential real estate mortgage loan. 15 USC 1640(e). Cowles filed this class-action complaint on July 1, 1998; thus, Cowles's TILA claim was untimely. Further, Cowles did not plead a TILA claim in her initial complaint, but she did plead a TILA claim in the second amended complaint. Accordingly, the first issue we must decide is whether the filing of Cowles's initial complaint within the TILA period of limitations for Paxson's claim, but outside the TILA period of limitations for Cowles's claim, was sufficient to toll the period of limitations for Paxson's claim on the previously unpleaded TILA claim under MCR 3.501(F). The Court of Appeals concluded that the period of limitations was tolled with respect to Paxson's claim. We agree.[6]

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[6] Remarkably, Justice CORRIGAN posits that "[t]he Court of Appeals opinion addressed only whether the relation-back doctrine applied to this case." *Post* at 40. But the Court of Appeals addressed *both* tolling and relation back. *Cowles*, *supra* at 219-231. Further, Justice CORRIGAN argues that the Court of Appeals did not conclude that Paxson's TILA claim was tolled. This is also incorrect because the Court of Appeals *specifically concluded that the period of limitations was tolled with respect to Paxson's TILA claim*. After noting that plaintiffs' unauthorized practice of law claims were dismissed by its prior order and concluding that summary disposition was proper on the MCPA claims, the Court of Appeals focused on Paxson's TILA claim, noting:

> Plaintiff Paxson next challenges the trial court's grant of summary disposition to defendant *on her TILA claim*. Neither the Michigan Court of Appeals nor the Michigan Supreme Court has

MCR 3.501(F) was modeled after the United States

decided whether the amendment of a class action complaint to add new theories of liability relates back to the filing of the initial complaint for purposes of computing the expiration of the period of limitations. Thus, whether *Paxson's TILA cause of action* was barred by the period of limitations involves an issue of first impression . . . .

The TILA claim was formally pleaded in Cowles's second amended complaint, which was filed on February 16, 1999. *Defendant argues that the statute of limitations for Paxson and all other class members was not tolled with respect to that claim on that date*. When the second amended complaint was filed, more than one year had passed since *Paxson's TILA claim* accrued on February 9, 1998. Therefore defendant argues that Paxson's claim is barred by the statute of limitations. We disagree.

MCR 3.501(F)(1) provides that the statute of limitations is tolled with respect to all persons within the class described in the complaint on the commencement of an action asserting a class action. MCR 3.501(F)(2) delineates several circumstances in which the statute of limitation resumes running against class members, specifically, on the filing of a notice of the plaintiff's failure to move for class certification; twenty-eight days after notice of the entry, amendment, or revocation of an order of certification eliminating the person as a member of the class; entry of an order denying certification of the action as a class action; submission of an election to be excluded from the class; or final disposition of the action.

Paxson was a member of the original class described in the complaint on the commencement of Cowles's original class action. The class was ultimately certified and none of the circumstances of MCR 3.501(F)(2) occurred that could have caused the period of limitations to resume running against Paxson or any other class members. *Thus, we find that the statute of limitations was tolled with respect to Paxson*. [*Id*. at 219-221 (emphasis added).]

Thus, we cannot agree with Justice CORRIGAN that the Court of Appeals was "not referring to Paxson's TILA claim" because this was the only claim that the Court of Appeals was expressly addressing and all of the other claims were previously addressed. *Post* at 41 n 3. Further, in connection with its later relation-back analysis, the Court of Appeals again stated its conclusion that Paxson's TILA claim was tolled, stating, "In reaching our conclusion, we reject the argument that the statute of

Supreme Court's decision in *American Pipe*. In *Ameri-*

limitations never tolled on the TILA claims because the period of limitations expired before Cowles's complaint was filed and, thus, she was never a valid class representative for that claim." *Id*. at 230. Accordingly, there is little doubt that the Court of Appeals concluded that Paxson's TILA claim was tolled.

Despite so concluding, the Court of Appeals nonetheless felt compelled to address whether amendments to the complaint related back to the date of the initial filing "*when the statute of limitations was tolled*." *Id*. at 221 (emphasis added). As we note later in this opinion, however, the class-action tolling doctrine and the relation back of amendments are conceptually different. And because we conclude that Paxson's TILA claim was tolled, it is unnecessary in this particular case to decide whether amendments to the complaint related back to the date of the initial filing for purposes of Paxson's TILA claim.

Moreover, we must note that the parties' arguments in this case mainly focused on tolling. In fact, after the Court of Appeals entered judgment and this Court granted defendant's application for leave to appeal, defendant raised the following issues on appeal:

> 1. Does the filing of a class action lawsuit toll the statute of limitations for a class member's individual claim, where that claim was not, and could not have been, asserted by the class representative?
>
> * * *
>
> 2. Should Michigan follow the Truth in Lending Act's plain language and purpose and use an objective test for determining whether a loan document charge is "bona fide" for purposes of the charge's exclusion from a lender's APR computation?

Indeed, defendant's principal arguments focused on tolling. For example, defendant argued that the class-action tolling doctrine should not extend to Paxson's claim because that claim was not and could not have been asserted by Cowles. Defendant further argued that the class-action tolling doctrine applies only if the class member's own claims are identical to those of the representative. Accordingly, defendant's arguments focused mainly on tolling, and it argued against extending the class-action tolling doctrine in this case. Only after defendant argued that tolling did not apply in this case did defendant argue that relation back was inapplicable. Specifically, defendant argued that the Court of Appeals erred when it relied on the relation back of amendments because such a rationale is inconsistent with and distinct from *American Pipe*. As

can Pipe, supra at 553-555, the Court held that the filing of a class action tolls the period of limitations for all class members who timely intervene after a court denies class certification. This has come to be known as the class-action tolling doctrine. The Court reasoned that the doctrine was necessary to balance a class member's right to pursue his claim if the class was not certified with a defendant's right to be free from stale claims. *Id*. at 553-554.

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights are satisfied when, as here, a named plaintiff who is found to be

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defendant argued in its brief, "In other words, the very case that MCR 3.501(F) codifies, *American Pipe*, makes clear that the relation-back principle is inapplicable here, because if the principle was available to class members, there would be no need for a tolling doctrine at all."

Justice CORRIGAN appears well-versed in defendant's relation-back argument and how it relates to defendant's tolling argument, see *post* at 53-54, but unlike Justice CORRIGAN, we need not decide this issue in this particular case because we conclude that the class-action tolling doctrine applies. But we must observe that we are puzzled by Justice CORRIGAN's assertions that the Court of Appeals addressed only the relation back of amendments and that we have mischaracterized the Court of Appeals decision. Simply stated, the Court of Appeals concluded that Paxson's claim was not time-barred because her claim was tolled *and* the amendment related back to the initial class complaint for purposes of computing the period of limitations. Further, and as noted later in this opinion, we acknowledge that the Court of Appeals holding that Paxson's TILA claim was improperly dismissed rested primarily on its conclusion that the relation-back doctrine applied to her claim. But because Paxson's claim was tolled and, thus, not time-barred on the basis of tolling alone, it was unnecessary for the Court of Appeals to decide the relation-back issue, a point with which Justice CORRIGAN seemingly agrees. See *post* at 41 n 3 ("If the Court of Appeals had been referring to the tolling of Paxson's TILA claim when contending that MCR 3.501(F) applied to Paxson, as suggested by the majority, it would not have needed to address whether the relation-back doctrine applied."). Merely because the Court of Appeals unnecessarily addressed both issues does not mean that tolling was not addressed at all or that this Court should overreach and analyze the relation-back issue where tolling alone is dispositive.

> representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . . [*Id*. at 554-555 (citations and quotation marks omitted).]

Further, the Court opined that the class-action tolling doctrine was needed to promote the judicial economy of the class-action mechanism. According to the Court, if the class-action tolling doctrine were not adopted, individual plaintiffs would be forced to intervene or file duplicative protective suits just in case the class was not certified or the action was dismissed on procedural grounds. *Id*. at 553. This would frustrate the purpose of the class-action mechanism, whereby putative class members are encouraged to remain passive during the early stages of the class action. Therefore, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights" because the federal class-action rule "permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal*, *supra* at 352-353. Accordingly, the Court in *American Pipe, supra* at 553, reasoned that the class-action tolling doctrine best serves the principal purposes of the class-action procedure—promotion of efficiency and economy of litigation. Indeed, not until the class is certified "does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it . . . ." *Id.* at 552.

In *Crown, Cork & Seal*, the Court later extended the class-action tolling doctrine to class members who file individual actions after class certification is denied.

Crown, Cork & Seal, supra at 353-354. Notably, Justice Powell authored a concurrence in *Crown, Cork & Seal* that attempted to clarify what he posited was the foundation for the class-action tolling doctrine. In his concurrence, Justice Powell opined that the doctrine would not toll the period of limitations for subsequent claims that were unrelated to the claims asserted in the initial class-action complaint. *Crown, Cork & Seal, supra* at 354-355 (Powell, J., concurring). Concerned that "different or peripheral" claims would not afford a defendant sufficient notice and force the defendant to defend stale claims, Justice Powell opined that *American Pipe* and the class-action tolling doctrine applied where the subsequent claims " 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit . . . .' " *Id*. at 354-355 (citation omitted); see also *United Airlines, Inc v McDonald*, 432 US 385, 393 n 14; 97 S Ct 2464; 53 L Ed 2d 423 (1977). Stated differently, Justice Powell opined that unrelated claims "are not protected under *American Pipe* and are barred by the statute of limitations." *Crown, Cork & Seal, supra* at 355 (Powell, J., concurring).

Some courts have relied on Justice Powell's concurrence and concluded that the class-action tolling doctrine only applies to claims identical to those raised in the initial class-action complaint or claims that could have been raised in the initial complaint. See, e.g., *Weston v AmeriBank*, 265 F3d 366, 367 (CA 6, 2001) ("[T]he statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint."); see also *Raie v Cheminova, Inc*, 336 F3d 1278, 1283 (CA 11, 2003) ("It is not enough for Appellants to rely on only that ambiguous class definition to support their argument for tolling under *Ameri-*

can Pipe; they must demonstrate that their wrongful death action was included in the *Seabury* class action.").

Other courts, however, have embraced Justice Powell's reasoning and instead held that subsequent individual claims filed after class certification is denied need not be identical to the claims in the original class action for tolling to apply. See, e.g., *Tosti v City of Los Angeles*, 754 F2d 1485, 1489 (CA 9, 1985); *Barnebey v E F Hutton & Co*, 715 F Supp 1512, 1528-1529 (MD Fla, 1989). Rather, the subsequent individual claims must share a common factual and legal nexus to the extent that the defendant would likely rely on the same evidence or witnesses in mounting a defense. See, e.g., *Cullen v Margiotta*, 811 F2d 698, 719 (CA 2, 1987); see also *Crown, Cork & Seal*, *supra* at 355 (Powell, J., concurring) ("[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.' ") (citation omitted). We believe that these latter courts have the better view and reject a rule that requires identical claims for tolling to occur under MCR 3.501(F).[7] Accordingly, under MCR 3.501(F), a class-action complaint tolls the period of limitations for a class member's claim that arises out of the same factual and legal nexus as

[7] We must note, however, that some courts have taken a broader position than we are prepared to adopt today. See, e.g., *Appleton Electric Co v Graves Truck Line, Inc*, 635 F2d 603, 609 (CA 7, 1980) ("We are persuaded that implicit in the Supreme Court's American Pipe decision was the Court's determination that 'effectuation of the purpose of litigative efficiency and economy,' [which Rule 23 was designed to perform] transcends the policies of repose and certainty behind statutes of limitations.") (citation omitted).

long as the defendant has notice of the class member's claim and the number and generic identities of the potential plaintiffs.

Our decision underscores the inherent tension that may appear to exist between the class-action mechanism and a statute of limitations. See, e.g., Lowenthal & Feder, *The impropriety of class action tolling for mass tort statutes of limitations*, 64 Geo Wash L R 532 (1996). But this tension was duly considered by this Court in adopting MCR 3.501(F), as well as by the *American Pipe* Court in crafting the class-action tolling doctrine. According to the *American Pipe* Court, statutes of limitations are important to the administration of justice by " 'preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " *American Pipe*, *supra* at 554 (citation omitted). But as later noted by the Court, the purpose of a statute of limitations is generally satisfied when a class action is filed.

> [A] class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification. [*Crown, Cork & Seal*, *supra* at 353 (citations omitted).]

In other words, crucial to whether the period of limitations is tolled under the class-action tolling doctrine and MCR 3.501(F) is notice to the defendant of both the claims being brought and the number and identities of the potential plaintiffs. See, e.g., *Rochford v Joyce*, 755

F Supp 1423, 1428 (ND Ill, 1990) ("The statute of limitations will not be tolled for plaintiffs having 'different or peripheral' claims from those in the original class action suit. To ensure fairness, the later action must be similar enough to the earlier action so that the defendants are notified of the substantive claims against them, as well as the number and generic identities of the potential plaintiffs.") (citation omitted).

Here, we believe that the aim of the statute of limitations was met with the filing of Cowles's initial complaint and would not be frustrated by determining that Paxson's TILA claim was not time-barred. The factual bases for Paxson's TILA claim are the same as the factual bases for the claims raised in Cowles's initial class-action complaint. Accordingly, the initial complaint notified defendant of "the number and generic identities of the potential plaintiffs." Further, Paxson's TILA claim involves the same "evidence, memories, and witnesses" as were involved in the putative class action. Moreover, we have a difficult time concluding that Cowles's initial class-action complaint concerning the document preparation fee was insufficient to alert defendant to preserve the evidence regarding the fee and the services provided in connection with the fee. Simply stated, Paxson's TILA claim is not such a "different or peripheral claim" so that tolling is not permitted under MCR 3.501. *Crown, Cork & Seal*, *supra* at 354 (Powell, J., concurring). The allegations in the initial complaint identify this case as a case where it can be seen from the initial complaint, the first amended complaint, the second amended complaint, and Paxson's complaint that the alleged liability is based on the same acts. See, e.g., *McCarthy v Kleindienst*, 183 US App DC 321, 327; 562 F2d 1269 (1977). Therefore, "there can be no doubt

that [defendant] received sufficient notice of the contours of potential claims to toll the running of the statute of limitations." *Id*.

Defendant's alleged liability has always been based on the way it reported its document preparation fee and the propriety of the services it provided in connection with the fee. Further, Paxson has always been a member of the described class, and she was a member of the class that was originally certified in the second amended complaint, the complaint that alleged the § 1605 claim. Moreover, Cowles was deemed an inappropriate representative on procedural grounds. Accordingly, we are simply hard-pressed to conclude that defendant was not put on notice of the TILA claim asserted under § 1605 as well as of the number and generic identities of the potential plaintiffs.[8] Thus, our conclusion that the period of limitations applicable to Paxson's TILA claim was tolled by Cowles's initial

[8] We disagree with Justice CORRIGAN's characterization of our interpretation of MCR 3.501(F) to bolster her argument that our interpretation would frustrate the purpose of statutes of limitation. First, we do not conclude that every unnamed class member may move to intervene at any time and add any different or peripheral claim. Rather, we conclude that tolling is permitted where the claim arises out of the same factual and legal nexus *and the defendant has notice of both the claim being brought and the number and generic identities of the potential plaintiffs*. Further, as explained earlier, the aim of statutes of limitations are not frustrated under such an interpretation or in this very case because the claim here is not so different or peripheral that tolling is not permitted and defendant had notice of it. In other words, in this particular case, Paxson's TILA claim involves the "same evidence, memories, and witnesses as the subject matter" of the original class action and defendant had notice of "the number and generic identities of the potential plaintiffs." Again, we believe that the aim of statutes of limitations is satisfied in this particular case. Additionally, we observe that the interpretation set forth today must be applied on a case-by-case basis because the relevant inquiry will almost always depend on the facts presented in a given case.

complaint is consistent with the functional goal of a statute of limitations and does not unduly prejudice defendant.[9]

Importantly, a contrary conclusion—limiting tolling under MCR 3.501(F) to claims identical to those that were asserted or may have been asserted in an initial complaint—would frustrate the very purpose of MCR 3.501. Specifically, the more rigid rule advanced by Justice CORRIGAN "would encourage and require absent class members to file protective motions to intervene and assert their new legal theories prior to class certification, thereby producing the very results . . . courts seek to prevent by such tolling, *i.e.*, 'court congestion, wasted paperwork and expense.' " *Cullen*, *supra* at 721 (citation omitted).[10] Moreover, and contrary to Justice

[9] Additionally, the United States Supreme Court noted in *Johnson v Railway Express Agency, Inc*, 421 US 454, 467 & n 14; 95 S Ct 1716; 44 L Ed 2d 295 (1975), that the identicalness of claims played a part in its decision in *American Pipe*. Accordingly, it could be argued that the Court may appear reluctant to extend the class-action tolling doctrine to litigation involving anything other than identical claims. But *Johnson* did not turn on the absence or presence of identical claims. See, e.g., *Mt Hood Stages, Inc v Greyhound Corp*, 616 F2d 394, 403 (CA 9, 1980) ("*Johnson* did not hold that an identical cause of action in both proceedings is prerequisite to tolling."). Rather, *Johnson* shows that notice to the defendant is the central concern with regard to whether tolling occurs, not simply whether an identical claim is subsequently made. Thus, *Johnson* does not preclude tolling here because defendant had sufficient notice of Paxson's TILA claim for purposes of MCR 3.501(F).

[10] Further, MCR 3.501(F) only requires the "assert[ion]" of a class action to trigger tolling. It provides that "[t]he 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." (Emphasis added.) One "asserts" a class action by claiming the right to a class action. If, in the end, it turns out that one does not, in fact, have such a right, this does not mean that the class action was not "asserted." Because a person only has to "assert" a class action to toll the period of limitations as to all class members, class members are not obligated to investigate whether the

CORRIGAN's assertions, Paxson did exactly what was encouraged of her under our court rules—she waited until the dust arguably settled before seeking to intervene. Accordingly, it cannot be fairly said that Paxson slept on her rights, because her claims were ostensibly being pursued by Cowles. Cowles filed a class action against defendant, and Paxson was included in the class. Further, Cowles then asserted a TILA violation under § 1638 before the period of limitations on Paxson's individual TILA claim would have expired.[11] Cowles then amended her complaint to include a § 1605 claim after Paxson's individual claim would have expired, and the trial court certified that class. But when it later appeared that the trial court was going to reconsider its certification ruling, Paxson then promptly sought to intervene. Accordingly, Paxson reasonably relied on the class-action mechanism and its corresponding tolling provision. If we were to hold otherwise, as Justice CORRIGAN suggests, countless potential class members like Paxson would be forced to file protective suits and, thus, circumvent the whole purpose behind MCR 3.501. "[U]nless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. . . . A putative class member who fears that class certification may be denied would have every incentive to file a separate action

person "asserting" it actually has the right to do so. That is, the class members should be able to fully rely on the "asserting" of the class action, without having to independently determine whether the person "asserting" it possesses standing, whether he has brought claims that are not time-barred, or whether he has set forth every single legal argument that could conceivably have been made.

[11] Notably, even though the claim in the first amended complaint was based on § 1638, Cowles stated in the amended complaint that "[t]he 'Document Preparation' fee assessed Plaintiff by Bank West exceeded the costs of preparing the 'final legal papers' . . . ."

prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions . . . ." *Crown, Cork & Seal*, *supra* at 350-351. See also *Devlin v Scardelletti*, 536 US 1, 10; 122 S Ct 2005; 153 L Ed 2d 27 (2002) ("Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them. See *American Pipe*[, *supra*]. Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated."). As aptly noted by the United States Court of Appeals for the Third Circuit:

> The [*American Pipe*] Court was concerned that, if the statute of limitations is not tolled in situations where the district court's ruling on maintenance of a class action is difficult to predict, members of a purported class might be induced to intervene as a matter of self-protection. Such protective intervention by class members might be compelled because those class members who have not intervened by the time the untolled statute of limitations runs would be unable to seek relief individually. The Court therefore reasoned that a rule which would result in the individual intervention of class members and which would "breed" needless duplicative motions was not in keeping with the objectives of the federal class action procedures. [*Haas v Pittsburgh Nat'l Bank*, 526 F2d 1083, 1097 (CA 3, 1975).] [12]

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[12] The Court of Appeals majority in this case similarly observed:

> In the conclusion of his dissent, Judge O'CONNELL indicates that he "would also hold that certification of a class only tolls the statute of limitations for claims that originally and properly received certification." This proposition is not supported by citation to authority or by analogy to any authority, and it ignores the purposes of class litigation. If class members cannot rely on the named plaintiff to toll the period of limitations on their claims,

Therefore, the view advanced by Justice CORRIGAN—limiting MCR 3.501(F) tolling to identical claims that were asserted or may have been asserted in an initial complaint—would frustrate the very purpose of MCR 3.501.

Further, we perceive no sound reason for the limitation that Justice CORRIGAN would place on MCR 3.501(F). For example, just as the filing of a class action that does not meet *the requirements for class certification* generally tolls the period of limitations with respect to all persons within the class described in the complaint, *American Pipe*, *supra*, the filing of a class action by a person who does not meet *the requirements to serve as the class representative* also tolls the period of limitations. See, e.g., *Birmingham Steel Corp v Tennessee Valley Auth*, 353 F3d 1331, 1333 (CA 11, 2003) (holding that "the district court abused its discretion by decertifying the class without permitting class counsel reasonable time to determine whether a new class representative could be substituted"); *Lynch v Baxley*, 651 F2d 387 (CA 5, 1981) (holding that when the district court determined that the class representative did not have standing it should have allowed a class member with standing to become the new class representative); *Haas*, *supra* (holding that the filing of a class action by a class representative without standing tolls the period of limitations with regard to all asserted members of the class and that the amendment of the complaint by the addition of a class member with standing relates back to the original complaint). Simply stated, the *American Pipe* rule has been applied in cases involving almost every conceivable basis on which class action status

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each class member will be required to separately bring all claims in his own name on the chance that the representative plaintiff will later be found to have an invalid claim and that the benefit of tolling will not apply. [*Cowles*, *supra* at 228 (citation omitted).]

might be denied or terminated. *Haas*, *supra* (class representative had no standing); *Lynch*, *supra* (class representative had no standing); *In re Crazy Eddie Securities Litigation*, 747 F Supp 850 (ED NY, 1990) (named plaintiffs did not have standing); *American Pipe*, *supra* (lack of numerous class members); *McCarthy*, *supra* (lack of typicality); *Green v United States Steel Corp*, 481 F Supp 295 (ED Pa, 1979) (lack of typicality and commonality of class members); *Gramby v Westinghouse Electric Corp*, 84 FRD 655 (ED Pa, 1979) (lack of adequate representation); *Bantolina v Aloha Motors*, *Inc*, 75 FRD 26 (D, Hawaii, 1977) (withdrawal of class representative); *Goodman v Lukens Steel Co*, 777 F2d 113 (CA 3, 1985) (lack of adequate representation); *Hemenway v Peabody Coal Co*, 159 F3d 255 (CA 7, 1998) (lack of subject-matter jurisdiction); *Tosti*, *supra* (tolling permitted in separate suit where claim was not identical to class action); *Barnebey*, *supra* (tolling permitted for claims not asserted in class action); *In re Linerboard Antitrust Litigation*, 223 FRD 335 (ED Pa, 2004) (tolling permitted in separate class action brought by members who opted out of initial class action and who also brought new state law claims). In this regard, Justice CORRIGAN's attempt to distinguish these cases is unpersuasive, and her dissent does not adequately explain why a contrary result should be reached in this case in light of those cases.

For example, Justice CORRIGAN does not adequately explain how, if the filing of a class action that does not meet the requirements for *class certification* nonetheless ordinarily tolls the period of limitations with respect to all persons within the class described in the complaint, *American Pipe*, *supra*, the filing of a class action by a person who does not meet the requirements *to serve as the class representative* somehow does not also toll the period of limitations. Similarly, Justice

CORRIGAN does not adequately explain how, if the filing of a class action by a class representative by someone *without standing* tolls the period of limitation with respect to all persons within the class described in the complaint, *Lynch*, *supra*; *Haas*, *supra*, the filing of a class action by a class representative whose own claim is *time-barred* would not also toll the period of limitations with respect to all persons within the class described in the complaint. Accordingly, rather than adopting Justice CORRIGAN's questionable limitation, we again observe that the proper focus under MCR 3.501(F), as well as *American Pipe* and its progeny, is on the extent to which the claim arose out of the same factual and legal nexus and whether the defendant had notice of both the claim and the number and generic identities of the potential plaintiffs.[13]

Nor are we persuaded by Justice CORRIGAN's additional argument that allowing "Paxson to now assert a TILA claim on behalf of the class would allow piggybacking of one class action onto another and, thus, tolling of the period of limitations indefinitely." *Post* at 53.[14] Where class certification is denied or terminated on the basis that the *class representative* was inappropriate—i.e., not on the appropriateness of class

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[13] Additionally, we must observe that we are puzzled by Justice CORRIGAN's assertion that "there is nothing to toll" in this case. Justice CORRIGAN maintains that *Paxson's* TILA could not be tolled because *Cowles's*TILA claim expired "before [Cowles] filed her complaint." *Post* at 47. But such an assertion ignores the language of MCR 3.501(F)(1) and the fact that the initial class action complaint was filed *before* the period of limitations had expired on *Paxson's* TILA claim and that *Paxson* was a person within the class described in the complaint. Accordingly, we believe that Justice CORRIGAN's rationale concerning tolling starts from a faulty premise.

[14] Although Justice CORRIGAN makes this argument in connection with her analysis on the relation back of amendments, we will address her argument because it also pertains to tolling.

treatment for the *underlying claims*—tolling is permitted. *McKowan Lowe & Co, Ltd v Jasmine, Ltd*, 295 F3d 380, 389 (CA 3, 2002). Thus, where class certification is denied solely on the basis of the appropriateness of the class representative, "a second class would not be an attempt to relitigate the question of class certification" and, thus, judicial economy and the class mechanism will be furthered. *In re Crazy Eddie Securities Litigation*, 802 F Supp 804, 813 (ED NY, 1992); see also *Catholic Social Services, Inc v Immigration & Naturalization Service*, 232 F3d 1139 (CA 9, 2000); *Yang v Odom*, 392 F3d 97, 105-107 (CA 3, 2004). Such a rule is consistent with *American Pipe* and its progeny,[15] and it will also prevent the improper piggybacking of class-action claims.

Here, because the initial class action was decertified on grounds other than the appropriateness of the substantive claims for class treatment, Paxson's TILA claim was tolled. Paxson was not "attempting to resuscitate a class that a court [had] held to be inappropriate as a class action." *McKowan*, *supra* at 386. Accordingly, we believe that claims of improper "piggybacking" and "abuse" are unwarranted in this particular case.

Therefore, we hold that under MCR 3.501(F), Cowles's initial class-action complaint tolled the period of limitations for Paxson's TILA claim because her claim arose out of the same factual and legal nexus and defendant had notice of Paxson's TILA claim. We are not prepared to conclude that only identical claims are sufficient for tolling purposes, because such a rule

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[15] The filing of a class-action complaint puts a defendant on notice "of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method the class members choose to enforce their rights upon denial of class certification*." *Crown, Cork & Seal*, *supra* at 353 (emphasis added).

would be at odds with MCR 3.501 itself. Nor are we prepared to hold that class-action tolling may never apply to subsequent class claims, because such a rule would unduly burden the goal of judicial economy and, thus, circumvent the class-action mechanism. Accordingly, we affirm that portion of the decision of the Court of Appeals.[16]

B. RELATION BACK

Even though the Court of Appeals concluded that the period of limitations was tolled with respect to Paxson's TILA claim, the Court of Appeals addressed the issue whether the amendment to a class-action complaint adding claims arising out of the conduct, transaction, or occurrence alleged in the original class-action complaint relates back to the date of the initial filing. Moreover, the Court of Appeals holding that Paxson's TILA claim was improperly dismissed rested primarily on its conclusion that the relation-back doctrine applied to her claim. Tolling under MCR 3.501(F), however, is conceptually distinct from relation back under MCR 2.118(D). Therefore, in light of our conclusion that Paxson's TILA claim was not time-barred, whether the second amended complaint relates back to Cowles's initial

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[16] It should not be obscured by our invocation in this opinion of various federal and state court precedents that, if we were to look at nothing else but MCR 3.501, we would reach the same conclusion. MCR 3.501(F) provides that "[t]he 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." (Emphasis added.) The manifest purpose of this provision is to avoid the situation in which each class member must initiate his or her own individual lawsuit to preserve a cause of action. Thus, class members must be allowed to rely upon the "assertion" of a class action without having to independently determine that the person asserting it has a right to do so. Moreover, it can be logically concluded, as we do in this opinion, that neither a too-broad nor a too-narrow identity of claims can be required under this rule.

complaint is not dispositive, and, thus, we need not address this issue in this particular case. Accordingly, we vacate that portion of the decision of the Court of Appeals.

C. "BONA FIDE" AND "REASONABLE"

Because we agree with the Court of Appeals ultimate conclusion that Paxson's TILA claim was improperly dismissed, we must likewise address whether summary disposition was warranted under MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted in the light most favorable to the opposing party. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The purpose of TILA is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . ." 15 USC 1601(a). Accordingly, TILA requires lenders, like defendant, to provide a written statement summarizing the loan transaction, including all related finance charges. 15 USC 1605(a). Under TILA, "the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the

creditor as an incident to the extension of credit." *Id*. Section 1605(a) sets forth a list of examples of fees and charges that are properly included in the finance charge. Significantly, 15 USC 1605(e) sets forth a list of certain items that are not properly included in the finance charge, and one of those items is "[f]ees for preparation of loan-related documents." 15 USC 1605(e)(2). Further, Regulation Z, 12 CFR 226.4(c)(7)(ii), provides that fees for preparing loan-related documents are not finance charges and, thus, need not be included in the finance charge "if the fees are bona fide and reasonable in amount[.]"

Here, Paxson claims that defendant violated § 1605 and Regulation Z because defendant's document preparation fee, as a finance charge, was not included in the loan's APR. Specifically, Paxson claims that defendant's document preparation fee was not "bona fide and reasonable in amount" because the fee did not actually relate to document preparation. The Court of Appeals concluded that summary disposition under MCR 2.116(C)(10) was inappropriate because, while there is no question of material fact with respect to the reasonableness of the document preparation fee, a question of fact exists whether defendant's fee was bona fide within the meaning of applicable federal law. We agree and adopt the Court of Appeals following rationale as our own.

> A resolution of the issue involves interpretation of federal law. When construing federal statutes and regulations, we are governed by authoritative decisions of the federal courts. *Bement v Grand Rapids & I R Co*, 194 Mich 64, 65-66; 160 NW 424 (1916). Where no decision on a particular issue has been rendered by the United States Supreme Court, we are free to adopt decisions of the lower federal courts if we find their analysis and conclusions

persuasive and appropriate for our jurisprudence. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

In *Brannam v Huntington Mortgage Co*, 287 F3d 601 (CA 6, 2002), the plaintiffs argued that the $ 250 document preparation fee was not bona fide and reasonable such that it could be excluded from the finance charge. The court acknowledged that the TILA exempts fees for preparation of loan-related documents from the computation of the finance charge. *Id*. at 603. The Sixth Circuit Court of Appeals considered whether the $ 250 fee was bona fide and reasonable. *Id*. at 603-604. The evidence did not support that the fee covered anything more than document preparation costs. Thus, there was no evidence to support that the fee was not "bona fide" under Regulation Z. *Id*. at 606. With respect to the reasonableness of the $ 250 charge, the court determined that a fee is reasonable if it is for a service actually performed and reasonable in comparison to prevailing practices of the industry in the relevant market. *Id*. The evidence supported that $ 250 was a reasonable document preparation fee for western Michigan. *Id*.

In this case, unlike in *Brannam*, there is a question of material fact with respect to whether the fee was "bona fide." The term "bona fide," as used in Regulation Z, is not defined. 12 CFR 226.2(b)(3) provides that, unless a term is specifically defined in Regulation Z, "the words used have the meanings given to them by state law or contract." We construe undefined words used in statutes according to their plain and ordinary meanings. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18; 651 NW2d 356 (2002). Resort to dictionary definitions is acceptable and useful in determining ordinary meaning. *Id*. The term "bona fide" means made or done in good faith, without deception or fraud, authentic, genuine, real. *Random House Webster's College Dictionary* (1997). The purpose of TILA is to assure a meaningful disclosure of credit terms so consumers may compare various credit terms to allow them to avoid uninformed uses of credit. 15 USC 1601(a); *Inge v Rock Financial Corp*, 281 F3d 613, 619 (CA 6, 2002). With that

purpose in mind, and using the ordinary definition of "bona fide," a document preparation fee is not bona fide, authentic, or genuine, if it includes charges for items other than document preparation.

There was evidence in this case to support that the document preparation charge was not "bona fide." Paul Sydloski, defendant's president, testified that he believed that the document preparation fee was charged to cover or defray defendant's expenses, specifically the costs associated "with taking a loan through the entire sequence from the application through the closing" and subsequently selling it to the secondary market or keeping it. Sydloski believed that defendant's senior management employees held the same view. He was unsure whether there was any difference between a document preparation fee and a loan processing fee. James Koessel, the bank's chief lending officer, testified that the document preparation fee was initially instituted at $ 100 to "defray some of the costs" incurred in preparing documents. Koessel admitted, however, that the document preparation fee was eventually replaced by a "loan-processing fee," which is properly disclosed as part of the finance charge. We believe the evidence presents a question of material fact with respect to whether the fee was for a variety of services necessary to take the loan from application through closing and beyond. Because a genuine issue of material fact exists with respect to whether the fee was bona fide, summary disposition on the merits of the TILA claim is inappropriate.

We note, however, that there is no question of material fact with respect to reasonableness. We agree with the *Brannam* Court that reasonableness is measured by looking at the marketplace, and we note that the market comparison approach is compatible with ordinary dictionary definitions of the term "reasonable," which include logical, not exceeding the limit prescribed by reason, not excessive, moderate. *Random House Webster's College Dictionary* (1997). The *Brannam* Court determined that $ 250 was a reasonable document preparation fee in west Michigan. *Id.* Paxson has failed to offer evidence to dispute that

$ 250 is reasonable in west Michigan for document preparation. [*Cowles*, *supra* at 233-235.][17]

Nonetheless, defendant urges this Court to adopt the view apparently espoused by the United States Court of Appeals for the Seventh Circuit in *Guise v BWM Mortgage, LLC*, 377 F3d 795, 800 (CA 7, 2004). According to defendant, *Guise* sets forth an "objective" test under

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[17] While not necessary to its ruling, the trial court similarly observed:

The fee seemingly is to defray overhead and costs associated with the entire underwriting process probably the small part of which is actually preparing the documents which are disclosed on 1105 of the—of the form used at closing. Again 1105, as indicated by [plaintiff's counsel], is a title line and the document or the fees are those associated with title and title documents. So it seems manifest, therefore, that whatever else it is, the fee is a lot more than a document preparation fee based on the testimony of the Bank officials and based on the Koessel memorandum and the history of the fee and how it works its way into Bank West doing a business.

Does that mean that the fee is not bona fide? Well, that's the trick. It seems to me that the mere fact that documents are prepared as part of the process is not sufficient of and by itself to make the fee bona fide and bona fide, as [plaintiff's counsel] points out, under Michigan law means that it is exactly what is claimed.

It seems here that whatever else we can say about it—the fee in this case—is not exactly what it claimed. It is a document preparation fee plus an overhead and underwriting fee and a processing and application fee.

Under these circumstances, it seems to me, that standard assessment of what we're looking at leads to the inevitable conclusion that the fee is not exactly what is claimed, it is more than that and, therefore, doesn't pass muster under Michigan law as being bona fide.

To that extent, it seems to me, the plaintiffs have made out a case and established that the fee does not fulfill the requirements of the Truth-In-Lending Act because it doesn't meet the bona fide test.

which a fee is bona fide as long as the services for which the fees are imposed are performed, period. We decline defendant's invitation to adopt its reading of *Guise* because it is inconsistent with the meaning of "bona fide." For example, if defendant charges $250 for its document preparation fee, but only $10 of that total fee represents actual document preparation services and the remainder represents, for example, overhead charges, the fee would not be "bona fide" within the meaning of the TILA. In other words, the fee would not be what it is claimed to be, so the fee would not be "bona fide," authentic, or genuine. Accordingly, we reject defendant's argument and affirm the Court of Appeals decision that summary disposition under MCR 2.116(C)(10) would be inappropriate.

IV. CONCLUSION

We hold that Cowles's initial class-action complaint tolled the period of limitations under MCR 3.501(F) for Paxson's TILA claim because Paxson's claim arose out of the same factual and legal nexus as Cowles's claim and defendant had notice of both the TILA claim and the number and generic identities of the potential plaintiffs. In light of this conclusion, we need not decide whether the amendment to the class-action complaint adding this claim related back to the date of the initial filing. Moreover, summary disposition under MCR 2.116(C)(10) would be improper because a material question of fact exists concerning whether the document preparation fee was "bona fide." Therefore, we affirm in part, vacate in part, and remand for further proceedings in the trial court consistent with this opinion.

WEAVER, KELLY, and MARKMAN, JJ., concurred with CAVANAGH, J.

CORRIGAN, J. (*dissenting*). I dissent from the majority's conclusion that the filing of a class-action complaint tolls the period of limitations for all claims arising out of the same factual and legal nexus. Cowles's filing of the original class action, alleging solely state law claims, did not toll the one-year period of limitations for Paxson's claim under the Truth in Lending Act. Moreover, Paxson's claim under the act, which Cowles could not have brought, does not relate back to the filing of the original complaint. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition to defendant.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Defendant charged a $250 document preparation fee for its residential real estate mortgage transactions. In early 1997, plaintiff Kristine Cowles obtained a mortgage from defendant and was charged the $250 document preparation fee. On July 1, 1998, Cowles filed several state law claims regarding the fee on her own behalf and on behalf of a class of consumers, alleging, among other claims, that defendant's document preparation constituted the unauthorized practice of law.

On August 20, 1998, Cowles amended her complaint to allege that the fee violated the federal Truth in Lending Act (TILA)[1] because the fee was improperly designated as a fee "paid to others on your behalf" when defendant, in reality, retained the fee. The trial court granted summary disposition to defendant because the form for Cowles's transaction explicitly stated that the fee was paid to the bank. Plaintiffs have not appealed that ruling.

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[1] 15 USC 1601 *et seq.*

On February 16, 1999, Cowles filed a second amended complaint, alleging another TILA violation because defendant allegedly had failed to disclose the document preparation fee as required by 15 USC 1605(a) and Regulation Z, 12 CFR 226.4. The trial court certified the class described in Cowles's second amended complaint. Defendant then moved for summary disposition, alleging that Cowles could not serve as the class representative because her claim was time-barred.[2] Plaintiff Karen Paxson, who had obtained a loan from defendant on February 9, 1998, and was charged the same $250 fee, then moved to intervene and serve as the class representative. Paxson's motion to intervene was granted, but the trial court later granted summary disposition to defendant on all the claims, with the exception of Paxson's TILA claim, because the period of limitations had run before Cowles had filed her initial complaint.

Defendant and Paxson filed cross-motions for summary disposition. The trial court ruled that Paxson's claim was time-barred. It had accrued more than one year before the TILA claim was pleaded in the second amended complaint. Thus, the trial court did not relate the second amended complaint back to the filing of the initial complaint.

The Court of Appeals thereafter granted plaintiffs' application for leave to appeal and held the case in abeyance for *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003), which held that the preparation of standard mortgage forms by a bank did not amount to the unauthorized practice of law. The Court of Appeals

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[2] 15 USC 1640(e) states that "[a]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

then considered the case in light of the *Dressel* decision and dismissed the unauthorized practice of law claim. In a published, split opinion, the Court of Appeals reversed in part. It held that the amendment of the class action complaint by an intervening plaintiff related back to the initial complaint. 263 Mich App 213, 230-231; 687 NW2d 603 (2004). Judge O'CONNELL dissented, arguing against the application of the relation-back doctrine. *Id.* at 236-238.

Defendant sought leave to appeal in this Court. We granted defendant's application for leave to appeal. 474 Mich 886 (2005).

II. CLASS ACTION TOLLING DOCTRINE

The Court of Appeals opinion addressed only whether the relation-back doctrine applied to this case.[3]

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[3] The majority mischaracterizes the Court of Appeals majority opinion in concluding that it addressed the class-action tolling doctrine. The majority extensively cites the Court of Appeals opinion for the proposition that the Court of Appeals addressed both the class-action tolling and the relation-back doctrines. The majority, however, fails to recognize that, read in context with the remainder of the opinion, the Court of Appeals applied only the relation-back doctrine. The Court of Appeals majority stated:

> Plaintiff Paxson next challenges the trial court's grant of summary disposition to defendant on her TILA claim. *Neither the Michigan Court of Appeals nor the Michigan Supreme Court has decided whether the amendment of a class action complaint to add new theories of liability relates back to the filing of the initial complaint for purposes of computing the expiration of the period of limitations.* Thus, whether Paxson's TILA cause of action was barred by the period of limitations involves an issue of first impression and an issue of law, which is reviewed de novo. [263 Mich App at 219-220 (emphasis added).]

The Court of Appeals majority further noted that since Paxson was a member of the original class, and since the class was ultimately certified, MCR 3.501(F)(2) applied to toll the period of limitations with respect to

The majority opinion, however, relies solely on the class action tolling doctrine. This is a different issue gov-

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Paxson. *Id.* at 220-221. In making this specific contention, the Court of Appeals majority, however, was not referring to Paxson's TILA claim when stating that MCR 3.501(F)(2) applied to Paxson. This is clear when read in context with the next sentence, which states, "The question then arises whether amendments to the complaint, adding claims arising out of the conduct, transaction, or occurrence alleged in the original complaint, *relate back to the date of the initial filing when the statute of limitations was tolled.*" *Id.* at 221 (emphasis added). If the Court of Appeals had been referring to the tolling of Paxson's TILA claim when contending that MCR 3.501(F) applied to Paxson, as suggested by the majority, it would not have needed to address whether the relation-back doctrine applied.

Additionally, the Court of Appeals demonstrated that it applied the relation-back doctrine only when it stated:

> Both defendant and the trial court interpret the ruling in *American Pipe* [*& Constr Co v Utah,* 414 US 538; 94 S Ct 756; 38 L Ed 2d 713 (1974)] to require notification of specific causes of action before the period of limitations on those claims expires. *Given that the* American Pipe *Court was not addressing the relation back of amendments, we decline to interpret the language in that manner*. . . .
>
> * * *
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> In *Crown, Cork & Seal Co v Parker,* 462 US 345; 103 S Ct 2392; 76 L Ed 2d 628 (1983), the Court revisited its ruling in *American Pipe*. *Again, however, the Court was not called on to address the relation back of amendments in class action litigation*. [*Id.* at 225-226 (emphasis added).]

Finally, the Court of Appeals majority clearly demonstrated that it was applying the relation-back doctrine only when it stated, "In sum, we conclude that the relation-back doctrine applies to Paxson's TILA claim and the claim was improperly dismissed on motion for summary disposition." *Id.* at 231.

To make it perfectly clear to the majority, I do not contend that the Court of Appeals did not conclude that Paxson's TILA claim was not tolled. Rather, I contend that the Court of Appeals was not referring to the tolling of Paxson's TILA claim when it stated that MCR 3.501(F)(2) applied to Paxson because she was a member of the class. *Id.* at 220-221. I further contend that the Court of Appeals held, albeit erroneously, that

erned by a different court rule. The tolling of the period of limitations in class actions is governed by MCR 3.501(F)(1). The relation back of amendments is governed by MCR 2.118(D). The majority concludes that "[b]ecause the claim was not time-barred in this particular case, we need not decide whether the amendment to the class-action complaint . . . related back to the date of the initial filing." *Ante* at 4.

In Michigan, class actions are governed by court rule. MCR 3.501(A) describes the nature of a class action. It provides, in relevant part:

> (1) 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:
>
> (a) the class is so numerous that joinder of all members is impracticable;

Paxson's TILA claim was tolled, but relied solely on the relation-back doctrine in reaching its holding. The majority has not rebutted this contention, *ante* at 14-17 n 6.

Evidently the majority is confused about the conclusion it reaches. It states, "[T]he Court of Appeals concluded that Paxson's claim was not time-barred because her claim was tolled *and* the amendment related back to the initial class complaint for purposes of computing the period of limitations." *Id.* at 17 n 6. The majority fails to realize that its statement is merely another way of stating my contention that the Court of Appeals relied on the relation-back doctrine, not the class-action tolling doctrine, in holding that Paxson's period of limitations was tolled. I acknowledge that the Court of Appeals holding is misleading and confusing. If Paxson's TILA claim related back to the filing of the original complaint (which the Court of Appeals held that it did), then no need would exist to hold that the period of limitations was "tolled." Thus, the Court of Appeals erroneously stated that Paxson's TILA claim was "tolled" because it related back to the original filing. Rather, it should have stated that Paxson's TILA claim was not barred by the statute of limitations because it related back to the filing of the original complaint. In reading the Court of Appeals opinion, the Court of Appeals clearly meant to state the latter, but did a poor job of communicating.

> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]

MCR 3.501(F)(1) provides that "[t]he 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." While this court rule tolls the period of limitations for all persons within the class described in the complaint, it is utterly silent regarding those claims to which the tolling provision applies. The majority holds that MCR 3.501(F) only requires the "assert[ion]" of a class action to trigger the tolling of the period of limitations for all claims arising out of the same factual and legal nexus as long as the defendant has notice of the class members' claim and the number and generic identities of the potential plaintiffs. *Ante* at 24 n 10. I disagree.

MCR 3.501(F) codifies the United States Supreme Court's decision in *American Pipe & Constr Co v Utah*, 414 US 538; 94 S Ct 756; 35 L Ed 2d 713 (1974). In *American Pipe*, the Supreme Court held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id*. at 553.

One year later, in *Johnson v Railway Express Agency, Inc*, 421 US 454; 95 S Ct 1716; 44 L Ed 2d 295 (1975), the Supreme Court held, in a non-class context, that a timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act did not toll the limitations period for an action, based on the same

facts, under 42 USC 1981. The Court stated, "[t]he tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* [*v New York C R Co*, 380 US 424; 85 S Ct 1050; 13 L Ed 2d 941 (1965)] depended heavily on the fact that those filings *involved exactly the same cause of action* subsequently asserted." *Id.* at 467 (emphasis added).

In *Crown, Cork & Seal Co, Inc v Parker*, 462 US 345, 350-352; 103 S Ct 2392; 76 L Ed 2d 628 (1983), the Supreme Court extended the tolling of the period of limitations to those who bring individual actions after class certification is denied and to those who elect to opt out of the class action to file individual claims. Justice Powell concurred, cautioning, however, as follows:

> [*American Pipe*] "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." The tolling rule of *American Pipe* is a generous one, inviting abuse. It preserves for class members a range of options pending a decision on class certification. The rule should not be read, however, as leaving a plaintiff free to raise different or peripheral claims following denial of class status.
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> In *American Pipe* we noted that a class suit "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." When thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit. As Justice Blackmun noted, a district court should deny intervention under Rule 24(b) to "preserve a defendant whole against

prejudice arising from claims for which he has received no prior notice." [*Id.* at 354-355 (Powell, J., concurring) (citations omitted).]

In *Dressel v Ameribank*, this Court dealt with a similar issue and fact pattern as the issue and facts in this case. In *Dressel*, the plaintiffs, acting on behalf of a class of similarly situated borrowers, filed a complaint in the Kent Circuit Court alleging that Ameribank violated Michigan law by charging them an excessive document preparation fee. The plaintiffs claimed, among other things, that Ameribank violated Michigan usury law and Michigan's statutory prohibition against the unauthorized practice of law by charging a $400 document preparation fee on their November 17, 1997, loan. On March 22, 1999, the circuit court certified the plaintiffs' case as a class action. On July 2, 1999, the circuit court dismissed the case, holding that Ameribank's document preparation fee did not violate Michigan's usury law and that Ameribank did not engage in the unauthorized practice of law. The plaintiffs moved for reconsideration and sought leave to amend their complaint to include, among other things, a TILA claim. On September 3, 1999, the circuit court denied their requests. The circuit court held that the plaintiffs' TILA claim was barred by the TILA's one-year statute of limitations because the plaintiffs' complaint was filed on December 21, 1998, more than 13 months after their November 17, 1997, loan.[4] In *Weston v Ameribank*, 265 F3d 366 (CA 6, 2001), the plaintiff obtained a loan from Ameribank on April 1, 1998. The bank charged the plaintiff a $350 document preparation fee. The *Weston*

[4] The circuit court in this case should have similarly denied Cowles's motion to amend her complaint to add a stale claim. As noted by Judge O'CONNELL, the trial court also erred in certifying the class on the basis of a stale claim. 263 Mich App at 238.

plaintiff was a member of the Dressels' class action in the *Dressel* case. On September 10, 1999, seven days after the Dressels' request for consideration and leave to amend their complaint was denied, the *Weston* plaintiff filed suit in federal district court, alleging that the $350 document preparation fee violated TILA because it was not properly disclosed. She claimed that the period of limitations on her TILA claim was tolled during the pendency of the Dressels' class action. The district court determined that the *Weston* plaintiff's claim was barred by the TILA's one-year statute of limitations. The Court of Appeals for the Sixth Circuit affirmed, holding that "the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint." *Id.* at 368.

The majority contends that two separate views exist regarding the class-action tolling doctrine. It states that some courts have relied on Justice Powell's concurrence to conclude that the class-action tolling doctrine applies only to identical claims that were raised or could have been raised in the initial class-action complaint. The majority cites *Weston* in support of this proposition.

The majority further contends that other courts have held that subsequent claims filed after class certification has been denied need not be identical to the original class action for tolling to apply. See *Tosti v City of Los Angeles*, 754 F2d 1485 (CA 9, 1985); *Barnebey v EF Hutton & Co*, 715 F Supp 1512 (MD Fla, 1989). Rather, they need only share a "common factual and legal nexus to the extent that the defendant would likely rely on the same evidence or witnesses in mounting a defense." *Ante* at 20, citing *Cullen v Margiotta*, 811 F2d 698, 719 (CA 2, 1987). The majority purportedly adopts this view, but does not recognize that even

a claim that shares a common factual and legal nexus with the initial claim cannot be tolled if the period of limitations had already run on the subsequent claim before the initial complaint was filed. Simply stated, there is nothing to toll. Thus, whether the tolling doctrine applies only to substantive claims that were raised or could have been raised or to all claims arising from a "common factual and legal nexus," the TILA claim in question was not, and could not have been, brought initially by class representative Cowles because the TILA's one-year period of limitations had already run before she filed her complaint. Because Paxson did not seek to intervene until after the period of limitations had also run on her TILA claim, she too could not toll the statute of limitations.

Lastly, the majority, citing Justice Powell's concurrence in *Crown, Cork & Seal,* contends that the linchpin of whether the period of limitations is tolled under the class-action tolling doctrine is notice to the defendant of both the claims and the number and identities of the potential plaintiffs. It concludes that Paxson's TILA claim, which involved the same factual bases and the same evidence, memories, and witnesses, was not such a "different or peripheral claim" so that tolling is not permitted. The majority has misconstrued Justice Powell's concurrence. Justice Powell specifically noted that *American Pipe* must not be used as a tool to encourage lawyers to frame pleadings to attract purported class members who have slept on their rights. *Crown, Cork & Seal, supra* at 354 (Powell, J., concurring). He went on to state that "[t]he rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Id*. Finally, he noted that a class action notifies the defendant of the substantive claims being brought against it and of the number and generic identities of the

people participating in the judgment. *Id.* Justice Powell's comments support neither Cowles's attempt to add a different claim nor the majority's conclusion in this case. To allow Cowles to bring her TILA claim now, after sleeping on her rights, does not promote the purpose of the statute of limitations of eliminating stale claims. Nor does it notify defendant of the substantive claims being brought against it. Rather, under the majority's rule, any unnamed class member may, at any time, seek to intervene and file an amendment adding different or peripheral claims, long after the period of limitations has run on such claims, as long as the claims involve the same factual and legal nexus.

Michigan courts do not and should not allow tolling where the new claim involves different legal theories than those pleaded in the first case. See *Dressel*, *supra*; *Weston, supra*. I would follow the Sixth Circuit's rule that the tolling doctrine applies only to substantive claims that were actually raised, or could have been raised, in the initial complaint.[5] *Weston, supra* at 368.

[5] The majority cites a laundry list of cases allegedly contradicting my position. *Ante* at 27-28. None of these cases, however, addresses the question at issue here, whether the filing of a class action tolls the period of limitations for a new class member's individual claim when that claim could not have been asserted by the initial class representative and when the period of limitations had already run on the new class member's claim before that member sought to intervene. As such, the cases are not inconsistent with my dissenting opinion. In any event, see *Weston,* to which to majority devotes one sentence in its entire opinion. Not only is *Weston* more factually on point than the cases cited by the majority, the legal issue is similar to that decided here, and the conclusion is consistent with my dissenting opinion.

The majority also contends that my view of the class-action tolling doctrine would frustrate the very purpose of MCR 3.501(F). I disagree. The purpose of MCR 3.501(F) is to toll the period of limitations for putative class members in regards to claims brought in the original class-action complaint. Thus, in the event that class certification is denied, the putative class members would not be punished by relying on

Cowles's initial complaint alleged solely state law violations. Cowles did not raise, nor could she have raised, the TILA claim in her initial complaint because the period of limitations had already run. Thus, Cowles's filing of the original class action, alleging solely state law claims, did not toll the one-year period of limitations for Paxson's TILA claim. Moreover, Paxson's intervention does not alter this conclusion because she did not seek to intervene until after the period of limitations had run on her TILA claim.[6] Accordingly, I

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the class action. Such a rule is necessary to prevent individual unnamed class members from having to intervene to preserve their claims. I do not dispute the validity of this rule. Rather, I would conclude that the tolling doctrine applies only to claims that were raised or could have been raised in the initial complaint. To hold otherwise would expand the purpose of MCR 3.501(F), which is to protect unnamed class members in the event that class certification is denied. Moreover, it would completely defy the general purpose of the statute of limitations, which is to prevent stale claims. Finally, the majority's interpretation of MCR 3.501(F) would allow unnamed class members to intervene at any time during the suit and to file an amendment adding different or peripheral claims long after the period of limitations has run on such claims. The majority's conclusion essentially deems rules of procedure in class actions, especially rules regarding statutes of limitations, unnecessary.

[6] The majority claims that I fail to explain how the filing of a class action that does not meet the requirements for class certification tolls the period of limitations, but the filing of a class action by a person who does not meet the requirements to serve as a class representative does not toll the period of limitations. The majority clearly misinterprets my dissenting opinion. I do not reach that conclusion in my dissent. Nor do I accept or reject the accuracy of the statement. Rather, I reach the narrow conclusion that Cowles did not bring her TILA claim in her original complaint and that she could not amend her complaint to add the claim because the period of limitations had run on her claim before she filed the initial complaint. Thus, MCR 3.501(F) would not apply because no claim existed to toll. Moreover, Paxson did not seek to intervene until the period of limitations had run on her TILA claim. Thus, when Paxson sought to intervene, she also had no claim to toll. MCR 3.501(F) would not apply to toll Paxson's TILA claim because the claim was not brought in the original complaint. Nor could it have been brought in the original

would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition to defendant.

III. RELATION-BACK DOCTRINE

As stated above, the Court of Appeals applied only the relation-back doctrine in reaching its conclusion. The majority, however, completely fails to address whether the Court of Appeals erred in applying the relation-back doctrine to this case. MCR 2.118(D) governs the relation-back doctrine. It provides:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

Although the court rules do not explicitly authorize the relation back of amendments in class actions, the Court of Appeals majority relied solely on this doctrine in allowing Paxson's TILA claim to survive.

The Court of Appeals majority recognized that the relation-back doctrine does not apply to the claims of nonparties and does not extend to new parties. *Hurt v Michael's Food Ctr, Inc,* 220 Mich App 169, 179; 559 NW2d 660 (1996). It concluded, however, that Paxson was not a new party because she was a member of the originally asserted class. In *Devlin v Scardelletti*, 536 US 1, 9-10; 122 S Ct 2005; 153 L Ed 2d 27 (2002), the United States Supreme Court noted:

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complaint. MCR 3.501(F) does not toll claims for all class members that the class representative did not and could not bring. To allow the tolling of such claims is not only outside the purpose of MCR 3.501(F), it broadens the application of MCR 3.501(F) to every conceivable claim that shares the same factual nexus, whether pleaded or not. Moreover, it completely obliterates any concept of a statute of limitations.

> Nonnamed class members . . . may be parties for some purposes and not for others. The label "party" does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.
>
> Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them. Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated. The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation. Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction. Perhaps more importantly, considering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect. [Citations omitted.]

As the Supreme Court observed, an unnamed class member may be considered a party for some purposes and not for others. That an unnamed class member is considered a party for tolling purposes does not automatically make him or her a party for relation-back purposes. The relation-back rule is a subsection of the rule on amendments and supplemental pleadings. As noted, only a party may amend a pleading. As an unnamed class member, Paxson could not amend any pleading. The earliest she could have amended anything was after she intervened in the suit. Therefore, her status as a party for purposes of the amendment rule did not accrue until she intervened, if at all.

Judge O'CONNELL, in his dissenting opinion, also concluded that unnamed class members are not parties for relation-back purposes:

The majority opinion goes astray when it fails to acknowledge that neither the TILA claim nor the original claim of illegal practice of law ever had a legitimate basis in the law. Deciding to disregard this detail, the majority allows Paxson to litigate the stale TILA claim as though the legal fiction of class status can somehow resurrect it. Propping up its legal reasoning on the erroneously granted class status, the majority allows Paxson to emerge from anonymity, replace Cowles as class representative, and advance a new cause of action that Cowles could not legitimately assert herself. The majority permits the substitution of claims and parties by glossing over Paxson's own failure to fit within the time restraints of the statute of limitations. Stretching the legal fiction of class status far beyond its rending point, the majority holds that the previously unknown Paxson, as a silent member of the ill-founded class, had actually asserted the new claim from the time of the original complaint. If the majority correctly deemed Paxson a new party, the new claim would fail for tardiness. *Hurt v Michaels' Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996).

The majority's contrary holding has more insidious ramifications than hyper-extending the statute of limitations on one claim for one group of litigants. It permits class litigants to ignore completely statutes of limitations as long as they can continue to muster fresh "class" plaintiffs with plausible causes of action stemming from the same general circumstances alleged in the complaint. If a court finds that one claim lacks legal support, the class's attorneys may simply conjure another legal issue, amend the complaint to include it, and avoid the running of any period of limitations by relating the claim back to their original, defeated complaint. If the representative did not suffer the new harm alleged or is legally barred from asserting it, the class may simply conjure one of its imaginary participants and put him at the class's helm. This approach allows a massive suit, brimming with countless phantom plaintiffs, to rise repeatedly from its own ashes

like a litigious Phoenix until a vexed and exhausted defendant finally pays it enough money to haunt someone else. [263 Mich App at 238-239.]

For the reasons well articulated in Judge O'CONNELL's dissent, I would conclude that unnamed class members such as Paxson should not be considered "parties" for relation-back purposes. Holding to the contrary would allow for widespread abuse of the relation-back rule, whereby intervening plaintiffs could revive stale claims, not only for themselves, but also for all similarly situated members of the class, even if the initial plaintiff never had such a claim.

Here, Paxson failed to bring her TILA claim within the one-year limitations period. Paxson's substitution as the class representative does not and should not give her license to add new claims that she previously failed to bring within the applicable limitations period. To so hold would defy the plain language of MCR 3.501(A)(1), which requires a class representative to bring the claims on behalf of the remaining class. Moreover, to allow the application of the relation-back doctrine would defeat the purpose of the class-action tolling doctrine. Judicial efficiency and economy, as well as the statute of limitations, dictate that the TILA claim be brought immediately, rather than years after the fact. Thus, a potential class member like Paxson, who was or should have been aware that Cowles had not pleaded a TILA claim, sleeps on her rights by failing to act immediately. To allow Paxson to now assert a TILA claim on behalf of the class would allow piggybacking of one class action onto another and, thus, tolling of the period of limitations indefinitely. Moreover, Cowles's reliance on the relation-back principle is completely inconsistent with the holding in *American Pipe*. If the relation-back principle applied in the class context to

proposed interveners, the holding in *American Pipe* would be superfluous. Every intervening plaintiff seeking to pursue a new claim would simply relate his or her claim back to the initial complaint.

For these reasons, Paxson should not be permitted to intervene to pursue a new claim that was not and could not have been brought by the initial class representative. A contrary holding invites gamesmanship. Moreover, such a rule will surely invite rampant abuse of the class-action tolling rule, as Justice Powell warned in *Crown, Cork & Seal, supra* at 354 (Powell, J., concurring).

IV. CONCLUSION

Cowles's filing of the original class action, alleging solely state law claims, did not toll the one-year period of limitations for Paxson's TILA claim. Moreover, Paxson's TILA claim, which was not and could not have been brought by the initial class representative, does not relate back to the filing of the original complaint. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition to defendant. Because I would hold that Paxson's TILA claim is barred by the statute of limitations, I do not reach the issue whether a question of fact existed regarding whether the document preparation fee was "bona fide."

TAYLOR, C.J., and YOUNG, J., concurred with CORRIGAN, J.

CAMERON v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 127018. Argued October 18, 2005 (Calendar No. 3). Decided July 28, 2006.

Diane and James Cameron, coguardians of Daniel Cameron, a minor, brought an action in the Washtenaw Circuit Court against Auto Club Insurance Association, seeking to recover benefits under the no-fault automobile insurance act for attendant care rendered to Daniel from August 1996 to August 1999. The defendant moved for summary disposition on the basis that the claim, brought in 2002, was barred by the rule in MCL 500.3145(1) limiting the recovery of personal protection insurance benefits in an action to losses incurred during the year preceding commencement of the action. The circuit court, John N. Kirkendall, J., instead granted summary disposition for the plaintiffs on the basis that the saving provision in the Revised Judicature Act (RJA), MCL 600.5851, tolled the period of limitations in MCL 500.3145(1) of the no-fault act. The Court of Appeals, BANDSTRA and SCHUETTE, JJ. (FITZGERALD, P.J., concurring), reversed, holding that MCL 600.5851(1) does not toll the one-year-back rule of MCL 500.3145(1). The Court also held that the tolling provision of MCL 600.5851(1) does not apply to the applicable statute of limitations for no-fault actions also set out in MCL 500.3145(1). 263 Mich App 95 (2004). The Supreme Court granted the plaintiffs' application for leave to appeal. 472 Mich 899 (2005).

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

The Court of Appeals properly concluded that MCL 600.5851(1) did not toll the one-year-back provision in MCL 500.3145(1) and that, because all damages that were sought here were for more than one year back, no damages could be recovered. The decision of the Court of Appeals reversing the trial court's denial of the defendant's motion for summary disposition and remanding the matter to the trial court for entry of summary disposition for the defendant must be affirmed. However, because the Court of Appeals unnecessarily addressed the issue whether the 1993 amendments of MCL 600.5851(1) rendered the tolling provision of MCL 600.5851(1) inapplicable to causes of action for

which the statute of limitations is not set forth in the RJA, its analysis of that issue must be vacated.

1. MCL 600.5851(1) concerns when a minor or person suffering from insanity may bring the action; it does not pertain to the damages recoverable once an action has been brought. MCL 600.5851(1) is irrelevant to the damages-limiting one-year-back provision of MCL 500.3145(1).

2. The opinion in *Geiger v Detroit Automobile Inter-Ins Exch,* 114 Mich App 283 (1982), which held to the contrary, must be overruled.

Justice MARKMAN concurred in the majority's analysis and conclusion that the minority/insanity tolling provision of MCL 600.5851(1) does not toll the one-year-back provision of MCL 500.3145(1), but wrote separately to express his concerns that this conclusion, while supported by the language of the statutes, could result in minors and insane persons recovering only a portion of the damages incurred. Although the result reached by the majority cannot properly be characterized as an "absurd result" for which limited judicial reformation might be appropriate, in light of these concerns, the Legislature should ascertain whether the holding in this case is consistent with its present intentions.

Affirmed in part and vacated in part.

Justice CAVANAGH, dissenting, stated that when the RJA saving provision allows a claimant to sue despite the expiration of the no-fault act's period of limitations, the saving provision has a corresponding effect on the one-year-back rule. There is little to no point to a saving provision that preserves a person's action or claim despite the fact that the period of limitations on the cause of action has expired, if that saving provision merely preserves the right to file papers rather than the right to recover damages that accrued during the time the claim was being saved. To impose the one-year-back rule as limiting the disabled's damages defeats the very purpose of the saving provision, which is preserving a legally incompetent person's claim, including damages, while the person is under a disability. When the Legislature enacted the saving provision, it intended to save the whole of the disabled person's claim. Without the saving provision, those who are judicially precluded and deemed incapable of protecting their own legal rights would be denied access to justice.

Justice WEAVER, dissenting, disagreed that the one-year-back rule applied in this case. By its plain language, the one-year-back rule is an integral part of the tolling provision contained in MCL 500.3145(1) for situations in which the insurer receives timely

notice of an injury or has previously paid benefits. The plaintiffs did not allege that this tolling provision applies; rather, they raised MCL 600.5851(1) as a defense to the statute of limitations. Because the tolling provision is not at issue, the one-year-back rule does not apply, and the plaintiffs may recover benefits that accrued more than one year before they filed suit. The Court of Appeals decision should be reversed, and the stipulated judgment in favor of the plaintiffs should be reinstated.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that she concurred with Justice CAVANAGH's dissent, but wrote to point out that the majority's interpretation of the statutes creates an absurd result. The effect of the majority opinion is to deny children and insane persons the full benefit of their causes of action, allowing them little or no monetary recovery. Such an absurd result cannot have been the Legislature's intent. Justice KELLY also agreed with Justices CAVANAGH, WEAVER, and MARKMAN that the absurd results rule is an important part of Michigan jurisprudence and should be reinstated. Justice KELLY stated that the repudiation of the absurd results rule in *People v McIntire*, 461 Mich 147 (1999), should be overturned, to return Michigan to the vast majority of states that recognize such a rule.

LIMITATION OF ACTIONS — INSURANCE — NO-FAULT ACT — REVISED JUDICATURE ACT.

The minority/insanity tolling provision in MCL 600.5851(1) of the Revised Judicature Act does not operate to toll the rule in MCL 500.3145(1) of the no-fault automobile insurance act that limits the recovery of personal protection insurance benefits in an action to losses incurred during the year preceding commencement of the action.

Logeman, Iafrate & Pollard, P.C. (by *Robert E. Logeman* and *James A. Iafrate*), for the plaintiffs.

Gross, Nemeth & Silverman, P.L.C. (by *James G. Gross*), and *Schoolmaster, Hom, Killeen, Siefer, Arene & Hoehn* (by *Michael G. Kramer*) for the defendant.

Amici Curiae:

Willingham & Coté, P.C. (by *John A. Yeager, Matthew K. Payok,* and *Leon J. Letter*), for Insurance Institute of Michigan.

Smith & Johnson, Attorneys (by *Louis A. Smith*) for Coalition Protecting Auto No-Fault.

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

TAYLOR, C.J. We granted leave in this case to determine whether the minority/insanity tolling provision of the Revised Judicature Act (RJA), MCL 600.5851(1), applies to toll the "one-year-back rule" in MCL 500.3145(1) of the no-fault automobile insurance act.[1] The Court of Appeals, reversing the trial court's denial of defendant's motion for summary disposition, held that it does not, but further concluded that the tolling provision at issue does not apply to the applicable statute of limitations for no-fault actions that is also set out in MCL 500.3145(1).

We affirm the Court of Appeals determination that defendant is entitled to summary disposition, but on narrower grounds. To decide this matter, the Court of Appeals only needed to address whether MCL 600.5851(1) tolls the one-year-back provision in MCL 500.3145(1). Because we conclude that MCL 600.5851(1) cannot toll the one-year-back rule, and all damages sought here were for more than one year back, no damages could be recovered and that disposes of this matter. Accordingly, it was dicta for the Court of Appeals to address the effect of MCL 600.5851(1) on the statute of limitations in MCL 500.3145(1) and we vacate that portion of its ruling while affirming its conclusion that defendant is entitled to summary disposition in this case.

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[1] This rule limits the amount of personal protection insurance (PIP) benefits recoverable to those incurred within one year before the action was commenced.

I. FACTS

Daniel Cameron, a minor, suffered a closed head injury resulting in a cognitive disorder when an automobile struck his bicycle in 1996. At the time of the accident, Daniel's parents maintained a no-fault automobile insurance policy with defendant Auto Club Insurance Association under which Daniel was eligible for coverage. In 2002, when Daniel was 16 years old, his parents filed suit on his behalf seeking PIP benefits for attendant care rendered to Daniel from August 1996 to August 1999.

Defendant moved for summary disposition, arguing that plaintiffs'[2] claim was barred by the one-year-back rule in MCL 500.3145(1). The circuit court denied defendant's motion and, instead, granted summary disposition in favor of plaintiffs. Thereafter, the circuit court entered a judgment in plaintiffs' favor in the amount of $182,500, an amount stipulated by the parties.

Defendant appealed to the Court of Appeals, which reversed.[3] The Court of Appeals held that tolling under MCL 600.5851(1) does not affect the date for bringing an action or limit the one-year-back rule of MCL 500.3145(1).[4] The Court therefore concluded that the

[2] Although Daniel's parents filed suit on his behalf, we refer to them, rather than Daniel, as "plaintiffs" for ease of reference.

[3] 263 Mich App 95; 687 NW2d 354 (2004).

[4] In holding this way, the Court noted that one aspect of the legislative amendments of MCL 600.5851 in 1993 PA 78 was to change the wording of the minority/insanity tolling provision in subsection 1 from stating that it applies to a person entitled to "bring *an action*" to stating that it applies to a person entitled to "bring *an action under this act*." (Emphasis added.) On the basis of this change, the panel concluded that the minority/insanity tolling provision in MCL 600.5851(1) does not apply to causes of action arising after October 1, 1993, the effective date of 1993 PA 78, for which the applicable statute of limitations is not provided in the RJA.

circuit court had improperly denied defendant's motion for summary disposition.

This Court granted plaintiffs' application for leave to appeal.[5]

II. STANDARD OF REVIEW

We review de novo a trial court's grant or denial of a motion for summary disposition.[6] Questions of statutory interpretation are also reviewed de novo.[7] As always, our primary goal when interpreting statutes is to discern the intent of the Legislature by focusing on the best indicator of that intent, the language the Legislature adopted in the statute.[8]

III. ANALYSIS

As stated above, plaintiffs filed suit in 2002, seeking no-fault automobile insurance benefits for attendant care rendered to Daniel from August 1996 to August 1999. Defendant asserts that this action is barred by MCL 500.3145(1), which provides in relevant part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent

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[5] 472 Mich 899 (2005).

[6] *Nastal v Henderson & Assoc Investigations, Inc,* 471 Mich 712, 720; 691 NW2d 1 (2005).

[7] *Id.*

[8] *Id.*; *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004).

> allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. [Emphasis added.]

As we recently reiterated in *Devillers v Auto Club Ins Ass'n,*[9] MCL 500.3145(1) contains two limitations on the time for commencing an action and one limitation on the period for which benefits may be recovered:

> "(1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.
>
> "(2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
>
> "(3) Recovery is limited to losses incurred during the one year preceding commencement of the action."[10]

Thus, an action for PIP benefits must be commenced within a year of the accident unless the insured gives written notice of injury or previously received PIP benefits from the insurer. If notice was given or payment was made, the action can be commenced within one year of the most recent loss. Recovery, however, is limited to losses incurred during the year before the filing of the action.

In the present case, although plaintiffs filed their complaint in 2002, more than one year after the date of the accident in 1996, defendant does not dispute that it either received written notice of injury or previously

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[9] 473 Mich 562, 574; 702 NW2d 539 (2005).

[10] *Devillers, supra* at 574, quoting *Welton v Carriers Ins Co,* 421 Mich 571, 576; 365 NW2d 170 (1985), overruled on other grounds in *Devillers, supra* (emphasis in *Welton*).

paid benefits and that plaintiffs commenced their action within one year after the most recent loss was incurred. Thus, defendant's sole assertion is that the one-year-back rule bars plaintiffs' claim because the period for which the plaintiffs seek recovery for their losses is August 1996 to August 1999. This, of course, is a period more than one year before the 2002 commencement date of their action. Thus, defendant argues, and the Court of Appeals agreed, no damages are recoverable.

In response, plaintiffs contend that the minority/insanity tolling provision in MCL 600.5851(1) applies to toll the one-year-back rule with regard to damages in MCL 500.3145(1) and, as a result, the losses incurred between August 1996 and August 1999 are recoverable. We disagree.

MCL 600.5851(1) provides in relevant part:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

By its unambiguous terms, MCL 600.5851(1) concerns when a minor or person suffering from insanity may "make the entry or bring the action." It does not pertain to the damages recoverable once an action has been brought. MCL 600.5851(1) then is irrelevant to the damages-limiting one-year-back provision of MCL 500.3145(1). Thus, to be clear, the minority/insanity tolling provision in MCL 600.5851(1) does not operate to toll the one-year-back rule of MCL 500.3145(1).

We note that in *Geiger v Detroit Automobile Inter-Insurance Exch,*[11] our Court of Appeals reached the

[11] 114 Mich App 283; 318 NW2d 833 (1982).

opposite conclusion and held that the minority/insanity provision in MCL 600.5851(1) does toll the one-year-back rule in MCL 500.3145(1). In reaching this conclusion the Court of Appeals, looking behind the language of the statute and focusing on its understanding of the Legislature's purported intent, determined that the legislative purpose behind the minority/insanity tolling provision for periods of limitations was to preserve not only a person's cause of action during the period of disability but also the person's damage claims. It opined that to not read the statute in this fashion would "severely limit the utility" of the minority/insanity tolling provision. The Court then concluded that, "[i]n order to advance the policy of RJA § 5851," the minority/insanity tolling provision applies to prevent the capping of damages under the one-year-back rule of MCL 500.3145(1).[12]

We believe this ruling was erroneous for the most uncomplicated reason; namely, that we must assume that the thing the Legislature wants is best understood by reading what it said. Because what was said in MCL 500.3145(1) and MCL 600.5851(1) is clear, no less clear is the policy. Damages are only allowed for one year back from the date the lawsuit is filed. We are enforcing the statutes as written.[13] While some may question the wisdom of the Legislature's capping damages in this fashion, it is unquestionably a power that the Legislature has under our Constitution.[14] Thus, because *Geiger's* conclusion that the minority/insanity tolling provision applies to extend the one-year-back rule is

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[12] *Id.* at 291.

[13] *Devillers, supra* at 588-589; *Warda v Flushing City Council,* 472 Mich 326, 340; 696 NW2d 671 (2005).

[14] *Phillips v Mirac, Inc,* 470 Mich 415, 431-438; 685 NW2d 174 (2004).

contrary to what the Legislature clearly directed in MCL 500.3145(1) and MCL 600.5851(1), *Geiger* is overruled.

Because we conclude that the minority/insanity tolling provision in MCL 600.5851(1) does not apply to the one-year-back rule in MCL 500.3145(1), we find it unnecessary in this case to reach the broader question whether the legislative amendments in 1993 PA 78 limit the applicability of the minority/insanity tolling provision to causes of action for which the applicable statute of limitations is set forth in the RJA. Because the Court of Appeals unnecessarily addressed this broader issue, its holding in this regard is vacated.

IV. RESPONSE TO JUSTICES CAVANAGH AND KELLY

Justices CAVANAGH and KELLY choose to attack our law-driven conclusion by proffering reasons why they think the one-year back rule *should* be tolled for minors and insane persons. What they should be seen as arguing is that all the disciplines that judges, lawyers, and even lay people use for giving meaning to documents and distinguishing in a principled fashion between potentially conflicting instruments are to be disregarded and instead we are to raise our eyes from the tedious page, weigh who is the most compelling litigant, and "effect legislative intent." This begs the question, to which they have no answer, of why the words the Legislature used do not do that better than their efforts to find the "real intent." Moreover, with a system of mandatory automobile no-fault insurance such as the Legislature has enacted, it just may be, because of the economies required to make it work, that the Legislature's "real intent" was to set up strict rules that can unfortunately, but unavoidably if you want no-fault insurance, produce some sad outcomes.

If the statute has provisions that are harsh, they undoubtedly reflect the compromises that were hammered out in the Legislature at the time mandatory coverage automobile no-fault insurance was enacted by the Michigan Legislature. Votes were cast for the statute by legislators on the basis that the compromises would be honored. It was for them, the legislators, not us, the judges, to weigh the "competing interests" and "chose the result" to use Justice CAVANAGH's descriptions.[15] In doing this we do not "ignore[] the interests of the insured,"[16] just as we are not "protecting insurers."[17] Nor should a court that looks to the statute and follows it be charged with ignoring "weighty public policy."[18] Moreover, a court is not "refusing to acknowledge that there is a conflict" between two statutes[19] to refuse to be complicit in conjuring up an imaginary conflict. Similarly, it is not a judge's task to read two very different statutes, one about the tolling of claims and another about allowed damages in an insurance action, and assert that they are unharmonious or that to understand them requires a special "frame of reference."[20] Reproaches of this sort by Justices CAVANAGH and KELLY because we refuse to follow their lead, betray a profound misunderstanding of the judicial and legislative roles. It is the legislators who establish the statutory law because the legislative power is exclusively theirs.[21] We cannot revise, amend, deconstruct, or ignore their product and still be true to our responsi-

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[15] *Post* at 96.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 97.

[20] *Id.* at 98 n 10.

[21] Const 1963, art 4, § 1.

bilities that give our branch only the judicial power.[22] By what theory can we not recognize these undeniable constitutional truths? The only one is that we have the raw power, because we rule after they have enacted, to refuse to honor the bargain they struck. This is an indefensible position whose illegitimacy was classically outlined by Chief Justice Marshall in the celebrated case of *Marbury v Madison,* 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), which has been the lodestar for generations of judges in questions of statutory construction: ours is to declare what the law is, not what it ought to be.

As an additional argument, Justices CAVANAGH and KELLY argue that the result reached by following the statutory language is "absurd" and contend, effectively, that we should rewrite the statutes in order to reach a result that better comports with their own personal policy preferences or, as they would have to describe it, what the Legislature must have really intended regardless of what it said. While they and Justice WEAVER urge us to revisit *People v McIntire,* 461 Mich 147; 599 NW2d 102 (1999), there is no reason for us to do so in this case. Whatever the wisdom of the rule, it would be dicta to discuss it here because, as Justice MARKMAN has aptly pointed out in his concurrence, the "absurd results" doctrine does not implicate the decision in this case because what was done by the Legislature was not absurd. The reason is that there are several conceivable explanations, as we have pointed out, why the Legislature could have intended the result the plain language of the statute requires. Thus, the result here is not absurd when properly understood and no discussion of the absurd results rule is germane.

[22] Const 1963, art 6, § 1.

What this all comes down to is that the proponents of the dissents' positions who have petitioned this Court for assistance are simply in the wrong place. They should go to the Legislature. There the increased premium costs to the drivers of this state occasioned by the revisions they seek for this mandatory insurance can be measured against the important goals of, among other things, affordability of this mandatory insurance. We have neither the tools nor the authority to strike that balance and we recognize it. It may be that the proponents of change will prevail in the Legislature or it may be that in the Legislature's wisdom the benefits will not justify the burden of increased premiums and potentially more uninsured drivers that will be occasioned by the changes sought. But, again, it must be emphasized, no one on this Court, or any other, has warrant to impose our view on the balance striking and make it law. The Legislature and the Legislature alone has that power. That it has struck this balance in the past in a way that strikes the dissents as "inexplicable and unsupported"[23] or "absurd"[24] is, as we have explained here, and before in these types of cases, irrelevant.

In conclusion, as judges, we have read the statutes at issue without a thumb on the scale. We are willing to enforce what the Legislature has enacted. It is just plain wrong to say or imply that we are indifferent or hostile to the rights of the disabled. We are not. We are recognizing the rights that the lawgivers gave them, and no Court should do more or less.

V. RESPONSE TO JUSTICE WEAVER

Justice WEAVER has argued in her dissent the inapplicability of the one-year-back rule to this case. We

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[23] *Post* at 102.

[24] *Post* at 103 n 12.

believe her argument is flawed, as we will discuss, but the more significant problem with it is that, even if it is correct, it cannot apply to these litigants. She argues that the one-year-back rule limits the amount of damages that can be recovered in no-fault cases *only* if the plaintiff is able to bring its action beyond one year from the date of the accident because it provided notice or was previously paid benefits as set forth in MCL 500.3145(1), and that the one-year-back rule *does not* apply if the time for bringing the action was extended by application of the minority/insanity tolling provision in MCL 600.5851(1). From this starting point, she then asserts that the one-year-back rule does not apply in this case because plaintiffs relied on the minority/insanity tolling provision in MCL 600.5851(1) to extend the one-year period of limitations for bringing the action. The record does not seem to support Justice WEAVER's assertion, however, that plaintiffs relied on the minority/insanity tolling provision in MCL 600.5851(1) to toll the one-year period of limitations in MCL 500.3145(1) that accrued on the date of the accident rather than merely taking advantage of that statute's other one-year period of limitations that began on the date of the most recent allowable expense. This is because the record indicates that defendant admitted that plaintiffs' complaint was timely filed in accordance with the limitations period of MCL 500.3145(1) that accrued on the date of the most recent allowable expense because defendant had received notice or previously paid benefits.[25] Thus, it appears from the record that plaintiffs only attempted to rely on the

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[25] Defendant stated in its affirmative defenses that "Since *notice was given, or payment has been previously made*, Plaintiffs may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1)." (Emphasis added.)

minority/insanity tolling provision in MCL 600.5851(1) to extend the one-year-back rule, not the time period for bringing their claim.

But even if the record could be interpreted to support Justice WEAVER's contention that plaintiffs relied on the minority/insanity tolling provision in MCL 600.5851(1) to extend the period for bringing their action, her conclusion that the one-year-back rule only applies in cases where plaintiffs take advantage of the later period of limitations that begins at the time of the most recent allowable expense is incorrect. This Court has consistently interpreted MCL 500.3145(1) as containing three distinct periods of limitations: two limitations on the time for filing suit (one provided in the first half of the first sentence of MCL 500.3145[1] that starts on the date of the accident, and a second, later one provided in the second sentence of MCL 500.3145[1] that starts at the time of the most recent allowable expense if the insured has given notice of injury or the insurer has previously paid benefits), and one limitation on the period for which benefits may be recovered (the one-year-back rule contained in the third sentence of MCL 500.3145[1]).[26] With only minimal explanation, Justice WEAVER argues that we should overrule this precedent,[27]

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[26] *Devillers, supra* at 574, quoting *Welton, supra* at 576.

[27] It is baffling that Justice WEAVER argues here that we should overrule *Welton* and *Devillers*, and change the interpretation given to MCL 500.3145(1) for over 20 years, given that she so often argues that we should leave erroneously decided cases intact simply because they are, in her words, "longstanding precedent." *Devillers, supra* at 620 (WEAVER, J., dissenting). What is even stranger is that in *Devillers* this Court overruled part of *Welton* that was inconsistent with the statute, but Justice WEAVER dissented on the ground that although *Welton* and its progeny were wrongly decided they should not be overruled because they had been in effect for a long time. *Id.* In this case, however, she argues that we should overrule another part of *Welton* with no concern whatsoever for how long it has been in effect. Moreover, she lobbies for the

contending that only the first half of the first sentence of MCL 500.3145(1) is a period of limitations, while the remainder of the first sentence is a tolling provision and the second and third sentences of MCL 500.3145(1) are merely "details" of how it is to be applied.[28]

The language of MCL 500.3145(1) does not support Justice WEAVER's assertion that the second and third sentences of MCL 500.3145(1) do not set forth separate periods of limitations. The reason is that the first sentence plainly states that an action must be commenced within one year of the date of the accident *unless* notice is given or the insurer has previously paid benefits. The word "unless" is commonly defined as meaning "except under the circumstances that," or "except; but; save."[29] Thus, in cases where the insured has given notice or the insurer has previously paid benefits, the one-year period of limitations that starts on the date of the accident is *not* tolled as Justice WEAVER asserts. Rather, the plaintiff is excepted from that period of limitations and, instead, is subject to the separate and distinct period of limitations for filing suit that starts at the time of the most recent loss. Similarly, because the word "unless" does not create a tolling period, the one-year-back rule is not merely a "detail" of a tolling period as Justice WEAVER asserts, but is, as this Court has always held, its own distinct period of limitations.

Justice WEAVER also argues that the one-year-back rule *only* applies to actions subject to the later period of limitations that begins on the date of the most recent

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overruling of *Welton* and *Devillers* without engaging in any analysis of whether their interpretation of MCL 500.3145(1) defies practical workability. *Robinson v Detroit,* 462 Mich 439, 464-467; 613 NW2d 307 (2000).

[28] *Post* at 105-106.

[29] *Random House Webster's College Dictionary* (2001).

loss because notice was given or benefits were previously paid, and that it *does not* apply to actions filed pursuant to the earlier period of limitations that starts on the date of the accident that may have been tolled because of the application of MCL 600.5851(1), equitable estoppel, or some other reason. Her argument is that because the Legislature began the third sentence of MCL 500.3145(1), which creates the one-year-back rule, with the word "however," that sentence only relates back to the second sentence of MCL 500.3145(1).

Although she does not directly reference it, Justice WEAVER appears to be relying on the last antecedent rule, which provides that a modifying clause is confined solely to the last antecedent.[30] However, the last antecedent rule does not apply where the modifying clause is set off by a punctuation mark, such as a comma or, in this case, a period.[31] Moreover, the last antecedent rule does not apply if something in the statute's subject matter or dominant purpose requires a different interpretation.[32] As we have consistently noted, a dominant legislative purpose permeating throughout the no-fault act is to ensure that this mandatory coverage is afford-

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[30] *Dessart v Burak,* 470 Mich 37, 41; 678 NW2d 615 (2004); *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999).

[31] *People v Small,* 467 Mich 259, 263 n 4; 650 NW2d 328 (2002), citing 2A Singer, Sutherland on Statutory Construction (6th ed), § 47.33, pp 369, 373.

[32] *Dessart, supra* at 41. It is odd that Justice WEAVER here attempts to overrule *Devillers* and *Welton* on the basis of the last antecedent rule when she has herself recently argued that the rule is "optional, not mandatory," " 'not inflexible and uniformly binding,' " and inapplicable " '[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections.' " *Dessart, supra* at 44 (WEAVER, J., concurring in the result), quoting 2A Singer, Sutherland on Statutory Construction (6th rev ed), § 433, p 372.

able.[33] Accordingly, declining to utilize the last antecedent rule to limit the one-year-back rule's application in the manner proposed by Justice WEAVER "is consistent with the Legislature's overarching commitment in the no-fault act, and its later amendments, to facilitating reasonable economies in the payment of benefits, thus causing the costs of this mandatory auto insurance to be more affordable."[34]

VI. CONCLUSION

We hold that the minority/insanity tolling provision in MCL 600.5851(1), by its plain terms, only addresses when an action may be brought. Therefore, it does not apply to toll the one-year-back rule in MCL 500.3145(1) because that provision does not concern when an action may be brought but, instead, limits the amount of PIP benefits a person injured in an automobile accident may recover. Accordingly, the decision of the Court of Appeals reversing the trial court's denial of defendant's motion for summary disposition and remanding this case to the circuit court for entry of summary disposition in defendant's favor is affirmed. However, because the Court of Appeals unnecessarily addressed the issue whether the legislative amendments of MCL 600.5851(1) in 1993 PA 78 render the minority/insanity tolling provision inapplicable to causes of action for which the statute of limitations is not set forth in the RJA, its analysis of that issue is vacated.

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[33] See *Jarrad v Integon Nat'l Ins Co,* 472 Mich 207, 218; 696 NW2d 621 (2005); *Griffith v State Farm Mut Automobile Ins Co,* 472 Mich 521, 539; 697 NW2d 895 (2005); *Cruz v State Farm Mut Automobile Ins Co,* 466 Mich 588, 597; 648 NW2d 591 (2002); *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996); *O'Donnell v State Farm Mut Ins Co,* 404 Mich 524, 547; 273 NW2d 829 (1979); *Shavers v Attorney General,* 402 Mich 554, 607-611; 267 NW2d 72 (1978).

[34] *Jarrad, supra* at 218.

Affirmed in part and vacated in part.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

MARKMAN, J. (*concurring*). I concur in the majority's analysis and conclusion that the minority/insanity tolling provision of the Revised Judicature Act, MCL 600.5851(1), does not toll the one-year-back rule of the no-fault automobile insurance act, MCL 500.3145(1).[1] I write separately to elaborate on the majority's analysis and to express certain reservations concerning the decision reached in these opinions.

(1) I am concerned that as a consequence of this decision, the protections afforded by the tolling provision may become increasingly illusory. This provision allows minors and insane persons to bring civil actions within one year after their legal disabilities have been removed. However, the one-year-back rule of the no-fault automobile insurance act allows such persons to recover only those losses incurred during the one year before the commencement of the action. In other words, although the tolling provision instructs minors and insane persons that they are entitled to wait until one year after their legal disabilities have been removed to bring their civil actions, if they do wait, they will only be allowed to recover what may be a portion of the total damages incurred.[2]

[1] For the reasons set forth in this opinion, I do disagree with the majority opinion's statement that whether legislation is or is not "absurd" is "irrelevant." *Ante* at 67.

[2] The largest portion of medical expenses ordinarily will have been incurred in the immediate aftermath of a covered accident rather than during the year immediately preceding the filing of the tolled cause of action. Indeed, the longer the period of tolling— for example, the younger

(2) Further, I am concerned that, although the tolling provision was intended to protect minors and insane persons, as a consequence of this decision, when such persons are injured in an accident in which others are also injured, they are likely to be undercompensated for equivalent medical expenses compared to other persons. If, for example, both an adult and a minor are injured in an automobile accident, the adult will be able to file an action and potentially recover *all* of his losses, while the minor who chooses to wait until he is 18 years old to file an action, as the tolling provision allows, will be able only to recover those losses that were incurred within the one-year period preceding the action.

(3) I am concerned that as a consequence of this decision, what is arguably the larger purpose of the tolling provision will be undermined. The tolling provision temporarily places the statute of limitations on hold for minors and insane persons. The purpose of tolling generally is to allow protected classes of persons an opportunity to be made whole once their disabilities have been removed. However, if the tolling provision in MCL 600.5851(1) does not also toll the one-year-back rule of MCL 500.3145(1), minors and insane persons will not necessarily be made whole. Rather than being allowed to recover all of the expenses incurred during their periods of tolling, these classes of individuals will be limited to only one year's worth of compensation. This is a result inconsistent with most other statutory tolling provisions.

(4) Finally, I am concerned that as a consequence of this decision, it will border on legal malpractice for an attorney ever to recommend reliance on the

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the child at the time of the covered accident— the smaller the portion of overall medical expenses that will ordinarily have been incurred during the one-year-back period.

minority/insanity tolling period, for a person acting in such reliance may learn too late that the person whose interests he is protecting in this regard has been deprived of several years' worth of compensation. In this regard, the tolling provision would seem to be more of a snare than a protection.

In the end, however, despite these concerns, I agree with the majority that the tolling provision of MCL 600.5851(1) does not toll the one-year-back rule of MCL 500.3145(1). I believe that this conclusion is mandated by the plain language of these statutes, and that there is at least an arguable rationale in support of the reasonableness of a statute producing this result. Moreover, I do not believe that I possess the judicial authority to impose what some, including myself, might view as a more "logical," a more "rational," or a more "consistent" structure for these statutes.

MCL 600.5851(1) provides, in pertinent part:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or *bring the action* although the period of limitations has run. [Emphasis added.]

MCL 500.3145(1) provides, in pertinent part:

> [T]he claimant may not *recover benefits* for any portion of the loss incurred more than 1 year before the date on which the action was commenced. [Emphasis added.]

It is a long-accepted principle of statutory construction that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible." *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991). Although the two statutes in controversy may appear to

be in tension, and while they clearly serve different legislative interests, these statutes nonetheless *can* be reconciled.

The tolling provision allows a protected person to "bring [an] action although the period of limitations has [otherwise] run" as long as the action is brought within one year after the legal disability of minority or insanity has been removed. At the same time, the one-year-back rule prohibits a person from "recover[ing] benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

Although the tolling provision temporarily delays the operation of the statute of limitations, the one-year-back rule is plainly not a statute of limitations, and therefore is plainly not the subject of tolling. As the lead opinion in *Howard v Gen Motors Corp,* 427 Mich 358, 385-386; 399 NW2d 10 (1986) (holding that the one-year- and two-year-back rules of the Worker's Disability Compensation Act are not statutes of limitations), explained:

> Simply stated, they are not statutes that limit the period of time in which a claimant may file an action. Rather, they concern the time period for which compensation may be awarded once a determination of rights thereto has been made.
>
> Moreover, the one- and two-year-back rules do not serve the same purposes as do typical statutes of limitations.
>
> * * *
>
> The rules do not perform the functions traditionally associated with statutes of limitations because they do not operate to cut off a claim, but merely limit the remedy obtainable. They do not disallow the action or the recovery— a petition may be filed long after an injury and benefits may be awarded in response thereto— they merely limit the award once it has been granted.

The one-year-back rule of the no-fault automobile insurance act is indistinguishable from the one-year- and two-year-back rules of the Worker's Disability Compensation Act. As do the latter, the former serves by its straightforward language only as a limitation on the recovery of benefits; it does not define a period within which a claimant may file a cause of action. Therefore, the one-year-back rule is not a statute of limitations, and it lies outside the scope of what is affected by the minority/insanity tolling provision.

The tolling provision of MCL 600.5851(1) tolls the limitation that applies to the "bring[ing of an] action"; however, it does not toll the limitation that applies to the "recover[y of] benefits," in particular the limitation set forth in MCL 500.3145(1). Accordingly, although a plaintiff may not be prohibited from "bring[ing] the action," a plaintiff is prohibited from "recover[ing] benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

I agree with the majority that the two statutes compel this conclusion. In the final analysis, this is not a conclusion that reflects the will of this Court, or that of individual justices, but one that reflects the will of the people of Michigan acting through their legislative representatives. The majority's conclusion is the only one, in my judgment, that accords reasonable meaning to the actual language of the laws, as opposed to the language of the law that might have been enacted but never was. Only if this Court ignores, or contorts, the language of the one-year-back rule can it fairly be encompassed within the language of the tolling provision.[3]

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[3] Justice CAVANAGH describes me at oral argument as having "aided" defendant in devising an alternative argument. This is a fair character-

Moreover, unlike Justice KELLY, I do not believe that the result reached by the majority can fairly be characterized as an "absurd result" for which some limited judicial reformation might be appropriate.[4] Unlike some

ization of what occurred only if asking a question concerning a matter that neither of the parties had previously given thought can be described as having "aided" a party. While my questioning did, in fact, "aid" this Court in getting the meaning of the law right, it did not apparently "aid" in producing the result desired by the dissenting justices.

[4] The "absurd results" rule has been described as one that asserts that "[i]t will always . . . be presumed that the legislature intended exceptions to its language, which would avoid [absurd consequences]." *United States v Kirby*, 74 US 482, 486-487; 19 L Ed 278 (1868). The United States Supreme Court has consistently adhered to this rule. As early as 1819, the Court asserted in *Sturges v Crowninshield*, 17 US 122, 202-203; 4 L Ed 529 (1819), that the absurdity of an interpretation warranted a departure from the plain meaning of the words. See also *Kirby, supra*; *Armstrong Paint & Varnish Works v Nu-Enamel Corp*, 305 US 315, 333; 59 S Ct 191; 83 L Ed 195 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function."). Justice Story has also observed, "Where [the law's] words are plain, clear, and determinate, they require no interpretation; and [such interpretation] should, therefore, be admitted, if at all, with great caution and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil." 1 Story, Commentaries on the Constitution of the United States (5th ed), § 405.

In addition, Michigan has always adhered to the "absurd results" rule, at least until its apparent reversal in *People v McIntire,* 461 Mich 147; 599 NW2d 102 (1999), a case referencing none of our earlier decisions in this regard. As early as *Green v Graves*, 1 Doug 351, 354 (Mich, 1844), this Court stated, "The reason and intention of the lawgiver will control the strict letter of the law" when the latter would lead to "absurdity." To name only a few cases, see also *Campau v Seeley*, 30 Mich 57, 62 (1874); *People v Labbe*, 202 Mich 513, 520; 168 NW 451 (1918); *Attorney General v Detroit U R Co*, 210 Mich 227, 254; 177 NW 726 (1920); *Grand Rapids v Crocker*, 219 Mich 178, 183-184; 189 NW 221 (1922); *Cytacki v Buscko*, 226 Mich 524, 528; 197 NW 1021 (1924); *Lukazewski v Sovereign Camp of the Woodmen of the World*, 270 Mich 415, 421; 259 NW 307 (1935); *Mondou v Lincoln Mut Cas Co*, 283 Mich 353, 358; 278 NW 94 (1938); *Elba Twp v Gratiot Co*, 287 Mich 372, 394; 283 NW 615 (1939); *Wayne Co Bd of Rd Comm'rs v Wayne Co Clerk*, 293 Mich 229, 236; 291 NW 879

of my colleagues, I believe that the "absurd results" rule is one that complements and reinforces the doctrine of interpretivism. Cf. *People v McIntire,* 461 Mich 147; 599 NW2d 102 (1999), rev'g *People v McIntire,* 232 Mich App 71; 591 NW2d 231 (1998); *Piccalo v Nix*, 466 Mich 861 (2002). As observed by Justice Scalia, "it is a venerable principle that a law will not be interpreted to produce absurd results." *K mart Corp v Cartier, Inc,* 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part). The "absurd results" rule underscores that the ultimate purpose of the interpretative process is to accord respect to the judgments of the lawmakers. While it must be presumed that these judgments are almost always those reflected in the words used by the lawmakers, in truly extraordinary cases, exercise of the "judicial power" allows recognition of the fact that no reasonable lawmaker could conceivably have intended a particular result. As Justice Kennedy observed in a concurring opinion in *Public Citizen v United States Dep't of Justice*, 491 US 440, 470; 109 S Ct 2558; 105 L Ed 2d 377 (1989), the "absurd results" rule "demon-

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(1940); *Superx Drugs Corp v State Bd of Pharmacy*, 378 Mich 430, 457; 146 NW2d 1 (1966) (opinion by O'HARA, J.); *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976); *Metro Council No 23 AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 325, 327-328; 294 NW2d 578 (1980); *Owendale-Gagetown School Dist v State Bd of Ed*, 413 Mich 1, 8; 317 NW2d 529 (1982); *Achtenberg v East Lansing*, 421 Mich 765, 772; 364 NW2d 277 (1985); *State Treasurer v Wilson*, 423 Mich 138, 145-146; 377 NW2d 770 (1985); *Gobler v Auto-Owners Ins* Co, 428 Mich 51, 62; 404 NW2d 199 (1987); *People v Stoudemire*, 429 Mich 262, 267; 414 NW2d 693 (1987); *Belanger v Warren Consolidated School Dist*, *Bd of Ed,* 432 Mich 575, 589; 443 NW2d 772 (1989); *Bewersdorf*, *supra* at 68. See also the subsequent decision of this Court in *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) ("[S]tatutes must be construed to prevent absurd results . . . ."). Moreover, I am unaware of any state other than Michigan that lacks an "absurd result" rule as an aspect of its legal system.

strates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."

However, the "absurd results" rule must not be invoked whenever a court is merely in disagreement, however strongly felt, with the policy judgments of the Legislature. This, in my judgment, is essentially what Justice CAVANAGH does here *sub silentio* and what Justice KELLY does here expressly. Although the Court's holding in this case maintains a law within our state that is contrary to that which seems to me most rational, and although I have doubts concerning whether individual members of the 71st Legislature genuinely had in mind this law,[5] I do believe that a reasonable lawmaker conceivably could have intended these results.

Such a lawmaker, for example, *might* have intended these results in order to make no-fault insurance more affordable. See *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 539; 697 NW2d 895 (2005) (stating that this Court has always been cognizant of the potential problem of "cost containment for this mandatory coverage" when interpreting the no-fault act), citing *Shavers v Attorney General*, 402 Mich 554, 599; 267 NW2d 72 (1978) (holding that "[i]n choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates"); *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 218; 696 NW2d 621 (2005) (recognizing "the Legislature's overarching commitment in the no-fault act, and its later amendments, to facilitating reasonable econo-

[5] The 71st Legislature enacted the tolling provision, the later-enacted statute of the two statutes at issue here.

mies in the payments of benefits, thus causing the costs of this mandatory auto insurance to be more affordable"); *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 597 n 13; 648 NW2d 591 (2002) (recognizing that "[c]oncern about the affordability of no-fault insurance has caused the Legislature over the years to amend the no-fault act in order to reduce the scope of mandatory coverages"); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 151; 644 NW2d 715 (2002) (recognizing that "the Legislature has, consistent with its ongoing efforts over the years, attempted to make such mandatory insurance affordable"); *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 654-655; 513 NW2d 799 (1994) (recognizing that "a primary goal of the no-fault act is to 'provid[e] an equitable and prompt method of redressing injuries in a way which made the mandatory insurance coverage affordable to all motorists' "), quoting *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984); *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996) (holding that "the no-fault insurance system . . . is designed to provide victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system"); *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 547; 273 NW2d 829 (1979) (recognizing that the Legislature has provided for setoffs in the no-fault act: "Because the first-party insurance proposed by the act was to be compulsory, it was important that the premiums to be charged by the insurance companies be maintained as low as possible[;] [o]therwise, the poor and the disadvantaged people of the state might not be able to obtain the necessary insurance.").

Conceivably as well, a reasonable lawmaker *might* have intended to maintain the solvency of insurers, and

to enhance their ability to undertake future planning, by protecting them from multimillion dollar lawsuits filed many years after medical expenses have been incurred, and only after relatively manageable month-to-month expenses have been allowed to develop into more extraordinary decade-to-decade expenses. Such a lawmaker *might* have sought to obligate those who have incurred medical expenses to seek reimbursement on a relatively ongoing basis, rather than allowing them to wait for many years before seeking compensation. Indeed, it is conceivable that a reasonable lawmaker *might* have wished to incentivize earlier, rather than later, causes of action in order to encourage those who have incurred medical expenses to act in a manner consistent with their own financial self-interest,[6] and to ensure that their medical expenses were reimbursed expeditiously.

Finally, a reasonable lawmaker *might* have concluded that practical problems pertaining to evidence and proofs in old claims required some balance between the interests of the insured and those of the insurer.

I am inclined to believe that the principal purpose of the minority/insanity tolling provision is to afford minors and insane persons an opportunity to be made litigatively whole once their disabilities have been removed. However, what I discern as the principal purpose of the tolling provision cannot be allowed to trump its actual language. To allow such a result would enable the judge to impose on the law his own characterization of its unstated "purpose" and trump the actual words of

[6] Indeed, it seems certain that the tolling provision will come into play in only a very small portion of all minor/insanity medical expense no-fault cases, and that most claimants will file actions on a timely, "untolled" basis, because whoever has incurred expenses on behalf of a minor or insane person will have an obvious financial interest in being reimbursed for such expenses as expeditiously as possible.

the law. Instead, I believe, it must be assumed that these actual words better address the "purpose" of the statute than some broad characterization divined by the judge.[7] The actual language of the tolling provision merely preserves the right to "bring [an] action"; whatever I might suppose to have been in the minds of individual legislators, and whatever I might speculate as the purpose of this law, the law *itself* says nothing about making the protected person litigatively whole.

Although the general purpose of tolling statutes is to render the beneficiary whole in his cause of action, the precise issue in this case is whether this purpose remains intact where there is, as here, a one-year-back rule— an equally applicable one-year-back rule.[8] The interpretative accommodation reached by the majority gives meaning to both provisions, while the approach of the dissents would give no meaning in the present context to either the one-year-back statute or the "bring the action" language in the tolling statute.

In *Geiger v Detroit Automobile Inter-Ins Exch,* 114 Mich App 283; 318 NW2d 833 (1982), the Court of Appeals held that the minority/insanity tolling provision does toll the one-year-back rule of the no-fault

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[7] One of the problems, of course, with a focus on the "purpose" of a statute, as opposed to its actual language, is that the former can be characterized at widely different levels of remove from the statute. If the "purpose" of the tolling statute is not to achieve the ends compelled by its plain words, is the "purpose" instead to toll the period of limitations without regard for other statutes? Is it to place minors and insane persons in an identical position with others who have filed claims for medical expenses immediately upon incurring such expenses? Is it to optimize litigative opportunities for minors and insane persons to file lawsuits? Is it generally to do good things for minors and insane persons?

[8] I am aware of only one other statutory one-year-back rule. See MCL 418.833(1) (the one-year-back rule of the Worker's Disability Compensation Act), referred to earlier in this opinion. There is no decision of this Court reconciling this provision and any applicable tolling provision.

automobile insurance act. However, the only reason it gave for reaching such a conclusion is that "[a] contrary rule would severely limit the utility of the minority saving provision . . . ." *Id.* at 291. I do not necessarily disagree with *Geiger* that not tolling the one-year-back rule may well "limit the utility" of the tolling provision, perhaps even "severely," but that is often what happens when there are statutes that are in tension with one another. It can be argued just as easily that to do the opposite, to toll the one-year-back rule, would be to "severely limit the utility" of the one-year-back rule. Indeed, it can be argued that to toll the one-year-back rule is not merely to "severely limit its utility," but to do it even greater damage by vitiating its language altogether. In the end, the *Geiger* rationale is not even a legal rationale at all; rather, it is little more than a statement by the majority in *Geiger* that it preferred a different statute than the one actually enacted by the Legislature. In this regard, it is no different than the dissents in this case.

This Court lacks the authority to alter a statute simply because it is confident that such alteration will better fulfill some supposed purpose. While I believe that this Court has an obligation to avoid genuinely "absurd results," a statute that is simply less well-crafted than a judge believes it could have been is not for that reason "absurd." Something is "absurd" as a matter of law, justifying the extraordinary remedy of judicial reformation, only if it is "utterly or obviously senseless, illogical, or untrue; contrary to all reason or common sense; laughably foolish or false." *Random House Webster's College Dictionary* (1991). Justice Scalia has described results as being "absurd" when they are "unthinkable," "bizarre," or "startling." *Green v Bock Laundry Machine Co,* 490 US 504, 527; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring);

City of Columbus v Ours Garage & Wrecker Service, Inc, 536 US 424, 450 n 4; 122 S Ct 2226; 153 L Ed 2d 430 (2002) (Scalia, J., dissenting). He has described a statute as "absurd" when it "cannot have been meant literally," or when it "cannot rationally . . . mean" what it seems to mean. *Green, supra* at 528.[9]

Justices CAVANAGH and KELLY, in contrast, effectively define as an "absurd result" one that is merely imperfect or flawed, one that is merely susceptible to improvement. Unencumbered, as this Court is, by the need of the legislative branch to engage in compromise and give-and-take between many competing social interests, Justices CAVANAGH and KELLY invoke an "absurd results" rule simply on the basis that the legislative process has produced what, in their view, is a law that is less "consistent" and less "effective" than it could have been.

As explained above, however, there are a number of reasons why the Legislature *might* have intended the statute that *Geiger* derogated. Because the actual language of the minority/insanity tolling provision of the RJA does not toll the one-year-back rule of the no-fault automobile insurance act, and because such a result cannot fairly be said to be "absurd," I believe that this

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[9] Black's Law Dictionary (5th ed) defines "absurdity" as "[a]nything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion." There are a variety of alternative formulations of the "absurd results" rule. See, e.g., *Crooks v Harrelson*, 282 US 55, 60; 51 S Ct 49; 75 L Ed 2d 156 (1930) ("so gross as to shock the general moral or common sense"); *Sturges, supra* at 203 ("so monstrous, that all mankind would, without hesitation, unite in rejecting the application"); *Public Citizen, supra* at 471 (Kennedy, J., concurring) ("quite impossible that [the Legislature] could have intended the result"); *Green, supra* at 511 ("can't mean what it says"); *Green, supra* at 527 (Scalia, J., concurring) ("an unthinkable disposition").

Court lacks the authority to reform this statute and to construe it in a manner contrary to its language.[10]

In the end, I cannot read the minds of those who enacted the two statutes in question, and I do not profess to understand what may have been secretly harbored in these minds. The most fundamental rule of statutory construction is that the actual words of the statutes are "the best indicator of the Legislature's intent." *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004). For the reasons set forth above, the actual words of the two statutes here lead me to agree with the majority that the minority/insanity tolling provision does not toll the one-year-back rule. However, also for the reasons set forth above, I would respectfully urge the present Legislature to review the opinions in this case and to ascertain whether the Court's holding is consistent with the Legislature's present intentions.

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[10] Justice KELLY, who insists on approaching the instant matter from the perspective of one authorized to second-guess the legislative branch, inquires, *post* at 130 n 61, "What legislator would find it *reasonable* to reduce the cost of insurance by leaving children and the insane with little or no recovery for their injuries?" (Emphasis added.) As I have made clear in this opinion, I doubt that I would if I were a legislator, and it seems that neither would Justice KELLY, but, of course, we are not legislators. Rather, we are judges. Therefore, the proper inquiry is not that of Justice KELLY but rather, "Is it *quite impossible* or is it *quite unthinkable* that a legislator would enact this legislation?" See, e.g., *Public Citizen*, *supra* at 471; *Green*, *supra* at 511. Justice KELLY, by ignoring virtually every conceivable rationale for MCL 600.5851(1) set forth in this and in the majority opinion, not only transforms the "absurd result" rule beyond all recognition, but through her characterization of this law at its most indefensible, rather than at its most defensible, as she is obligated to do as a judge, demonstrates an inappropriate willingness to substitute her judgment for that of the Legislature. The Legislature is entitled to make dubious policy judgments without myself, or Justice KELLY, being thereby authorized to act as lawmakers-in-chief.

CAVANAGH, J. (*dissenting*). This case is essentially the second installment[1] of defendant's attempt to further immunize itself and other insurers from having to pay benefits indisputably owed to their injured insured—people who have diligently paid policy premiums with the expectation that, should they be injured, their insurer will reimburse them for all allowable expenses. While in *Devillers* defendant targeted people who had not filed suit because of insurer delay, in this case, defendant targets infants and the legally incompetent.

MCL 500.3145(1), a provision of the no-fault automobile insurance act, contains what is known as the "one-year-back rule." The provision states that when an insurer is on notice of a plaintiff's claim for injury expense reimbursement, the plaintiff has one year after the most recent allowable expense was incurred to bring an action to recover accident-related expenses. The provision also states that the claimant cannot "recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." *Id.* It is that latter portion that is known as the one-year-back rule.

In *Devillers*, *supra*, a majority of this Court held that the one-year-back rule prevents a plaintiff from recovering expenses incurred before the one-year deadline even when the reason suit has not been filed is because the insurance company has not yet denied the plaintiff's claim. In other words, the majority gave insurers an open invitation to delay responding to an insured's claim for however long it wishes so that it can profit from the fact that most prudent people are not going to rush into court before at least hearing from their insurance company that their claim has been denied.

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[1] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), was the first.

Normally, after submitting a claim to an insurer, the insured waits for a response. But under *Devillers*, if the unwary person hears nothing—and, thus, does not file suit—for over a year, the person loses the right to collect the benefits that accrued before the one-year period preceding suit.[2] Turning a blind eye to the no-fault act's goal of *reducing* litigation, the majority categorically ensured an onslaught of resource-wasting peremptory lawsuits that were previously unnecessary under *Lewis v Detroit Automobile Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), a case that had effectively balanced the rights of the insurer and the insured for nearly 20 years.

Close on the heels of *Devillers*, defendant now argues that MCL 600.5851(1), a provision of the Revised Judicature Act (RJA) that preserves the claims of minors and the insane until one year after the disability is removed,[3] should not apply to claims brought under the no-fault act. Stated differently, defendant argues that

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[2] Even if the plaintiff diligently pursues a response from the insurance company or is actively negotiating with the insurer, the result is the same. If the insurer holds out for over a year, the reduction in owed benefits begins.

[3] The provision states:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852. [MCL 600.5851(1).]

> "Insane" is defined as a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane. [*Id.* at § 5851(2).]

despite an injured person's infancy or inability to understand his rights, that person is not excepted from the rules of MCL 500.3145(1), so the saving provision specifically crafted to protect these groups is meaningless. Thus, under defendant's argument, infants and the legally incompetent who "wait" for more than one year to file suit for damages owed them are precluded from recovering all damages incurred outside the one-year period that precedes their filing. Apparently, in defendant's view, there is no reason to distinguish between people of age and with their full faculties from those who have the misfortune of being under a legal disability.

Aided by Justice MARKMAN at oral argument, defendant eventually devised an alternative argument on which we accepted supplemental briefing and argument.[4] Under this alternative theory, defendant argues that we need not reach the issue whether the RJA applies to the no-fault act because all the damages plaintiff requests in this case were incurred before the one-year-back period. Under defendant's logic, then, no

[4] Justice MARKMAN objects to my characterization of his statements as "aiding" a party. While there is certainly no bar to asking a party about various legal theories, in this particular case, counsel for defendant explicitly disagreed in his brief to this Court and at oral argument that any distinction could or should be made between the statute of limitations and the one-year-back rule in the context of the saving provision of MCL 600.5851. Clearly, then, defendant understood and accepted as sensible the prevailing legal precedent that allowed minors and incompetents to preserve their claims in full and saw no reason to revisit the longstanding rule that a "claim" encompassed not only the mere filing of a lawsuit, but also the ability to recover all damages alleged to be owed. In other words, counsel saw no reason to, and did not, challenge settled law. Rather, counsel endeavored to persuade this Court to overturn settled law only after being "aided" by Justice MARKMAN into seeing a golden opportunity to do so successfully. It is in that peculiar context that I find this sequence of events disconcerting.

unique considerations are made for underage or mentally incompetent insureds with respect to the no-fault act's one-year-back rule on damages. In other words, even if a person is incapable, by virtue of his disability, of protecting his rights by bringing suit until that disability is removed, the person is still prevented from recovering any damages that were incurred more than a year before the date the person does manage to bring suit.

Having already assisted the defendant's coup of cutting off benefits when the defendant's own delay is the impetus for a plaintiff's delay in filing suit, see *Devillers*, *supra*, the majority now approves cutting off owed benefits not because of a plaintiff's lack of diligence and not even in the face of an insurer's delay tactic, but simply because it chooses to drastically curtail the protection provided by the Legislature for infants and the incompetent.

The issue the majority dismisses today finds its genesis in *Lambert v Calhoun*, 394 Mich 179; 229 NW2d 332 (1975). In *Lambert*, this Court held that the RJA's saving provision applies to causes of action created by statute, even when the statute sets forth its own limitations period. When this Court determined in 1975 that there was no indication that the Legislature intended the saving provision to apply only to common-law causes of action, it explained as follows:

> The need and desirability for saving in one case are the same as in the other. Infants or insane persons are under the same disability whether their actions be common-law or statutory; the defendant in one case is generally in no greater need than the defendant in the other of protection from delay in commencement of the action. We are unable to distinguish the two cases or to ascribe to the Legislature such an intention. [*Lambert*, *supra* at 191.]

While the *Lambert* Court was comparing the right of a disabled person to bring a common-law cause of action to that person's right to bring a statutory one, the lack of reason to distinguish between the two is, of course, universal. A person without capacity to bring a common-law claim is equally without capacity to bring suit under a statute. Likewise, a person without capacity to bring suit under some other act is equally without capacity to bring suit under the no-fault act.

As much was found in a subsequent case when the Court of Appeals explicitly held that the saving provision applies to the no-fault act. *Rawlins v Aetna Casualty & Surety Co*, 92 Mich App 268; 284 NW2d 782 (1979).[5] Further examining the interplay between the saving provision and the no-fault act, the Court of Appeals, in *Geiger v Detroit Automobile Inter-Ins Exch*, 114 Mich App 283; 318 NW2d 833 (1982), discussed the purposes of the no-fault act's one-year period of limitations, its one-year-back rule, and the RJA's saving provision. In its analysis, the panel detailed the reasoning behind its ultimate conclusion that when the saving provision allows a claimant to sue despite the expiration of the no-fault act's period of limitations, the saving provision has a corresponding effect on the one-year-back rule:

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[5] I would not disturb that holding now, despite amendatory language in the RJA that changed the clause "if the person first entitled to make an entry or *bring any action*" to "if the person first entitled to make an entry or *bring an action under this act* . . . ." (Emphasis added.) As plaintiff's brief explains, "The RJA prescribes the jurisdiction of the courts, the basis of jurisdiction, and various other procedural guidelines within our civil justice system. It also prescribes a method for disputes to be resolved through the filing of a civil action. Specifically, at MCL 600.1901, the RJA states, 'a civil action is commenced by filing a complaint with the court.' Therefore, it is basic civil procedure that all lawsuits filed are brought 'under this act,' i.e., the RJA."

The no-fault act, § 3145(1), does two things. First, it provides that an action to collect PIP [personal injury protection] benefits must be commenced within one year after the date of the accident. The period is tolled if a proper notice is given to the insurer within one year. Second, it provides that a claimant may not recover benefits for losses incurred more than one year before the date the action was commenced.

From the above discussion, we know that RJA § 5851 allows an insured who is injured during his minority to commence an action within one year after attaining the age of majority, notwithstanding that the one-year period of limitations in § 3145(1) has expired. The question under present consideration is whether RJA § 5851 allows that person to collect PIP benefits for all expenses and losses incurred from the date of the accident, notwithstanding that § 3145(1) generally precludes recovery for expenses and losses incurred more than one year prior to the date the action was commenced. Although this is apparently a question of first impression, we believe that the minority saving provision of RJA § 5851 should apply to the "one year back" rule of § 3145(1), as well as to the one-year period of limitations therein.

The purpose of the one-year period of limitations is to encourage claimants or persons acting on their behalf to bring their claims to court while those claims are still fresh. *Burns v Auto-Owners Ins Co*, 88 Mich App 663; 279 NW2d 43 (1979), *Aldrich v Auto-Owners Ins Co*, 106 Mich App 83; 307 NW2d 736 (1981). The "one year back" portion of § 3145(1) has a similar policy.

In *Rawlins v Aetna Casualty & Surety Co*, *supra*, this Court held that RJA § 5851 applied to the one-year period of limitations in § 3145(1). The basis for the minority saving provision and the decision in *Rawlins* is that a person should not lose his claim during his minority, when he has no legal capacity to act on his own behalf. We believe that the *Rawlins* rule should also apply to the "one year back" portion of § 3145. A contrary rule would severely limit the utility of the minority saving provision and could deprive a person of benefits to which he would otherwise be

> rightfully entitled. In the present case, James Geiger, injured at the age of 16, incurred substantial medical expenses over the 2 years following the accident. He commenced this action approximately two weeks before his nineteenth birthday. Although his right to commence the action is preserved under *Rawlins*, *supra*, if we do not apply the minority saving provision to the "one year back" rule of § 3145, plaintiff would be effectively precluded from recovering PIP benefits for the medical expenses incurred during the two years immediately following the accident. In order to advance the policy of RJA § 5851 and *Rawlins*, *supra*, we conclude that an insured who is injured during his minority and commences an action before his nineteenth birthday is entitled to collect PIP benefits for expenses and losses incurred from the date of the accident. [*Geiger*, *supra* at 290-291.]

As the *Geiger* Court recognized, there is little to no point to a saving provision that preserves a person's "action" or "claim" despite the fact that the period of limitations on the cause of action has expired, if that saving provision preserves merely the right to file papers rather than the right to recover damages that accrued during the time the claim was being "saved." Rather, the Legislature surely would not have intended to enact a hollow saving provision for people under a disability which would "save" only a sliver, if any, of the disabled's claim.[6] To interpret the one-year-back rule as limiting the disabled's damages defeats the very purpose of the saving provision: preserving a legally incompetent person's claim—the very nature of which is the seeking of damages—while the person is under a particular disability.

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[6] As correctly noted by Justice MARKMAN in his concurrence, if a person is injured in an motor vehicle accident while an infant or legally incompetent, and his injuries resolve a year or more before his disability resolves, then the majority's interpretation of MCL 500.3145(1) will completely preclude that person from recovering *any* of the damages incurred from the accident, and, thus completely abrogate his claim.

The majority finds that my reasoning, as well as that of the *Geiger* Court of Appeals panel, is based solely on personal preference and not informed by the rules of statutory construction. But by creating a saving provision for infants and the insane, the Legislature has conveyed its conviction that there is some important reason to protect individuals in these groups—some characteristic that sets these individuals apart and merits giving them unique treatment. By its very existence, the saving provision recognizes that infants and the mentally infirm should be treated differently than others to whom the statute applies. The presence of the saving provision on the statute books is unrivaled evidence of legislative intent to "save" the claims of the disabled, and it is our obligation to discover what "save" means.

Should one undertake this endeavor, one would find that a saving provision that preserves the claims of the legally disabled until their disability is removed cannot be dismissed as a mere legislative whim. Rather, the saving provision is a necessary counterpart to the rule created by this Court that prohibits minors and the incompetent from bringing lawsuits on their own. MCR 2.201(E)(1)(b).[7] Under that rule, minors and incompetents who wish to pursue a cause of action have no choice but to be represented by a conservator or next friend.[8] Through the saving provision of MCL 600.5851(1), the Legislature has recognized not only that this group is prohibited from suing on its own, but

[7] If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his behalf, and the next friend is responsible for the costs of the action.

[8] The appointment of these persons does not remove the disability. *Rittenhouse v Erhart*, 126 Mich App 674; 337 NW2d 626 (1983), aff'd in part and rev'd in part on other grounds 424 Mich 166 (1985).

that not all infants and incompetents have the benefit of someone who takes the initiative to sue for them, and not all infants and incompetents can petition the court to appoint someone in that capacity. Presumably, the Legislature recognized that "whether such an action is in fact brought depends on good fortune since the [infant or] incompetent is helpless." *Kiley v Jennings, Strouss & Salmon*, 187 Ariz 136, 140; 927 P2d 796 (Ariz App, 1996). Thus, the saving provision, a necessary answer to our court rule, prevents the abrogation of the claims of infants and the incompetent.

By failing to consider the one-year-back rule of MCL 500.3145(1) in the context of the saving provision of MCL 600.5851(1) and what that provision is actually designed to do, the majority only partially employs the tenet that the primary goal of statutory interpretation is to effect legislative intent. As such, it does a great disservice to the critical, indeed paramount, component of assessing a statute's overriding purpose. Instead of endeavoring to effectuate the clear purpose of the saving provision, or even questioning whether the interpretation of the one-year-back rule in this context should be informed by the saving provision, the majority misunderstands the saving provision and views the one-year-back rule in a vacuum. As a result, it reaches a cursory finding that MCL 500.3145(1) is "clear" because the one-year-back rule is not subject to "tolling."

The reader should not be misled into believing that only one interpretation is possible in this case or that everything is "clear." An honest reading of these statutes reveals that a conflict exists and that there are several ways in which the conflict could be resolved. Not only does the majority refuse to so much as recognize a conflict, it chooses a resolution to this case that it

claims, without support, was part of the "compromises that were hammered out" during the enactment of no-fault legislation. See *ante* at 65. But when there are multiple competing interests, as there are here, our job is to examine them in full and choose the result that would best accomplish the Legislature's intent.

It should be evident that the majority's choice elevates one concern—protecting insurers from having to pay claims in a manner the majority deems untimely—over a multitude of other important considerations. Many of the considerations the majority fails to weigh are set forth in Justice MARKMAN's concurrence. In addition, the majority's choice ignores the interests of the insured, whose right to prompt and full recovery was also a paramount consideration in enacting the no-fault scheme and was also part of the "hammered out" compromises. See *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) ("The Michigan No-Fault Insurance Act . . . was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses."). Further, it entirely ignores the weighty public policy behind the RJA's saving provision, which was crafted to protect the interests of those who cannot act on their own. See *Paavola v St Joseph Hosp Corp*, 119 Mich App 10, 14-15; 325 NW2d 609 (1982). As has been repeatedly recognized by this very majority, when a conflict exists, we must choose the interpretation that best effectuates legislative intent. But rather than acknowledge the existence of numerous considerations that could inform this endeavor, the majority asserts that my attempt to do so is an "indefensible position"

and my conclusion a function not of statutory interpretation, but of my wanting it to be so. *Ante* at 64-67. As any astute reader can observe, the majority's characterization lacks credibility.

In any event, the majority's analysis falters when one considers the true character of MCL 600.5851(1). By portraying the statute as having a "tolling" function, the majority is misguided into an incorrect conclusion. This is because although it may seem facially rational to conclude that a "tolling" provision cannot "toll" something other than a period of limitations, the one-year-back rule, MCL 600.5851(1), is not a "tolling" provision. It is a statute through which the Legislature granted a "year of grace" to infants and the legally incompetent in recognition of their inability to legally act until their disabilities are removed. *Honig v Liddy*, 199 Mich App 1, 3-4; 500 NW2d 745 (1993).[9] This year of grace acts to "save" a person's claim, not "toll" the period of limitations that applies to the claim. In other words, the saving provision does more than defeat a period of limitations. It preserves the protected person's *claim* and prevents the same from total abrogation.

By refusing to acknowledge that there is a conflict between MCL 500.3145(1) and MCL 600.5851, the majority finds this an open-and-shut case; it holds that because MCL 500.3145(1) does not say otherwise, the one-year-back rule applies to those who might otherwise be protected by MCL 600.5851. This, it asserts, is

[9] Notably, the majority refuses to acknowledge its mischaracterization of the saving provision, insisting on calling it a "tolling" provision. This obstinacy derails the majority's analysis and renders it inaccurate. Perhaps the majority favors this course because recognizing the differences between the design and effect of tolling and saving provisions would require it to actually engage in a straightforward discussion regarding the operation of the saving provision on the one-year-back rule.

"plain and unambiguous."[10] The majority's conclusion must be questioned for several reasons. First, MCL 500.3145(1) contains no explicit statement that the one-year-back rule applies in the same manner to persons whose claims are saved under MCL 600.5851(1) as it does to those whose claims are not saved. Nor does the saving provision contain any explicit statement that it saves merely the right to file papers alleging damages, but not the enveloped right to collect those damages. Likewise, there is no indication that, in this context, the right to bring a "claim" does not include the right to sue for all damages incurred. Thus, when read in conjunction with MCL 600.5851, as we must, a genuine question arises regarding whether the Legislature viewed the right to recover damages as encompassed within the broader right to bring suit when it crafted the saving provision so that the saving provision would operate to preserve a claim in its entirety. And because reasonable minds can differ with respect to harmonizing these two provisions, their interpretation is open to legitimate debate. Labeling this as "personal preference" is nothing more than a convenient way to dismiss sound legal analysis.

Oddly, the majority chastises me for examining both statutory provisions, apparently preferring to ignore one of them. See *ante* at 64. It claims that there is no recognized method of statutory construction that per-

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[10] As this Court has astutely observed, "What is 'plain and unambiguous' often depends on one's frame of reference." *Shiffer v Bd of Ed of Gibraltar*, 393 Mich 190, 194; 224 NW2d 255 (1974). The majority's "frame of reference" is its failure to consider the true character of the saving provision and refusal to even attempt to give meaning to the conflicting statute. As such, it concludes that the one-year-back rule plainly and unambiguously disallows minors and incompetents from obtaining a full recovery. My frame of reference encompasses both statutes and their import to one another. Under that frame of reference, a conflict is apparent.

mits considering the effect of these two statutes on one another, both of which we have been asked to interpret, and both of which, to be given any meaning at all, are inextricably intertwined. The saving provision cannot be read alone because, by its very nature, it operates on or in conjunction with other governing statutes. With respect to its denial of our obligation to read the statutes together, the majority's statements are not only befuddling and counterintuitive, but just plain wrong. See *Bailey v Oakwood Hosp & Med Ctr*, 472 Mich 685, 693; 698 NW2d 374 (2005) ("When ascertaining intent, we read differing statutory provisions to produce an harmonious whole."), citing MCL 8.3a; *Farrington v Total Petroleum, Inc*, 442 Mich 201, 208-209, 212; 501 NW2d 76 (1993). See also *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002) (listing as one of "the most basic principles of statutory construction" the obligation to attempt to resolve potential statutory conflicts by reading provisions harmoniously); *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 98, 99 n 2; 523 NW2d 310 (1994) ("When different statutes address the same subject, courts must endeavor to read them harmoniously and give them reasonable effect. *House Speaker v State Administrative Bd*, 441 Mich 547, 568; 495 NW2d 539 (1993); *Huron Twp v City Disposal Systems, Inc*, 201 Mich App 210, 212; 505 NW2d 897 (1993).") ("[W]e are required to treat the mandates of § 341 as paramount to sentences in other statutes that appear to be facially inconsistent when taken out of context.") (" 'Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail' "), quoting 2B Singer, Sutherland Statutory Construction (5th ed), § 51.05, p 174.

Considering the two statutes together, then, *as is our job*, we must determine whether the "action" and the "claim" that is saved by MCL 600.5851(1) encompass the right to collect damages. The word "claim" has been discussed by this Court many times over the past century. For instance, in *Allen v Bd of State Auditors*, 122 Mich 324; 81 NW 113 (1899), this Court noted the following definition of the word "claim": " '[A] demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services.' " *Id.* at 328, citing *Cent Dict*. In *In re Chamberlain's Estate*, 298 Mich 278; 299 NW 82 (1941), this Court explained that " '[t]he word "claims" is "by authorities generally construed as referring to demands of a pecuniary nature and which could have been enforced against the deceased in his lifetime." ' " *Id.* at 285, quoting *In re Quinney's Estate*, 287 Mich 329, 333; 283 NW 599 (1939), quoting *Knutsen v Krook*, 111 Minn 352, 357; 127 NW 11 (1910). More recently, in *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002), this Court set forth the legal definitions of the term:

> "1. The aggregate of operative facts giving rise to a right enforceable by a court . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . 3. A demand for money or property to which one asserts a right . . . . [Black's Law Dictionary (7th ed).]"

In short, then, a claim means a "demand[] of a pecuniary nature," a "right to payment," and a "demand for money." These definitions suggest that when a minor's or incompetent's "claim" is saved by MCL 600.5851(1), it is that person's demand for monetary relief and right to obtain it that is preserved.

It is worth noting that it would be ironic indeed for the Legislature to have *set a trap* for these particular groups of people and to have disguised the trap as a protective measure. But that is exactly what the majority's holding implies. For when one would choose to rely on the clear promise of the saving provision that one's claim is preserved until one year after the disability is removed, one would come to find that, in certain circumstances, the saving provision has actually *extinguished* the claim, not *saved* it. See n 6 of this opinion.

Given the above, I would conclude that when the Legislature enacted the saving provision, it indeed intended to save the whole of the disabled person's claim, not merely a severely devitalized right to bring the claim. Without the saving provision, those who are judicially precluded and deemed incapable of protecting their own legal rights would be denied access to justice, so I find this conclusion unchallenging. Insureds who are of age and possess full mental faculties are, understandably, deemed capable of filing suit within a time frame that would preserve their right to recover all damages owed to them. MCL 500.3145(1). If an insured nonetheless waits to file suit, the Legislature has seen fit to limit the insured's ability to recover damages to the year preceding the lawsuit.[11] *Id.* This is the price that is exacted when an insured, presumably capable of filing suit in a manner that would preserve the entirety of his damages, does not do so.

But when a saving provision prevents the abrogation of a legally disadvantaged person's claim, and when there is a statutorily recognized reason why an insured

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[11] Of course, I do not believe that it is equitable to preclude recovery when the delay in filing suit is caused by an insurer's failure to notify its insured that a claim has been denied. See *Devillers*, *supra* at 594-620 (CAVANAGH, J., dissenting).

does not file suit, e.g., infancy or insanity, why that person should be precluded a full recovery in the same manner in which a person who is both culpable for not bringing suit in a timely manner and who is not under a disability is inexplicable and unsupported by the statutory language. Faced with a choice, the majority chooses a prohibitively narrow construction that results in sanctioning persons whom *this Court has deemed unable to file suit*. The Legislature recognized the need for an additional layer of protection for infants and the incompetent and provided one by saving the claims of these persons until they can act unencumbered by their disabilities. Nonetheless, the majority returns infants and the incompetent to the same footing as those not so afflicted, but only under the no-fault act, because the majority believes that only one legitimate construction of these statutes is possible. As difficult as it is for the majority to accept, I would recognize another legitimate construction and choose the one that both avoids abrogating the claims of minors and the legally incompetent and effectuates the Legislature's intent. "[A] contrary holding would constitute unjustifiable tampering with the significant public policy clearly reflected in MCL 600.5851(1)—the protection and preservation of the substantive rights of [minors and] mentally incompetent persons." *Paavola*, *supra at* 14-15 (discussing why the appointment of a guardian does not negate the saving provision).

In addition to the reasons already discussed, I would also give weight to the fact that the latter construction has gone unchanged by the Legislature since *Geiger*, *supra*. Had we drastically misconstrued the Legislature's meaning and created turmoil in the no-fault system by allowing infants and the incompetent their day in court, certainly the Legislature would have seen fit to correct that grave error.

The majority's disregard for the rights of the disabled —indeed, the abrogation of their right to the full effect of our judicial system—made manifest by the cursory overruling of 20 years of law, is unjust and immensely sad. And the result discords with the purpose of the legislative protection. Cogent, and what should be obvious, reasons for extending the protections at issue to persons who require them have been recognized by the Legislature and honored for nearly a quarter of a century. So sensible was the reconciliation of the saving provision with the no-fault statute in *Geiger* that defendant itself never challenged it until such a challenge was suggested to defendant at oral argument. But the majority proclaims omnipotent percipience of the legislative intent behind MCL 500.3145(1), while completely disregarding any inquiry into the purpose or function of the saving provision. And for those attentive to this Court's decisions, it should come as no surprise that the majority again chooses to distract the reader from its defective legal analysis by incorrect and unsupportable accusations that those who disagree are merely promoting their own personal agendas.

And so it is that the legislative door to the courthouse —legislatively made wider for those judicially precluded from bringing suit—has today been judicially slammed shut. For these reasons, I respectfully dissent.[12]

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[12] Further, as Justice KELLY concludes, the majority's result in this case is absurd. One only need peruse Justice MARKMAN's catalog of the absurdities that flow from the majority's analysis to be convinced on this point. Thus, I concur in her conclusion that the majority's analysis fosters intolerably absurd results.

Moreover, I fully concur with Justice KELLY's thorough analysis pertaining to the validity of the "absurd results" doctrine as a tool of statutory construction. While I have always held this view, I take this opportunity to participate in the overdue disavowal of the erroneous

WEAVER, J. (*dissenting*). Daniel Cameron was ten years old when an automobile struck his bicycle, causing a closed head injury. When Daniel was 16 years old, his parents filed suit on his behalf seeking personal protection insurance (PIP) benefits for attendant care given to Daniel in the first three years after his injury. Defendant moved for summary disposition, arguing that plaintiffs' claim was barred by the one-year-back rule in MCL 500.3145(1) of the no-fault automobile insurance act. The trial court denied defendant's motion, granted summary disposition in favor of plaintiffs, and awarded plaintiffs $182,500, an amount stipulated by the parties.

The Court of Appeals reversed. The majority affirms, holding that under the "one-year-back rule" in MCL 500.3145(1) of the no-fault automobile insurance act, plaintiffs may not recover damages incurred more than one year before they filed suit. The majority further holds that the saving provision in MCL 600.5851(1), which preserves the claims of minors and the insane until one year after the disability is removed, does not apply to the one-year-back rule.

I respectfully dissent from the majority's holding and analysis.[1] I would hold that the one-year-back rule, MCL 500.3145(1), in the no-fault automobile insurance act does not apply in this case because the tolling provisions found in § 3145(1) are not applicable. Because the one-year-back rule does not apply, plaintiffs may recover benefits that accrued more than one year before they filed suit.

repudiation of the "absurd results" doctrine this Court accomplished in *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).

[1] I also agree with Justices KELLY and MARKMAN that this Court should reinstate the "absurd results" rule. The "absurd results" rule, the commonsense rule that statutes should be construed so as to prevent absurd results, was rejected by this Court in *People v McIntire,* 461 Mich 147; 599 NW2d 102 (1999).

The majority's analysis and holding are premised on a fundamental misinterpretation of the no-fault act. MCL 500.3145(1) reads in full:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

The sentence emphasized above, "However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced," is the origin of the "one-year-back rule" that is at the heart of the case before us.

The majority treats this sentence, the "one-year-back rule," as a separate limitation on the period for which benefits may be recovered.[2] But this is an incorrect reading of the statute.

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[2] The majority states that the no-fault act contains two limitations on the time for commencing an action and one limitation on the period for which benefits may be recovered:

> " '(1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of

There is only *one* period of limitations in § 3145(1): that the action must be brought within one year of the accident. This is stated in the first sentence: "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury . . . ."

This statute of limitations in § 3145(1) contains its own tolling provision, also provided in the first sentence of the statute: "unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury." This tolling provision takes effect when one of two things occurs: (1) the insurer is given written notice of the injury within one year of the accident or (2) the insurer has previously paid personal protection insurance benefits for the injury.

The remainder of § 3145(1), the second, third, fourth, and fifth sentences, detail how this tolling provision is to be applied. The so-called "one-year-back rule" is not a separate limitation on the period for which benefits may be recovered. Rather, it is an integral part of the

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accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.

" '(2) If notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.

" '(3) Recovery is limited to losses incurred during the one year preceding commencement of the action.' " [*Ante* at 61 (emphasis omitted).]

In making this summary, the majority is quoting from *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005), which in turn was quoting from *Welton v Carriers Ins Co*, 421 Mich 571, 576; 365 NW2d 170 (1985), overruled on other grounds in *Devillers*.

tolling rule contained within § 3145(1). This was the Court of Appeals interpretation of the statute in *Allstate Ins Co v Frankenmuth Mut Ins Co,* 111 Mich App 617; 314 NW2d 711 (1981).

The third sentence of the statute, the one at issue in this case, must be read in context with the other three sentences detailing how the tolling provision is to be applied. When interpreting a statute, the Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). The second, third, fourth, and fifth sentences of the statute read as follows:

> If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

The use of the word "however" at the beginning of the sentence is significant. "However," when used as a conjunction, means "nevertheless; yet; in spite of that; all the same." *Webster's New World Dictionary, Second College Edition* (1982). This conjunction, "however," shows an exception to the sentence preceding it, which sets forth when an action may be brought under the

tolling provision contained within § 3145(1).[3] Therefore the exception contained within the "one-year-back rule" takes effect only when the tolling provision is being used. This Court should overrule the interpretation of the statute given in *Welton, supra,* and followed in *Devillers, supra,* and give meaning to the actual text of the statute.

In determining whether to overrule a prior case, pursuant to the doctrine of stare decisis, this Court should first consider whether the earlier case was wrongly decided. If it was wrongly decided, the Court should then examine reliance interests: whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute.[4]

Correcting this point of statutory interpretation in *Welton* and *Devillers* would effectively leave the law in its current state. The Court of Appeals has held that the saving provision in § 5851 applies to the no-fault act,[5] and that this saving provision tolls the "one-year-back" rule.[6] Thus, restricting the "one-year-back" rule to apply only when the tolling provision within § 3145(1) is relied on would preserve the status quo, and cause no "practical real-world dislocations."

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[3] I do not rely on the last antecedent rule, contrary to the majority's hypothesis, *ante* at 71-72.

[4] *Robinson v Detroit,* 462 Mich 439, 464-467; 613 NW2d 307 (2000).

[5] *Rawlins v Aetna Cas & Surety Co*, 92 Mich App 268; 284 NW2d 782 (1979).

[6] *Geiger v Detroit Automobile Inter-Ins Exch*, 114 Mich App 283; 318 NW2d 833 (1982).

Because the "one-year-back rule" is an integral part of the tolling provision contained within § 3145(1), it can be applied only as a part of that tolling provision. It cannot be used independently, as a separate limitation on the recovery of benefits. Therefore, the "one-year-back rule" is inapplicable here, where the plaintiffs never allege that the tolling provision of § 3145(1) applies.[7] Plaintiffs instead raised the saving provision in MCL 600.5851(1), which preserves the claims of minors and the insane until one year after the disability is removed, as a defense to the one-year statute of limitations in § 3145(1).

For this reason, I would reverse the decision of the Court of Appeals reversing the trial court's denial of defendant's motion for summary disposition and reinstate the stipulated judgment entered in favor of the plaintiffs.

KELLY, J. (*dissenting*). I concur with Justice CAVANAGH's dissent. I write this opinion to point out that the majority's interpretation creates an absurd result, one that the Court should not permit. It is absurd to conclude that the Legislature intended to jettison no-fault claims of children and mentally impaired persons.

I agree also with Justices MARKMAN, WEAVER, and CAVANAGH that the "absurd results" rule is an important part of Michigan jurisprudence and should be reinstated. Four justices believe that the absurd results rule is valid and can be used in assessing a case. The accuracy of this statement is unaffected by the fact that

[7] Defendant moved for summary disposition, arguing that plaintiff's claim was barred by the one-year-back provision of MCL 500.3145(1), consistent with this Court's interpretation of the statute in *Welton, supra*. Although *defendant* asserted that notice was given or payment had previously been made, *plaintiffs* never raised it as a defense to the one-year limitations period in § 3145(1).

only two of them have found an absurd result to have been reached by the majority in this case. *People v McIntire*[1] should be overturned.

ABSURD RESULTS

The principle that statutes should be construed to avoid absurd results that are manifestly inconsistent with legislative intent is not a new or radical innovation. On the contrary, it was well-established in the jurisprudence of the United States Supreme Court before the twentieth century. In *Church of the Holy Trinity v United States*,[2] the Court unanimously stated:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Likewise, more recent case law of the United States Supreme Court recognizes that situations exist when it is appropriate to depart from a strictly literal interpretation of statutory language to further legislative intent. For example, in *Lewis v United States,*[3] the Court considered an issue of statutory interpretation involving the federal Assimilative Crimes Act. As the Court

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[1] 461 Mich 147; 599 NW2d 102 (1999).

[2] 143 US 457, 459; 12 S Ct 511; 36 L Ed 226 (1892).

[3] 523 US 155; 118 S Ct 1135; 140 L Ed 2d 271 (1998).

explained, the basic purpose of this act is to "borrow[]" state law to fill in gaps in federal criminal law applicable to conduct on federal enclaves. *Id.* at 160.

By its literal language, the federal act applies to a defendant's acts or omissions that are not made punishable by "any enactment" of Congress. *Id.* at 159. However, the Court declined to apply the act literally, stating that doing so would not be a "sensible interpretation" because a literal reading of the words "any enactment" would "dramatically separate the statute from its intended purpose." *Id.* at 160.[4]

THE ABSURD RESULTS EXCEPTION TO THE PLAIN LANGUAGE DOCTRINE IN MICHIGAN

The absurd results exception to the plain language doctrine has a long history in Michigan jurisprudence. From 1844 until 1999, this state relied on and regularly used the rule to interpret statutory language that led to absurd results.

In *Alvord v Lent*,[5] Justices GRAVES, CAMPBELL, and COOLEY held that "[i]f [statutory] construction would produce great inconvenience, if it would lead to absurd or mischievous results, if it would tend to embarrass the course of justice and serve to defeat necessary legal remedies, it ought not to be adopted unless required by some positive rule of law, and we are not aware of any such rule." *Id.* at 372. This holding by some of the most highly regarded justices of this Court continued the application of the absurd results rule that became part

[4] The Court recognized that an absurd result would be caused by a literal interpretation of the act. It indicated that if the act were read literally, a state law against murder might not be able to be assimilated under the act. This could occur because of the existence of a federal law against assault. *Id.* at 161.

[5] 23 Mich 369 (1871).

of Michigan law as early as 1844. See *Green v Graves*, 1 Doug 351, 354 (Mich, 1844).

The holding in *Alvord* continued a trend that lasted until 1999. Fourteen years after its decision in *Alvord*, this Court again heard a case raising an absurd results issue. In *Cummings v Corey*,[6] the Court followed the holding in *Alvord,* thus cementing the use of the rule in Michigan. Again, in 1904, the Court cited and followed *Alvord*. See *In re Lambrecht*, 137 Mich 450; 100 NW 606 (1904).

The trend did not end there, and, in fact, the Court has affirmed the application of the absurd results exception repeatedly during the last century. Cases in the 1910s,[7] 1920s,[8] 1930s,[9] 1940s,[10] 1950s,[11] 1960s,[12] 1970s,[13] 1980s,[14] and 1990s[15] show its continual use. It was only in 1999 that this Court, in *People v McIntire,* overruled this longstanding part of Michigan law.

In *McIntire*, the Court gave no legal justification for not following Michigan precedent. Instead, it quoted Justice Antonin Scalia stating, " '[We] agree with Jus-

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[6] 58 Mich 494; 25 NW 481 (1885).

[7] See *People v Schoenberg,* 161 Mich 88; 125 NW 779 (1910).

[8] See *Attorney General v Detroit U R Co,* 210 Mich 227; 177 NW 726 (1920).

[9] See *Garwols v Bankers Trust Co*, 251 Mich 420, 427-428; 232 NW 239 (1930), quoting *Holy Trinity, supra* at 459.

[10] See *Webster v Rotary Electric Steel Co*, 321 Mich 526; 33 NW2d 69 (1948).

[11] See *State Hwy Comm'r v Detroit City Controller,* 331 Mich 337; 49 NW2d 318 (1951).

[12] See *People v Bailey*, 10 Mich App 636; 160 NW2d 380 (1968).

[13] See *Franges v Gen Motors Corp*, 404 Mich 590; 274 NW2d 392 (1979).

[14] See *Michigan Humane Society v Natural Resources Comm*, 158 Mich App 393; 404 NW2d 757 (1987).

[15] See *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539; 606 NW2d 45 (1999).

tice Scalia's description of such attempts to divine unexpressed and nontextual legislative intent as "nothing but an invitation to judicial lawmaking." ' " *McIntire, supra* at 156 n 2, quoting 232 Mich App 71, 122 n 2 (1998) (YOUNG, J., concurring in part and dissenting in part), quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

Justice Scalia's opinion on the absurd results rule, while perhaps interesting, is not and was not binding on Michigan. Nonetheless, the Court adopted it, and *McIntire* caused a ripple in Michigan law that was not clearly apparent at the time it was decided. However, *McIntire*'s effect is now very clear. The damage that it has done and continues to do should be stemmed, and Michigan jurisprudence should be put back on the correct track.[16]

PRESUMPTIVE UNDERSTANDING OF THE FRAMERS
OF THE MICHIGAN CONSTITUTION

A reasonable person must presume that the drafters and ratifiers of our state constitution expected Michigan courts to apply the absurd results rule of construction to Michigan statutes. This is because it was well-established by 1963 that courts should construe statutes to avoid absurd results and at times should depart from a strictly literal application of statutory language. Also, the Michigan Constitution includes no language disapproving this principle. Accordingly, the Court's earlier approval of the principle was consistent with the original intent of the drafters of the state constitution.

[16] Recently in *Costa v Community Emergency Med Services, Inc*, 475 Mich 403; 716 NW2d 236 (2006), the Court called into question the continuing relevance of *McIntire* in Michigan by using an absurd-results-type analysis in reaching its decision.

Notably, in 1976, a time much closer to the adoption of the current Michigan Constitution than the present, this Court, in a majority opinion joined by six justices, stated: "[It is a] fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question." *Salas v Clements,* 399 Mich 103, 109; 247 NW2d 889 (1976).

THE NEARLY UNIVERSAL RECOGNITION OF THE ABSURD RESULTS RULE OF CONSTRUCTION IN AMERICAN STATES

A review of the case law of our sister states reflects the wide extent to which Michigan has departed from traditional norms of statutory construction. The Arizona Supreme Court has aptly summarized the traditional approach to applying statutory language in American law. It has emphasized that a court should look first to the words of the statute and apply its language if it is unambiguous. But, the Arizona court has counseled, other clear indicators of legislative intent can require a departure from the literal meaning of statutory language that seems unambiguous on its face:

> The primary rule of statutory construction is to find and give effect to legislative intent. We look first to the statute's words. Words have their ordinary meaning unless the context of the statute requires otherwise. Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary. [*Mail Boxes Etc, USA v Industrial Comm of Arizona,* 181 Ariz 119, 121; 888 P2d 777 (1995) (citation omitted).]

In addition, prevailing case law from the highest courts of many diverse American states recognizes that courts must construe statutes to avoid absurd results or to further legislative intent. This must occur even if it requires the courts to adopt a construction that departs

from a strictly literal reading of statutory language. The states are: Alabama,[17] Alaska,[18] Arkansas,[19] California,[20] Colorado,[21] Delaware,[22] Florida,[23] Hawaii,[24] Idaho,[25] Illi-

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[17] See *Ex parte Watley,* 708 So 2d 890, 893 (Ala, 1997), quoting Singer, Sutherland Statutory Construction (5th ed), § 45.11, p 61 (stating that it is " 'fundamental' " that " 'departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question' ").

[18] See *Brooks Range Exploration Co, Inc v Gordon,* 46 P3d 942, 945-946 (Alas, 2002) ("[W]here the literal interpretation of a statute would lead to absurd results, courts can interpret the words of the statute to agree with the intention of the legislature.").

[19] See *Madden v Aldrich,* 346 Ark 405, 412-413; 58 SW3d 342 (2001) ("[S]tatutes will not be given a literal interpretation if it leads to absurd consequences that are clearly contrary to legislative intent.").

[20] See *In re JW,* 29 Cal 4th 200, 210; 126 Cal Rptr 2d 897; 57 P3d 363 (2002) ("[W]e have often said that courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended.").

[21] See *Colorado Dep't of Corrections v Nieto,* 993 P2d 493, 501 (Colo, 2000), quoting *AviComm, Inc v Colorado Pub Utilities Comm,* 955 P2d 1023, 1031 (Colo, 1998) (" '[T]he intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result.' ").

[22] See *Director of Revenue v CNA Holdings, Inc,* 818 A2d 953, 957 (Del, 2003), quoting *Newtowne Village Service Corp v Newtowne Rd Dev Co, Inc,* 772 A2d 172, 175 (Del, 2001) (indicating that ambiguity in a statute allows for judicial interpretation " 'if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature' ").

[23] See *Joshua v Gainesville,* 768 So 2d 432, 435 (Fla, 2000), quoting *Las Olas Tower Co v Fort Lauderdale,* 742 So 2d 308, 312 (Fla Dist App, 1999) (stating that a rule of statutory construction is that " 'a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity' ").

[24] See *State v Guillermo,* 91 Hawaii 307, 316; 983 P2d 819 (1999) (stating that the court may depart from a plain reading of a statute where a literal interpretation would lead to absurd or unjust results).

[25] See *Driver v SI Corp,* 139 Idaho 423, 427; 80 P3d 1024 (2003) ("The plain meaning of a statute therefore will prevail unless clearly expressed

nois,[26] Indiana,[27] Louisiana,[28] Maine,[29] Massachusetts,[30] Minnesota,[31] Missouri,[32] Montana,[33] Nebraska,[34] Ne-

legislative intent is contrary or unless plain meaning leads to absurd results.").

[26] See *In re DF,* 208 Ill 2d 223, 230; 802 NE2d 800 (2003) (declining to apply a "plain language or literal reading" of the statutory provision at issue with reference to the principle that a court "is not bound by the literal language of a statute that produces a result inconsistent with clearly expressed legislative intent, or that yields absurd or unjust consequences not contemplated by the legislature").

[27] See *State v Duggan,* 793 NE2d 1034, 1038 (Ind, 2003) (explaining that in examining a statute, "it is often necessary to avoid excessive reliance on a strict literal meaning" and that the legislature "is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result").

[28] See *Metro Riverboat Assoc, Inc v Louisiana Gaming Control Bd,* 797 So 2d 656, 662 (La, 2001) (construing statute "to avoid the potential constitutional questions raised by a literal interpretation" and "to avoid the absurd results that would result from such a reading").

[29] See *Guiggey v Great Northern Paper, Inc,* 704 A2d 375, 377 (Me, 1997) (noting that statutory interpretation is controlled by a statute's plain meaning unless the plain meaning leads to absurd results).

[30] See *Commonwealth v Wallace,* 431 Mass 705, 708; 730 NE2d 275 (2000), quoting *Lexington v Town of Bedford,* 378 Mass 562, 570; 393 NE2d 321 (1979) (" 'A literal construction of statutory language will not be adopted when such a construction will lead to an absurd and unreasonable conclusion . . . .' ").

[31] See *Mutual Service Cas Ins Co v League of Minnesota Cities Ins Trust,* 659 NW2d 755, 762 (Minn, 2003) (recognizing that the court may "disregard the plain language of a statute only where the legislative purpose was clear and the plain meaning would utterly confound that purpose").

[32] See *Lewis v Gibbons,* 80 SW3d 461, 465-466 (Mo, 2002) (stating that statutory construction "is not to be hyper-technical" and declining to apply an interpretation of statutory language that it found to be "inconsistent with the intention of the legislature, unreasonable and absurd").

[33] See *Hiett v Missoula Co Pub Schools,* 317 Mont 95, 104; 75 P3d 341 (2003), quoting *State v Price,* 310 Mont 320, 326; 50 P3d 530 (2002) (noting that the court must " 'construe each statute so as to avoid an absurd result' ").

[34] See *Premium Farms v Holt Co,* 263 Neb 415, 423-424; 640 NW2d 633 (2002) (stating that "we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the

vada,[35] New Hampshire,[36] New Jersey,[37] New Mexico,[38] New York,[39] North Carolina,[40] North Dakota,[41] Ohio,[42]

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statute" and declining to apply a plain reading of a statutory provision because it did not lead to a "sensible result").

[35] See *Pellegrini v State,* 117 Nev 860, 873-874; 34 P3d 519 (2001) (setting forth principles that "words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act" and that "we must construe statutory language to avoid absurd or unreasonable results").

[36] See *Simpson v Young*, 153 NH 471, 479; 899 A2d 216 (2006) ("We enforce the statute as written, unless it leads to an absurd result, and leave policy decisions to the legislature.")

[37] See *Hubbard v Reed,* 168 NJ 387, 392; 774 A2d 495 (2001), quoting *Turner v First Union Nat'l Bank,* 162 NJ 75, 84; 740 A2d 1081 (1999) (" '[Where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control.").

[38] See *State v Davis,* 134 NM 172, 175; 74 P3d 1064 (2003) (stating that if "adherence to the literal use of the words would lead to injustice, absurdity or contradiction," then "the statute is to be construed according to its obvious spirit or reason").

[39] See *Desiderio v Ochs,* 100 NY2d 159, 172; 761 NYS2d 576; 791 NE2d 941 (2003) ("Our well-established rules of statutory construction prevent us from looking behind the unambiguous language of a statute unless an absurd result would obtain from its application.") (citation omitted).

[40] See *Frye Regional Med Ctr, Inc v Hunt,* 350 NC 39, 45; 510 SE2d 159 (1999), quoting *Mazda Motors of America, Inc v Southwestern Motors, Inc,* 296 NC 357, 361; 250 SE2d 250 (1979), quoting *State v Barksdale,* 181 NC 621, 625; 107 SE 505 (1921) (" ' "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." ' ").

[41] See *Shiek v North Dakota Workers Compensation Bureau,* 634 NW2d 493, 499 (ND, 2001) ("[I]f adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute.").

[42] See *Hubbard v Canton City School Bd of Ed,* 97 Ohio St 3d 451, 453; 780 NE2d 543 (2002) ("Courts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning.").

Oklahoma,[43] Rhode Island,[44] South Carolina,[45] South Dakota,[46] Tennessee,[47] Texas,[48] Utah,[49] Vermont,[50]

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[43] See *Bishop v Takata Corp,* 12 P3d 459, 466 n 30 (Okla, 2000) ("The plain meaning of statutory language is conclusive except in the rare case in which literal construction will produce a result demonstrably at odds with the intention of the Legislature.").

[44] See *Park v Ford Motor Co,* 844 A2d 687, 692 (RI, 2004), quoting *Providence Journal Co v Rodgers,* 711 A2d 1131, 1134 (RI, 1998) ("We do not ' "interpret a legislative enactment literally when to do so would provide a result at odds with its legislative intent." ' ").

[45] See *Hodges v Rainey,* 341 SC 79, 91; 533 SE2d 578 (2000), quoting *Ray Bell Constr Co, Inc v Greenville Co School Dist,* 331 SC 19, 26; 501 SE2d 725 (1998) (courts will reject ordinary meaning of statutory language, "[h]owever plain," if "to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention").

[46] See *Slama v Landmann Jungman Hosp,* 654 NW2d 826, 828 (SD, 2002), quoting *In re Petition of Famous Brands, Inc,* 347 NW2d 882, 885 (SD, 1984) (" '[R]esorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable.' ").

[47] See *Heirs of Ellis v Estate of Ellis,* 71 SW3d 705, 712 (Tenn, 2002), quoting *Tennessee Title Co v First Fed S & L Ass'n,* 185 Tenn 145, 154; 203 SW2d 697 (1947) ("[W]here the 'carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed,' then the legislative intent should be applied over 'the literal import of the words.' ").

[48] See *Helena Chemical Co v Wilkins,* 47 SW3d 486, 493 (Tex, 2001) (stating that "[e]ven when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature's intent" and articulating various factors, including the circumstances of the statute's enactment and the legislative history).

[49] See *Jackson v Mateus,* 70 P3d 78, 83 (Utah, 2003), quoting *Millett v Clark Clinic Corp*, 609 P2d 934, 936 (Utah, 1980) (stating that "[a]n ordinance should be applied according to its literal wording, unless such a reading is unreasonable, confused, inoperable, or in blatant contravention of the express purpose of the statute" and that " 'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd.' ").

[50] See *Town of Killington v State,* 172 Vt 182, 189; 776 A2d 395 (2001) ("When the plain meaning of statutory language appears to undermine

Virginia,[51] Washington,[52] West Virginia,[53] Wisconsin,[54] and Wyoming.[55]

The Iowa Supreme Court has strongly suggested that it would depart from a literal application of statutory language to avoid an absurd result. It stated that it presumes that the legislature intends a reasonable and just result and accordingly "interprets statutes so as to avoid absurd results." *State v Iowa Dist Court for Black Hawk Co,* 616 NW2d 575, 578 (Iowa, 2000). Similarly,

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the purpose of the statute, we are not confined to a literal interpretation . . . ."). See also *Judicial Watch, Inc v State*, 2005 Vt 108, *16; 892 A2d 191, 199 (2005) (standing for the proposition that the absurd results doctrine "does not, however, provide a license to substitute this Court's policy judgments for those of the Legislature" and that it " 'should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said' "), quoting 2A Singer, Sutherland's Statutes and Statutory Construction (6th ed), § 46.07, p 199.

[51] See *Shelor Motor Co Inc v Miller,* 261 Va 473, 479; 544 SE2d 345 (2001) ("We must determine the intent of the General Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result.").

[52] See *Fraternal Order of Eagles v Grand Aerie of Fraternal Order of Eagles,* 148 Wash 2d 224, 239; 59 P3d 655 (2002) (stating that the court "will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences").

[53] See *Taylor-Hurley v Mingo Co Bd of Ed,* 209 W Va 780, 787; 551 SE2d 702 (2001), quoting *State ex rel Frazier v Meadows*, 193 W Va 20, 24; 454 SE2d 65 (1944) (stating a recognition of the need to depart from statutory language " 'in exceptional circumstances' " and, accordingly, that courts " 'may venture beyond the plain meaning of a statute in the rare instances in which there is a clearly expressed legislative intent to the contrary' " or " 'in which a literal application would defeat or thwart the statutory purpose' ").

[54] See *Hamilton v Hamilton,* 261 Wis 2d 458, 478; 661 NW2d 832 (2003) (noting that "[o]ne of the few exceptions" to the principle that plain and unambiguous statutory language is applied without further analysis is "that the court will seek to avoid a truly absurd or unreasonable result").

[55] See *Abeyta v State,* 42 P3d 1009, 1012 (Wy, 2002) (stating that the court will not construe a statute in a way that "produces an absurd result").

the Oregon Supreme Court has noted that "a statute should not be construed 'so as to ascribe to the legislature the intent to produce an unreasonable or absurd result.' " *State v Galligan,* 312 Or 35, 39; 816 P2d 601 (1991), quoting *State v Linthwaite,* 295 Or 162, 170; 665 P2d 863 (1983). Likewise, the Kentucky Supreme Court has stated that "[t]he words of the statute are to be given their plain meaning unless to do so would constitute an absurd result." *Executive Branch Ethics Comm v Stephens,* 92 SW3d 69, 73 (Ky, 2002).

Interestingly, it appears that the Pennsylvania courts are statutorily bound to construe statutes to avoid absurd results. Hence, they are required to depart from a literal application of a statute that would create an absurd result. See *In re Nomination Papers of Lahr,* 577 Pa 1, 7; 842 A2d 327 (2004), citing 1 Pa Cons Stat 1922(1) (noting that the state Statutory Construction Act requires the courts to " 'presume that the General Assembly did not intend a result that is absurd or unreasonable' ") (citation omitted).

The Georgia Supreme Court has also demonstrated that it recognizes an absurd results exception to applying "clear" statutory language by stating that, as long as statutory language "is clear and does not lead to an unreasonable or absurd result, 'it is the sole evidence of the ultimate legislative intent.' " *Ray v Barber,* 273 Ga 856; 548 SE2d 283 (2001), quoting *Caminetti v United States,* 242 US 470, 490; 37 S Ct 192; 61 L Ed 442 (1917).

The Connecticut Supreme Court also clearly rejects an approach to statutory construction that would always apply the literal meaning of a statute in the following thoughtful explanation of its approach to statutory construction:

> In construing the workers' compensation statutes at issue, we follow the method of statutory interpretation recently articulated in *State v. Courchesne,* 262 Conn. 537 [577-578], 816 A.2d 562 (2003). "The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . . Thus, this process requires us to consider all relevant sources of the meaning of the language at issue, without having to cross any threshold or thresholds of ambiguity. Thus, we do not follow the plain meaning rule.
>
> "In performing this task, we begin with a searching examination of the language of the statute, because that is the most important factor to be considered. In doing so, we attempt to determine its range of plausible meanings and, if possible, narrow that range to those that appear most plausible. We do not, however, end with the language. We recognize, further, that the purpose or purposes of the legislation, and the context of the language, broadly understood, are directly relevant to the meaning of the language of the statute." [*Hatt v Burlington Coat Factory,* 263 Conn 279, 290; 819 A2d 260 (2003).]

In a similar vein, the Kansas Supreme Court has stated that " '[i]n determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested.' "

State v Barnes, 275 Kan 364, 375; 64 P3d 405 (2003), quoting *State v Le,* 260 Kan 845, 849; 926 P2d 638 (1996).

The Maryland Court of Appeals has likewise made clear that it does not regard issues of statutory interpretation always to be controlled by the literal meaning of a statute:

> [W]hen there is some question as to whether a literal interpretation of the language used in the statute really would be consistent with the purpose of the legislation, we may look beyond that literal meaning. In such a circumstance, "the court, in seeking to ascertain legislative intent, may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense." [*Brown v State,* 359 Md 180, 189; 753 A2d 84 (2000), quoting *Kaczorowski v Mayor of Baltimore,* 309 MD 505, 513; 525 A2d 628 (1987).]

From this discussion, it strongly appears that 48 of the 50 American states adhere to the traditional principle that a court should construe a statute to avoid absurd results. They agree that courts should not follow a rigidly literal approach to statutory construction that is inconsistent with legislative intent.

The remaining state, aside from Michigan, is Mississippi. It appears that Mississippi might not allow a departure from a literal application of a statute even to avoid absurd results or to further legislative intent. My research has found no Mississippi precedent clearly recognizing the traditional absurd results rule of construction, and the Mississippi Supreme Court has stated that if a statute " 'is plain and unambiguous there is no room for construction . . . .' " *32 Pit Bulldogs & Other Prop v Prentiss Co,* 808 So 2d 971,

973-974 (Miss, 2002), quoting *Clark v State ex rel Mississippi State Med Ass'n,* 381 So 2d 1046, 1048 (Miss, 1980).

Hence, American jurisdictions overwhelming adhere to the historic principle that statutes should be construed to avoid absurd results even if it means departing from a literal interpretation. This fact certainly calls into question the recent jurisprudence of the Michigan Supreme Court that departs from the state's decades-long position in the mainstream of American jurisprudence on this matter.

A CRITIQUE OF JUSTICE SCALIA'S "TEXTUALISM"

A rigidly literalist approach that applies the plain language of a statute is drastically at odds with the approach that the United States Supreme Court employs in interpreting federal statutes.[56] It is also at odds with the overwhelming majority of American states. Hence, it is curious that recent case law from this Court has departed from the traditional approach of American courts to statutory construction.

It appears that the cause of the change in perspective by this Court is rooted in the personal views of Associate Justice Antonin Scalia of the United States Supreme Court. In *McIntire,* the Michigan Supreme Court adopted as its own the Court of Appeals dissent in that

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[56] This distinction between federal case law and currently prevailing Michigan case law regarding statutory construction is important for Michigan courts at all levels to bear in mind. Holdings of the Michigan Supreme Court require lower Michigan courts to generally adhere to a rigidly literal application of the language of Michigan statutes even if this produces absurd results. However, there are decisions of the United States Supreme Court indicating that it is appropriate to depart from a literal interpretation to avoid absurd results or to further congressional intent. It is axiomatic that these decisions apply when Michigan courts are called on to interpret federal statutes, as sometimes happens.

case written by a Michigan Supreme Court justice while he was a member of that Court. In doing so, the Supreme Court rejected the earlier statement of the Court in *Salas v Celements, supra* at 109, that "departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and polices of the act in question." See *McIntire*, *supra* at 156 n 2.

The stated rationale for rejecting *Salas* was the majority's agreement with Justice Scalia's disdainful treatment of the rule as an attempt " 'to divine unexpressed and nontextual legislative intent . . . .' " *Id.,* citing Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21. The Court quoted Justice Scalia as opining that such attempts were " ' "nothing but an invitation to judicial lawmaking." ' " *McIntire, supra* at 156 n 2. But the Court offered no explanation why the personal views of Justice Scalia should have prevailed over established Michigan jurisprudence with regard to construing a statute to avoid an absurd result. Neither was consideration given to the principle of stare decisis, which is respect for established precedent.[57]

A brief review of Justice Scalia's book reveals that his views are marked by internal inconsistencies. Justice Scalia's main thesis with regard to statutory construction is that "[t]he text is the law, and it is the text that must be observed." Scalia, *supra* at 22. He asserts that what the legislature meant as opposed to what it

[57] I realize that I signed the opinion in *McIntire.* I have since recognized my mistake and have rejected the views on statutory construction expressed in that opinion. See *Halloran v Bahn*, 470 Mich 572, 588; 683 NW2d 129 (2004) (KELLY, J., dissenting); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 326; 645 NW2d 34 (2002) (KELLY, J., dissenting); *People v Clemens*, 462 Mich 864, 865 (2000) (KELLY, J., dissenting).

actually stated in the language of a statute is immaterial. *Id*. at 22-23. However, Justice Scalia acknowledges that one of the "sound principles of interpretation" is the interpretative doctrine of *lapsus linguae* (slip of the tongue) or "scrivener's error," where from the very face of the statute "it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made." *Id.* at 20.

As an example, Justice Scalia refers to a statute stating "defendant" when only "criminal defendant" makes sense. *Id.* I agree that the scrivener's error canon of construction is an appropriate tool in determining legislative intent. But intellectual honesty requires an acknowledgement that it involves a departure from the actual language used by the Legislature or by Congress.

In a similar vein, Justice Scalia defends the use of traditional canons of construction that he states are often associated with textualism, including the canons *expressio unius est exclusio alterius* (expression of one thing implies exclusion of others) and *ejusdem generis* (limiting general language to items of the same sort as contemplated by specific language). *Id.* at 25-27. I certainly believe that traditional canons of construction such as these are not only appropriate, but are often extremely helpful tools in ascertaining legislative intent.

However, it must be acknowledged that they are not typically required by the statutory text itself. Rather, it may be fairly understood that the Legislature expects and intends the judiciary to employ well-established canons of construction in construing statutes. Thus, it cannot reasonably be concluded that using the canons of construction accords with a rigid adherence to applying the text of a law without regard to actual legislative intent.

These contradictions in Justice Scalia's judicial philosophy reflect an internal inconsistency seemingly endemic to rigid textualism. As a thoughtful commentator has stated:

> While textualists generally avoid legislative history, they freely consult assorted dictionaries, make use of various linguistic arguments without benefit of linguistic study, and selectively employ canons of statutory interpretation in their textual analyses. The advocates of plain meaning textualism do so without the benefit of any principled methodology justifying these extra-statutory tools. [Cavanaugh, *Order in multiplicity*: *Aristotle on text, context, and the rule of law*, 79 NC L R 577, 595-596 (2001).]

Justice Scalia also acknowledges that the principle that a judge's objective in interpreting a statute is to give effect to the intent of the Legislature "goes back at least as far as Blackstone." Scalia, *supra* at 16 n 15, citing 1 Blackstone, Commentaries on the Laws of England 59-62, 91 (1765). Hence, the principle that courts may depart from a literal interpretation of a statute to effect legislative intent was a recognized facet of the law before our nation was founded.

Accordingly, departure from this historic principle is a remarkably activist position. Indeed, as one commentator has noted, Justice Scalia's views on statutory construction expressed in *A Matter of Interpretation* are extreme. Justice Scalia compares judges who use traditional guides to statutory construction to ascertain legislative intent (other than a rigid adherence to the "plain language" of the statute) to the despotic Roman Emperor Nero.[58]

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[58] See Cavanaugh, *supra* at 593 n 50 (referring to the relevant language in Scalia's book and noting that "[i]t is important to recognize that for Justice Scalia there appears no distinction between interpretation by judges (elected or not) and the edicts of tyrants"). In the referenced

In essence, Justice Scalia and his adherents place their idiosyncratic views on statutory construction above adherence to traditional norms of American jurisprudence. Of course, many aspects of the law must develop over time. Accordingly, it is appropriate occasionally, for example, for courts to alter common-law principles in light of new social realities. However, this is worlds apart from abolishing a bedrock principle of statutory construction such as the rule that a statute should be construed to avoid absurd results inconsistent with legislative intent.

It is also worthy to note, as does Justice MARKMAN, that Justice Scalia himself has at certain times embraced the absurd results rule. See *K mart Corp v Cartier, Inc,* 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part). This fact further strengthens my position that this Court should not continue to follow *McIntire,* which rejected the rule.

APPLICATION OF THE ABSURD RESULTS RULE TO THIS CASE

I now return to the case on appeal. The minority saving provision is found in MCL 600.5851(1) of the Revised Judicature Act (RJA). It provides that a person is entitled to defer bringing an action if the person was

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portion of Justice Scalia's work, he refers to judicial construction of statutes informed by concern for actual legislative intent as "one step worse than the trick the Emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read." Scalia, *supra* at 17. Of course, this extreme position does not meaningfully acknowledge that judicial construction of a statute is typically concerned with the details of its application. It differs greatly from imposing an edict in an area in which a citizen would have no reasonable basis for expecting a court decision. Also, constitutional protections can prevent statutes from being interpreted or applied in a way that imposes unforeseen harms on parties.

under 18 years of age or insane at the time the claim accrued. The person, or someone making a claim for the person, has one year after the disability is removed to bring the action, even if the statutory period of limitations has run. The obvious intent of this section of the RJA is to provide minors and the insane with time to bring a cause of action once they are legally capable of bringing it.

MCL 500.3145(1) is the no-fault act's statute of limitations and tolling provision.[59] As Justice WEAVER explains, the one-year-back rule is part of the no-fault act's tolling provision and is not applicable in this case. But the majority insists that we apply it, thereby creating a situation in which injured children and the insane may likely be robbed of the benefit of their causes of action. The ruling assumes that the Legislature intended to grant minors and insane persons a hollow right to bring a no-fault action. It is patently preposterous that any sane legislator intended the law to be construed as it has been construed by the majority in this case. The result reached is absurd.

As this Court has stated on numerous occasions, a result is absurd where it is clearly inconsistent with the

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[59] Section 3145(1) of the no-fault act provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* [Emphasis added.]

purposes and policies of the act in question. *Salas, supra* at 109. See *Attorney General v Detroit U R Co,* 210 Mich 227, 254; 177 NW 726 (1920) (citation omitted) (" 'Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, . . . a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.' "). I have no serious question but that the result reached by the majority in this case is inconsistent with the intent of the minority/insanity saving provision. It is a manifest contradiction of the apparent purpose of the saving clause, which is to help prevent children and the insane from losing their rightful legal claims.[60]

The intent behind the provision is to provide minors and the insane time to bring an action for injuries they suffered while they were unable to bring it for themselves. Nothing in the statute signals that the Legislature intended to provide such people something less than a complete cause of action. It is inconceivable that the Legislature had a good reason to create a vehicle whereby disadvantaged people could sue later but would have little or no monetary recovery.

For example, assume a nine-year-old boy was injured in an automobile accident and needed seven years to recover. If he brought suit the day he turned 18 and prevailed, he would recover nothing, because he recovered from the accident two years before. Had the Legislature actually intended to treat this person in this

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[60] I do not advance here a personal policy judgment, as Justice MARKMAN insists. The saving clause was a policy judgment of the Legislature. I do not, as he asserts, define an "absurd result" as one that is "imperfect or flawed" or "less 'consistent' and less 'effective' than it could have been." *Ante* at 85. My definition of "absurd result" is one given by this Court.

way, it would have made it clear. No reasonable legislator would expect the Court to assume such a perverse intent.

Justice MARKMAN suggests that there is no absurd result here because there are "reasonable" reasons why a legislator might have wanted the outcome provided by the majority. The reader can judge for him- or herself whether a legislator would have embraced any of the imagined reasons Justice MARKMAN and Chief Justice TAYLOR offer.[61]

CONCLUSION

The result that the majority reaches in this case is absurd. It is inconceivable that the Legislature intended to create a hollow cause of action for some of our most helpless and powerless citizens.

I believe that the Court should reject *McIntire*'s treatment of the absurd results rule. We should reinstate the rule in Michigan and apply it in this case. The idea that the rule is outside of this Court's constitutional authority is indefensible. Throughout all our various constitutions, the people of this state have given this Court its power knowing that, included in it, is the ability to construe statutes to avoid absurd results.

The spirit of the law should control. The absurd results rule should be applied to this case. Since it has not been applied, the result is unjust, absurd, and manifestly contrary to public policy.

CAVANAGH, J., concurred with KELLY, J.

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[61] What legislator would find it reasonable to reduce the cost of insurance by leaving children and the insane with little or no recovery for their injuries? It is quite unthinkable that a legislator would intentionally vote for a bill that did that.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY

Docket No. 128878. Argued May 2, 2006 (Calendar No. 3). Decided July 28, 2006. Amended 476 Mich 1201.

The 46th Circuit Trial Court (the Trial Court), which services Crawford, Kalkaska, and Otsego counties, brought an action in the 46th Circuit Trial Court, Circuit Court Division, against Crawford County, Kalkaska County and the Crawford County Board of Commissioners, seeking to compel the counties to appropriate funding for enhanced pension and retiree health care plans the Trial Court deemed necessary to recruit and retain adequate staff to enable it to fulfill its judicial functions. Crawford County and Kalkaska County filed a third-party claim against Otsego County. Crawford County and Kalkaska County, but not Otsego County, filed defenses and a counter-complaint seeking a declaratory judgment that the Trial Court exceeded its authority in implementing the disputed plans.

The case was heard by a visiting circuit court judge, Dennis C. Kolenda, J., assigned by the State Court Administrator. The court ruled that the requested appropriation for the enhanced benefits plan was "reasonable and necessary" to the court's ability to perform its essential functions and that the counties had entered into a contractual obligation to implement these plans. The court also found that the counties had filed frivolous pleadings and sanctioned them and their counsel, determined that Otsego County should not participate in the costs of the Trial Court's litigation, and limited the Trial Court's counsel's hourly rate for the purpose of awarding attorney fees. The counties and their counsel appealed. The Court of Appeals, COOPER and NEFF, JJ. (ZAHRA, P.J., concurring in part and dissenting in part), consolidated the appeals and affirmed the judgment of the circuit judge. 266 Mich App 150 (2005). The Supreme Court granted the counties' application for leave to appeal, limited to the questions whether the appropriations sought for the enhanced benefits package were "reasonable and necessary" to carry out the trial court's constitutional and statutory responsibilities, whether the counties were contractually obligated to fund the enhanced benefits plan at the level sought by the trial court, and whether

evidence supported the conclusion that the level of funding offered by the counties was insufficient to allow the trial court to carry out essential court responsibilities. 474 Mich 986 (2005).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR and Justice YOUNG, and a concurring opinion by Justice CORRIGAN, the Supreme Court *held*:

1. The judiciary's "inherent power" to compel funding is an extraordinary power and is derived from the separation of governmental powers set forth in the Michigan Constitution. In litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is "reasonable and necessary" to allow that court to function serviceably in carrying out its constitutional responsibilities. A court deciding an inherent powers claim must set forth both findings of fact specifically identifying those judicial functions that will be in jeopardy if a funding request is denied and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary.

2. An appropriation is "necessary" when it affects the court's ability to function "serviceably" in carrying out its constitutional responsibilities. The Trial Court here failed to demonstrate by clear and convincing evidence that the enhanced benefits plan was "necessary."

3. A claim that court employees suffer from a loss of morale is not sufficient to support an inherent powers claim, absent a showing that the claimed morale problems have caused court employees to be unable to carry out their constitutional responsibilities. The Trial Court failed to demonstrate that the claimed morale problems among its employees rendered the court unable to carry out its constitutional responsibilities.

4. The Constitution imposes a duty on a county to appropriate funds "reasonable and necessary" to enable a court to function serviceably in carrying out its constitutional responsibilities. Because a county has a preexisting constitutional duty to fund the court, a county cannot be compelled under contract law to appropriate "reasonable and necessary" funds to enable the court to function serviceably in carrying out its constitutional responsibilities. Moreover, the purported contract here fails with respect to Crawford County because there was no meeting of the minds. Since all three funding units had to agree to implement the enhanced benefits plan, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

Justice CORRIGAN, concurring, agreed with the result and reasoning of Justice MARKMAN's opinion, except for the portion that adopts the reasoning set forth in *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114, 124 (1979). It is not necessary in this case to decide whether the judiciary's inherent authority to compel funding should be limited to "minimum budgetary appropriations[s]" and to functions that are carried out in a "barely adequate manner." Existing authorities of the Supreme Court fully support the conclusion in Justice MARKMAN's opinion that the enhanced retirement benefits at issue in this case are not reasonable and necessary to the serviceability of the Trial Court.

Reversed and remanded to the circuit judge for entry of judgment in favor of the defendant counties.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, would hold that Judge Kolenda did not clearly err in finding that the disputed plans were reasonable and necessary for the Trial Court's ability to perform its mandated responsibilities. The judgment of the Court of Appeals should be affirmed.

1. CONSTITUTIONAL LAW — COURTS — INHERENT POWERS.

The judiciary's "inherent power" to compel funding is an extraordinary power and is derived from the division of governmental powers set forth in the Michigan Constitution; in litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is "reasonable and necessary" to allow that court to function serviceably in carrying out its constitutional responsibilities; a court deciding an inherent powers claim must set forth both findings of fact specifically identifying those judicial functions that will be in jeopardy if the appropriation requested is denied and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary.

2. CONSTITUTIONAL LAW — COURTS — FUNDING — NECESSARY FUNDING.

An appropriation is "necessary" when it affects the court's ability to function "serviceably" in carrying out its constitutional responsibilities.

3. COURTS — CIRCUIT COURTS — COUNTIES — FUNDING.

The Constitution imposes a duty on a county to appropriate funds "reasonable and necessary" to enable a court to function serviceably in carrying out its constitutional responsibilities; because a county has a preexisting constitutional duty to fund the court, the county cannot be compelled under contract law to appropriate

"reasonable and necessary" funds to enable the court to function serviceably in carrying out its constitutional responsibilities.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Thomas G. Kienbaum* and *Noel D. Massie*) (*Patricia J. Boyle,* of counsel), for the plaintiff.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Christopher J. Johnson* and *Marcelyn A. Stepanski*), for Otsego County.

Allan Falk, P.C. (by *Allan Falk*) and *Cohl, Stoker, Toskey & McGlinchey, P.C.* (by *Bonnie G. Toskey*), for Crawford County and Kalkaska County.

Amici Curiae:

Foster, Swift, Collins & Smith, P.C. (by *Webb A. Smith*), for Michigan Association of Counties and Michigan Townships Association.

MARKMAN, J. We granted leave to appeal to consider this funding dispute between the 46th Circuit Trial Court (hereafter the Trial Court) and two of its three county funding units. This case involves a conflict between the legislative branch's exercise of the "legislative power" to appropriate and to tax, and the judicial branch's inherent power to compel sufficient appropriations to allow the judiciary to carry out its essential judicial functions. Specifically, the Trial Court seeks to compel the defendant counties to appropriate funding for the enhanced pension and retiree health care plans it deems necessary to recruit and retain adequate staff to allow it to carry out its essential judicial functions. The circuit judge found in favor of the Trial Court, holding that the benefits were "reasonable and necessary" to the court's ability to perform its constitutional responsibilities and that the counties created for them-

selves a contractual obligation to appropriate funds for the enhanced pension and retiree health care plans. The Court of Appeals affirmed. Because we conclude that such benefits were not "reasonable and necessary" to the "serviceability" of the court, and because we conclude that the defendant counties were not contractually obligated to appropriate funds for the enhanced benefits plan sought by the Trial Court, we reverse the judgment of the Court of Appeals and remand this case to the circuit judge for entry of a judgment in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

The Trial Court's predecessor, the 46th Circuit Court, was the circuit court serving Otsego, Crawford, and Kalkaska counties. Pursuant to Administrative Order No. 1996-9, 451 Mich civ, the 46th Circuit Court, along with the district and probate courts within these counties,[1] became part of a demonstration project designed to evaluate the feasibility of consolidating various court functions into a single entity known as the 46th Circuit Trial Court.[2] The chief judge of the 46th

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[1] The other courts included in the demonstration project were the 83rd District Court, to the extent it served Crawford County; the 87th District Court, to the extent it served Kalkaska and Otsego counties; the Crawford County Probate Court; the Kalkaska County Probate Court; and the Otsego County Probate Court.

[2] The demonstration project was originally scheduled to last only two years and encompassed six project courts: Barry County, Berrien County, Isabella County, Lake County, Washtenaw County, and the 46th Circuit Court. However, pursuant to Administrative Order No. 1997-12, 456 Mich clxxxi, the project was extended "until further order of the [Supreme] Court." Iron County was added as a seventh demonstration project court in 1999. In 2002, the Legislature enacted MCL 600.401 *et seq.*, which permits a county or judicial circuit to consolidate all or part of its operations subject to the approval of this Court. In January 2003, this Court adopted Administrative Order No. 2003-1, 467 Mich cix, which

Circuit Court was appointed the Trial Court's chief judge (hereafter Chief Judge), and Otsego County was designated as the Trial Court's control unit.

In order to facilitate this consolidation, the Trial Court began a large-scale administrative reorganization for the purpose of standardizing wages, benefits, and personnel policies. During this reorganization in the summer of 2000, the Chief Judge requested that his employees switch to a less-favorable prescription drug and health insurance plan and that they relinquish longevity pay. In return for this concession, the Chief Judge agreed to seek an enhanced employee pension plan and a new retiree health care plan funded by the counties. The Chief Judge presented his enhanced benefits plan, first, to the Tri-County Committee, a nonbinding committee that consisted of individuals representing each county, and subsequently to each county's board of commissioners. The boards of commissioners for Otsego and Kalkaska counties passed resolutions agreeing to implement the enhanced benefits plan. On August 29, 2000, the Crawford County Board of Commissioners passed the following resolution:

> MOTION by Hanson, seconded by Beardslee, to authorize the County [to] pay 24% of $50,000 ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at [sic] the year 2000 at $4,087.00 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654.00 per year.
>
> MOTION by Wieland, seconded by Hanson, to request the [Trial] Court not implement the MERS [Municipal

provides in part that "[s]ubject to approval of the Supreme Court, a plan of concurrent jurisdiction may be adopted by a majority vote of judges of the participating trial courts."

Employees' Retirement System] B-4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle.

That same afternoon, the Chief Judge informed the Chairwoman of the Crawford board that there had been an error in calculating the annual premium for the first year of the retiree health care plan and that the $4,087 figure was too low. The Chief Judge and the Chairwoman of the board subsequently agreed that the sum of $5,763 should be substituted as the correct first-year premium. However, the Crawford board never amended the resolution to reflect this new figure.

Following the vote in Crawford County, the Chief Judge prepared a contract memorializing the agreement. Although the contract was signed by representatives from Kalkaska and Otsego counties, Crawford County refused to sign the contract because of the board's concern regarding the prospect of a sizeable unfunded liability.[3] Shortly thereafter, on December 4, 2000, the Chief Judge implemented both the enhanced benefits plan and the employee concessions by order. Initially, Crawford County alone refused to appropriate its share of the costs of the enhanced benefits plan for fiscal years 2001-2003. However, approximately one year after the implementation order was entered, the Kalkaska County Board of Commissioners rescinded its resolution approving the enhanced benefits plan primarily on the basis of the concerns raised by Crawford County.[4] Otsego County proceeded to fund the entire cost of the enhanced benefits plan without reimbursement from the other funding units.

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[3] Crawford County Commissioner Scott Hansen also noted that the board rejected the contract because it was "not what [the board] approved [on August 29, 2000.]" Defendant's appendix at 435a.

[4] Kalkaska County paid its full share of the Trial Court's budget in both 2001 and 2002. It failed to appropriate funds for its share of the enhanced benefits plan for fiscal year 2003.

After unsuccessful attempts to settle the dispute, the Chief Judge communicated the notice required by Administrative Order No. 1998-5, § III(1), 459 Mich clxxvi, of the Trial Court's intention to sue Crawford County. After the required 30-day waiting period expired, the Trial Court brought this action to compel funding, claiming both that Crawford County was contractually obligated to fund the enhanced benefits and that it had failed to provide sufficient funds to allow the court to operate. Specifically, the Trial Court argued that, absent the enhanced benefits, the morale of its employees would decline, leading to lower productivity and, as a result, the court would be unable to function. The Trial Court further argued that it could not generate sufficient savings in its budget to pay for the enhanced benefits and that any staff cuts would prevent the court from operating at a serviceable level. Crawford County denied the allegations and asserted in a counterclaim that the Trial Court had exceeded its authority when it implemented the enhanced pension and retiree health care plans and that the Trial Court had fraudulently misrepresented the costs of the latter. Kalkaska County moved to intervene on behalf of Crawford County. In a separate action, Crawford and Kalkaska counties sued Otsego County, claiming that Otsego County had improperly implemented the enhanced pension and retiree health care plans and had colluded with the Trial Court to withhold information about the cost of the pension increase. The cases were consolidated and the State Court Administrator assigned a circuit judge from outside the affected counties to preside over these cases.

The circuit judge eventually found that the Trial Court's requested budget, specifically the requested appropriation for the enhanced benefits plan, was "reasonable and necessary" to the court's ability to perform its essential functions. The requested appropriation

was "reasonable" because it was not "excessive" and was "comparable to what other courts spend on like activities." The requested appropriation was also "necessary" because it had been "convincingly" proved that loss of the benefits plan would destroy employee morale to the point where the court could no longer function. The circuit judge also found that the August 29, 2000, resolution created an explicit contract with the Trial Court to implement the enhanced benefits plan. In a published opinion, 266 Mich App 150; 702 NW2d 588 (2005), the Court of Appeals affirmed.[5]

This Court granted the defendant counties' application for leave to appeal, limited to the questions: (1) whether the appropriations sought for the enhanced benefits plan were "reasonable and necessary to achieve the court's constitutional and statutory responsibilities"; (2) whether the defendant counties were contractually obligated to fund the enhanced benefits plan at the level requested by the Trial Court; and (3) whether there was evidence to support the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill its essential functions. 474 Mich 986 (2005).[6]

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[5] Judge ZAHRA, concurring in part and dissenting in part, opined that defendants had a preexisting statutory and constitutional duty to provide the Trial Court with sufficient funding to carry out its constitutional responsibilities. Because of this, the Trial Court's contract claim failed for lack of consideration. In addition, he observed that there was no statutory or other authority underlying the contract claims between courts and their funding units.

[6] In addition to affirming the judgment of the circuit judge on the Trial Court's contractual and "inherent power" claims, the Court of Appeals resolved a number of other issues, including the Trial Court's entitlement to attorney fees. Applications for leave to appeal from those matters have been held in abeyance by this Court for resolution of the instant case. *Crawford Co v Otsego Co*, 707 NW2d 350 (2005); *46th Circuit Trial Court v Crawford Co*, 707 NW2d 351 (2005); *Crawford Co v Otsego Co*, 707 NW2d 351 (2005); *46th Circuit Trial Court v Crawford Co,* 707 NW2d 594 (2005).

II. STANDARD OF REVIEW

Whether county funding of local court operations satisfies constitutional requirements presents a constitutional question that this Court reviews de novo. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003). We review for clear error the factual findings underlying the circuit judge's determination of whether the requested appropriation was "reasonable and necessary." MCR 2.613(C).

Issues of contract interpretation are questions of law that we review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). We review for clear error the findings of fact underlying the circuit judge's determination whether a valid contract was formed. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is "clearly erroneous" if, "the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Bynum v EASB Group, Inc,* 467 Mich 280; 285; 651 NW2d 383 (2002). The interpretation of a county resolution, as with the interpretation of a statute, is a question of law, which we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. ANALYSIS

A. "INHERENT POWER"

The judiciary's "inherent power" to compel funding is an extraordinary power and is derived from the separation of governmental powers set forth principally in Const 1963, arts 4-6, relating to the authorities of the legislative, executive, and judicial branches of government, and Const 1963, art 3, § 2, which provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The framers of Michigan's Constitution understood well the importance of separating the powers of government. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. James Madison expressed this sentiment more than 200 years ago when he wrote, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist, No. 47. Thus, governmental power was separated— with the Legislature exercising the "legislative power," Const 1963, art 4, § 1; the Governor exercising the "executive power," Const 1963, art 5, § 1; and the judiciary exercising the "judicial power," Const 1963, art 6, § 1.

The "legislative power" has been defined as the power "to regulate public concerns, and to make law for the benefit and welfare of the state." Cooley, Treatise on the Constitutional Limitations (Little, Brown & Co, 1886), at 92. Perhaps the most fundamental aspect of the "legislative power," authorized by the opening sentence of US Const, art I, § 8, which defines the powers of the legislative branch, is the power to tax and to appropriate for specified purposes. See also Const 1963, art 4. The power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to appropriate defines the priorities of government. Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of

government to exercise these powers should be that branch which is closest to, and most representative of, the people.

This is true for other reasons as well. In contrast with the judiciary, for example, the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise positions after negotiation and bargaining, it is more regularly and directly accountable to the people, and its membership is more broadly representative of society and its various interests.

However, just as it is implicit in the separation of powers that each branch of government is empowered to carry out the entirety of its constitutional powers, and only these powers, it is also implicit that each branch must be allowed adequate resources to carry out its powers. Although the allocation of resources through the appropriations and taxing authorities lies at the heart of the *legislative* power, and thus belongs to the legislative branch, in those rare instances in which the legislature's allocation of resources impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power. As observed by James Madison:

> [M]embers of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the Legislature in this particular, their independence in every other would be merely nominal. [Madison, The Federalist, No. 51.]
>
> As the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence over the pecu-

> niary rewards of those who will fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. [Madison, The Federalist, No. 48.]

In order for the judicial branch to carry out its constitutional responsibilities as envisioned by Const 1963, art 3, § 2, the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities.

Thus, the judiciary's "inherent power" to compel appropriations sufficient to enable it to carry out its constitutional responsibilities is a function of the separation of powers provided for in the Michigan Constitution. The "inherent power" does not constitute an exception to the separation of powers; rather, it is integral to the separation of powers itself. What *is* exceptional about the judiciary's "inherent power" is its distinctiveness from more traditional exercises of the judicial power, involving as it does determinations that directly implicate the appropriations power.

However, in order to accommodate this distinctive, and extraordinary, judicial power with the normal primacy of the legislative branch in determining levels of appropriations, the "inherent power" has always been sharply circumscribed. The "inherent power" contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation that are "reasonable and necessary" to enable the judiciary to carry out its constitutional responsibilities. However, levels of appro-

priation that are *optimally* required for the judiciary remain always determinations within the legislative power.

This Court has recognized the inherent powers doctrine for over 120 years. In *Stowell v Jackson Co Bd of Supervisors*, 57 Mich 31; 23 NW 557 (1885), the Jackson Circuit Court deemed it necessary to house jurors in a hotel during the course of a murder trial. After the trial was over, however, the board of supervisors refused to pay for the hotel charges. This Court undertook its analysis by noting that the trial court has the power and discretion to determine whether a jury needs to be secluded. We reasoned that, because the trial court has the power to sequester the jury, it must also have the authority to bind the county funding unit to pay for that sequestration. *Id.* To hold otherwise "would put it in the power of a board of supervisors to prevent courts from exercising their proper functions." *Id.* at 34-35.[7] Therefore, the Court concluded that, while the Legislature controls the power of the purse, "the inherent power and duty of courts to exercise their functions must authorize [payment for actions such as the sequestration] as becomes expedient in the course of judicial business." *Id.* at 34.

That the judiciary's inherent power to compel funding also extends to the appropriation of funds for employee salaries was expressed by Justice BLACK in his dissenting opinion in *Wayne Circuit Judges v Wayne Co*, 383 Mich 10; 172 NW2d 436 (1969) (*Wayne Co I*). As he

[7] Importantly, this Court noted that "[i]t would be very unsafe, and might imperil the validity of a conviction, if the care of the jury should be left to the discretion of an officer." *Id.* at 32-33. In other words, the power to sequester a jury, and the corresponding power to demand payment from the funding authority to pay for that sequestration, plays a vital role in a court's ability to conduct criminal trials and, therefore, to exercise its constitutionally mandated responsibilities.

explained, the essence of the "inherent power" doctrine is "that the constitutionally-assigned duty of a court such as ours automatically carries with it the power and responsibility of making [continually] sure that this 'one court of justice' (Const 1963, art 6, § 1) functions serviceably as a co-equal branch of Michigan's government . . . ." *Id.* at 33. To determine whether a court can function "serviceably," Justice BLACK indicated that the Court must first determine whether the appropriation sought by the court is necessary to address a "critical judicial need[]" and, if it is, then determine whether the amount requested is reasonable "to meet the urgency of the situation." *Id.* at 34.

Less than two years later, this Court expressly adopted Justice BLACK's dissenting statement in *Wayne Co I. Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1, 8-9; 190 NW2d 228 (1971) (*Wayne Co II*). In so holding, this Court concluded that

> "the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government." [*Id.* at 9, quoting *Commonwealth, ex rel Carroll v Tate*, 442 Pa 45, 52; 274 A2d 193 (1971) (emphasis in original).]

We further reasoned that the "inherent powers" doctrine is rooted in the constitutional command that the judicial power of this state is vested exclusively in "one court of justice . . . ." Const 1963, art 6, § 1. "The [L]egislature may not abolish that court. Neither is it permissible for the [L]egislature to render the court inoperative by refusing financial support." *Wayne Co II, supra* at 14 (opinion by T.E. BRENNAN, J.). Thus, the judiciary has the inherent power to seek the funding

necessary to sustain its ability to function serviceably in carrying out its constitutional responsibilities. *Wayne Co I, supra* (BLACK, J., dissenting). On that basis, this Court held that Wayne County must appropriate funds for those positions "established by the law or needed in the operation of the circuit court . . . ." *Id.* at 33.

Subsequent decisions make clear that the judiciary's inherent power to compel funding is limited to those appropriations required to meet "critical judicial needs." *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114; 286 NW2d 62 (1979). In *Wayne Co Prosecutor,* several county executive officers sought an injunction against budget cuts proposed by the defendant county. The Court of Appeals began its analysis by noting that, as is the case with the judiciary, a funding authority is obligated to budget sums sufficient to allow executive officers to carry out their mandated duties and obligations. However, the Court of Appeals also recognized that the courts must not involve themselves with the "truly discretionary appropriations decisions of a county board . . . ." *Id.* at 122. To balance these concerns, the Court of Appeals held that

> "serviceability" [is] the standard to be applied in determining whether the board of commissioners has unlawfully underfunded the county executive officers so that they are unable to fulfill their statutory obligations. Serviceability must be defined in the context of Justice BLACK's opinion, *i.e.* "urgent", "extreme", "critical", and "vital" needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out. A function

> funded below a serviceable level, however, will not be fulfilled as required by statute. [*Id.* at 124, citing *Wayne Co I* (BLACK, J., dissenting).]

This Court reiterated the limited nature of the "inherent power" doctrine in *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985). In *Hillsdale Co*, this Court addressed the issue of whether a funding unit could be compelled to appropriate funds for salary increases that were neither approved by it nor "proven to be necessary to maintain a statutory function of the court or to provide for the overall administration of justice."[8] This Court began its analysis by noting that "[e]ach branch of government has inherent power to preserve its constitutional authority." *Id.* On the other hand, "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.' " *Id.,* quoting *United States v Will*, 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980). Thus, a lawsuit to compel funding under the "inherent powers" doctrine is limited to circumstances where "the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit." *Hillsdale Co, supra* at 717-719. This Court noted that there was no dispute that, as found by the trial court, the plaintiff trial court was functioning at a level " 'satisfactory to all.' " *Id.* at 722. Because

[8] In the companion case, *Cheboygan Co Bd of Comm'rs v Cheboygan Circuit Judge*, the Cheboygan Circuit Court sought to compel funding for a part-time mediation clerk. However, at issue in *Cheboygan Co* was the question of whether a trial court may employ an administrative order to compel funding in excess of the court's appropriation. This Court concluded that the use of an administrative order was inappropriate under MCR 8.112(B).

there was no claim that the plaintiff trial court could not exercise a statutory or constitutional function, there was no basis to resolve "the issue of when and under what standards the judiciary may compel expenditures beyond those appropriated . . . ." *Id.* at 722.

Justice RILEY wrote separately for the purpose of "set[ting] forth principled procedures to resolve, as fairly and expeditiously as possible, those conflicts which necessarily arise when the legislative branch refuses to approve funding requested by the judicial branch for reasonable and necessary court operations." *Id.* at 728 (RILEY, J., dissenting). Specifically, Justice RILEY responded to the majority's failure to articulate a standard against which the court's inherent power to compel funding is to be measured. Justice RILEY began her analysis by recognizing that the "inherent powers" doctrine was designed to preserve the balance of power between the three branches, not to upset that balance in favor of judicial supremacy. In order to protect both the county board's power over county funds and the court's ability to exercise the judicial power, Justice RILEY concluded that "the judiciary must bear the burden of articulating the constitutional bases for asserting [the inherent power]" and that it must invoke the authority "with caution, in a manner that will not place in jeopardy the public's confidence in the integrity of the judiciary." *Id.* at 740. Specifically, Justice RILEY opined that the court seeking to compel funding must "set forth specific findings of fact, identifying those judicial functions that will be in jeopardy if the appropriation requested is denied, and conclusions of law indicating why the function is required by the constitution." *Id.* at 744.

We agree with Justice RILEY that invocation of the "inherent power" of the judiciary will least disrupt the

constitutional balance between the judicial and legislative branches where procedures of the sort she proposes are followed. Accordingly, we adopt that portion of Justice RILEY's opinion that articulates the *procedure* that trial courts must follow in pursuit of their "inherent power."

In litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is both "reasonable and necessary." *Branch Co Bd of Comm'rs v Service Employees Int'l Union*, 168 Mich App 340, 351; 423 NW2d 658 (1988); *17th Dist Probate Court v Gladwin Co Bd of Comm'rs,* 155 Mich App 433, 453; 401 NW2d 50 (1986). The plaintiff court seeking to compel funding must demonstrate that "the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit." *Hillsdale Co, supra* at 717-719. Finally, a court deciding an inherent powers claim must specifically set forth findings of fact identifying specifically those judicial functions that will be in jeopardy if the appropriation sought is denied, and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary.

B. CLEAR & CONVINCING EVIDENCE

Because the Trial Court here has failed to demonstrate by clear and convincing evidence that the enhanced benefits plan is both "reasonable and necessary" to allow that court to function serviceably in carrying out its constitutional responsibilities, we conclude that the circuit judge and the Court of Appeals clearly erred in holding that the Trial Court could compel appropriations for such plan. An appropriation is "necessary" when it is sought by the court to address a "critical judicial need[]" that affects that court's

ability to function "serviceably" in carrying out its constitutional responsibilities. *Wayne Co I, supra* at 33-34. A "serviceable" level of funding is "the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled." *Wayne Co Prosecutor, supra* at 124. "A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out." *Id.*

To justify the conclusion that the enhanced benefits plan was both "reasonable and necessary," the circuit judge and the Court of Appeals both relied on the claims of the Chief Judge that failure to provide the enhanced benefits would negatively affect employee morale. However, we believe that the Trial Court failed to demonstrate that there existed a morale problem that impaired the court's ability to function "serviceably" in carrying out its constitutional responsibilities. *Wayne Co II*.

Specifically, the Chief Judge testified that there "probably" would be people who would quit their jobs and that the Trial Court would have trouble finding new employees. However, the Chief Judge's opinion was utterly unsupported. The Trial Court failed to demonstrate that even *one person* had either left its employ or was planning to leave its employ as a result of the alleged inadequacy of the preexisting benefits plan.[9] Further, the Trial Court was unable to identify even *one*

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[9] The dissent argues that the testimony of Rudi Edel, the Trial Court's administrator, that "six [employees] left for wages and benefits" supports the circuit judge's conclusion that the enhanced benefits plan was "reasonable." *Post* at 169. However, when Edel was asked, "How many [of the six employees] told you that the reason they were leaving was for better retirement plans?" he could not identify even one such person. Defendants' appendix at 1468a. Further, one of the Trial Court's judges, Judge Dennis Murphy, testified at a deposition that he had never heard

person who had refused an offer of employment because the preexisting benefits plan was inadequate.

Even assuming for the sake of argument that there was sufficient evidence to support the Chief Judge's claim of declining morale, a claimed effect on employee morale, by itself, is not sufficient to invoke the "inherent powers" doctrine. The circuit judge and the Court of Appeals based their holdings on *Gladwin Co*. In *Gladwin Co*, the defendant funding unit determined compensation for court employees without taking into account the training, responsibilities, and duties of each position. As a result, for example, a probation officer was paid the same amount as a register, and a newly hired juvenile probation officer was paid the same wage as the defendant county's general clerical employees. The Court of Appeals concluded that, because of the morale problems caused by this "unfair and inequitable" pay scheme, the additional appropriations for salaries for the disputed positions were "reasonable and necessary." *Id.* at 454-455.

However, we note that declining employee morale alone was *not* the determinative factor in *Gladwin Co.* As noted by the Court of Appeals, the irrational pay scheme instituted by the funding unit had caused the court to fill the position of juvenile probation officer six times in less than 12 years. Further, the court had considerable difficulty attracting competent employees for the position, as demonstrated by the two occasions on which the position had gone unfilled for more than three months each. In other words, the irrational pay scheme had not just caused the court's employees to become "demoralized," but such morale problems had

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either directly or indirectly of any employee who had quit or contemplated quitting their job in the event they did not receive a better pension plan. *Id.* at 1225a.

specifically manifested themselves in the court's inability to hire and retain probation officers. Accordingly, we conclude that a claim that court employees suffer from a loss of morale is insufficient to support an inherent powers claim, absent some showing that the claimed morale problems have demonstrably caused court employees to be unable to carry out their constitutional responsibilities.

Further, there is no evidence here that the productivity of court employees has diminished to such an extent that the court cannot carry out its constitutional responsibilities, or indeed that it has diminished to any extent. Rudi Edel, administrator of the Trial Court, testified that the court was not suffering from any speedy-trial problems either before or after the current funding controversy. Defendants' appendix at 1452a-1453a.[10] In fact, the court has continued to process its civil and criminal dockets adequately.[11] *Id.* Moreover, an

[10] Edel further acknowledged that, with current staffing levels, the Trial Court is "getting our work done, our *mandated and reasonable and necessary functions.*" Plaintiff's appendix at 700b (emphasis supplied).

[11] Edel testified that the Trial Court was not complying with at least one administrative order of this Court, three or four federal statutes, and three or four state statutes. Trial Transcript Vol 1 at 284. According to the dissent, this evidence supports the circuit judge's findings of fact. *Post* at 170-171. However, there was no evidence to suggest that the Trial Court was fulfilling these requirements before the instant controversy. Moreover, the requested appropriation is for *retiree* benefits and would not result in a single additional person being hired. The dissent opines that "people *do* choose jobs on the basis of adequacy or inadequacy of retiree benefits." *Post* at 171. Doubtless, employees rely on any number of factors in choosing jobs. While retirement benefits undeniably are within a broad range of factors an employee considers in deciding whether to accept an offer of employment, there is no demonstrated impact in this case of the absence of *additional* such benefits upon the Trial Court's ability to fulfill its constitutional and statutory obligations. Accordingly, the appropriation at issue is not "reasonable and necessary" in the sense that the judicial branch can impose this appropriation upon unwilling counties as part of its inherent powers.

audit conducted by the State Court Administrative Office determined that the Trial Court's quality control is "excellent." Thus, unlike in *Gladwin Co*, there is no evidence that the claimed morale problems rendered the court incapable of carrying out any of its essential judicial functions. Even if we accept the Chief Judge's unsupported statements that some court employees may have "one eye on another job" and will be "unhappy," the Trial Court has failed to demonstrate that those employees are unable to perform their jobs. In fact, the Trial Court's own expert testified that the employees were functioning "within the ranges that are expected to be there by the State." Plaintiff's appendix at 852b.[12] Further, the Chief Judge admitted that his staff was "soldiering on" even in light of the potential loss of the enhanced benefits plan. In other words, even assuming that the employees were dissatisfied or unhappy, the Trial Court was, in fact, *able* to function as a court even without the enhanced benefits plan. The question in an inherent powers case is not whether all court employees are "satisfied" or "happy," but, rather, whether they are able to perform their jobs in a manner that allows the Trial Court to function "serviceably" in carrying out its constitutional responsibilities.

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[12] The expert, Ross Childs, who is the county executive of Grand Traverse County, testified:

> I looked at the budgets that were prepared. I read some of the documents. I looked at it and made an assessment as to whether there was what I thought "fat" in the budget. I didn't see a lot of fat in the budget. I looked at the caseloads and I went through the State Court Administrator's Officer and looked at the reports that were there, the assignments and the staff and the caseload per staff for caseworkers in the Friend of the Court and probation officers and so on were consistent; that they are well in — within the ranges that are expected to be there by the State. I didn't find the fat in the budget. [*Id.*]

Also, the Chief Judge admitted at trial that he specifically asked for "the best [pension] plan that's available." Trial transcript at 342. In other words, the requested appropriation, by its own terms, comprises the *maximum* necessary to improve employee morale, not what was "reasonable and necessary" to ensure that its employees could carry out the Trial Court's constitutional responsibilities.

Finally, any claimed morale problems that did exist among the Trial Court's employees seem predicated upon the Chief Judge's own unilateral promise to provide the enhanced benefits.[13] To this extent, the Trial Court is seeking to require the counties to pay for a problem that it has arguably created. It cannot be that a court can claim a "morale problem" where the alleged problem is a function of unwarranted promises of benefit increases that it has made to its employees. Under the circuit judge's reasoning in this regard, any court could seek to invoke its "inherent power" to compel its funding unit to make an appropriation

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[13] The dissent argues that it was the counties' decision to renege on the agreement, and not the Chief Judge's unilateral promises, that created the alleged morale problems. *Post* at 173-174. However, when the Chief Judge implemented the benefits plan by order in December 2000, he did so knowing that Crawford County was unwilling to go along. This was established in a September 29, 2000, letter by the Chief Judge to the county boards of commissioners, which stated that "should the contract fail to be executed prior to the year's end, issues regarding wages and longevity bonuses will have to be revisited." Defendant's appendix at 1695a. This was also established in a November 2000 letter by the Chief Judge to the county boards of commissioners, which recognized that "Crawford County is still considering that matter" and that "we must conclude our arrangement early in the month of December." Defendants' appendix at 414a-415a. Had Crawford County already agreed to the purposed benefits, as the dissent asserts, Crawford County would not have needed to "consider" anything and there would have been no need to "revisit" the wage and longevity pay concessions made by the Trial Court's employees.

beyond what it was prepared to make— no matter how unreasonable or unnecessary— solely on the basis of such a unilateral promise. To adopt such a position would not maintain the balance of powers between the legislative and judicial branches— as the "inherent powers" doctrine is designed to do— but would instead impose a doctrine of judicial supremacy in favor of the branch of government *least* suited to make policy-driven appropriations and taxing decisions.[14]

In light of insufficient evidence that the appropriation for enhanced benefits sought by the Trial Court was "necessary" to the ability of the court to function "serviceably" in carrying out its constitutional responsibilities, the Trial Court has failed to establish a right to compel funding from the defendants under the "inherent powers" doctrine.[15] Therefore, any increased benefits for the employees of the Trial Court must come through the ordinary processes of negotiation and bargaining between the Trial Court and the representatives of the people on the Crawford, Kalkaska, and Otsego county boards of commissioners; such benefits are not properly obtained by judicial order.

C. CONTRACT CLAIMS

Although we conclude that the requested appropriation was not "necessary" to allow the Trial Court to function "serviceably" in carrying out its constitutional

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[14] Indeed, we note that Kalkaska County's request for an additional one mill of taxation to fund the Trial Court's retirement expenses was overwhelmingly defeated by the voters in that county, with 4,415 votes against the proposal to 568 votes in favor of the proposal. Defendants' appendix at 1371a.

[15] Because we conclude that the enhanced benefits were not "necessary," we need not determine whether those benefits were a reasonable means "to meet the urgency of the situation." *Wayne Co I, supra* at 33-34 (BLACK, J., dissenting).

responsibilities, we must also address the lower courts' alternative conclusion that defendants are contractually obligated to appropriate funding for the enhanced benefits plan.

Administrative Order No. 1998-5, 459 Mich clxxvi-clxxvii, provides in pertinent part:

> A court must submit its proposed and appropriated annual budget and subsequent modifications to the State Court Administrator at the time of submission to or receipt from the local funding unit or units. The budget submitted must be in conformity with a uniform chart of accounts. If the local funding unit requests that a proposed budget be submitted in line-item detail, the chief judge must comply with the request. . . . A chief judge may not enter into a multiple-year commitment concerning any personnel economic issue unless: (1) the funding unit agrees, or (2) the agreement does not exceed the percentage increase or the duration of a multiple-year contract that the funding unit has negotiated for its employees. . . .
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> If, after the local funding unit has made its appropriations, a court concludes that the funds provided for its operations by its local funding unit are insufficient to enable the court to properly perform its duties and that legal action is necessary, the procedures set forth in this order must be followed.

Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent . . . .' " *Id*., quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). This Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley*, *supra* at 237, quoting *Bailey v United*

States, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley*, *supra* at 237. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236. "[T]he same principles of statutory construction apply in determining [this Court's] intent in promulgating rules of procedure . . . ." *People v Davis*, 181 Mich App 354, 356; 448 NW2d 842 (1989).

As noted above, the Constitution imposes a duty on a county board of commissioners to appropriate funds "reasonable and necessary" to allow the court to function serviceably in carrying out its constitutional responsibilities. Once the board of commissioners has made a funding determination, AO 1998-5 imposes a duty on the court not to exceed either the total amount appropriated by the board or the amount specified in a line-item appropriation. Where the total or line-item appropriation is insufficient, the court must follow the procedures set forth in AO 1998-5. A trial court may only challenge a funding decision made by a county board if "the funds provided for its operations . . . are insufficient to enable the court to properly perform its duties . . . ." *Id*. Thus, the county board's appropriations to the judiciary can be challenged either through the political process, i.e., by seeking an additional appropriation from the board, or through the legal process, when the board has failed to appropriate enough money to allow the court to function serviceably in carrying out its constitutional responsibilities. However, if it decides not to exercise either of these two options, a trial court must live within the budget appropriated by its board.

The circuit judge and the Court of Appeals majority concluded that a county board could also be bound by contract to appropriate a certain level of funding to its trial courts. However, the county board has a preexisting constitutional duty to appropriate a serviceable level of funding to its trial courts. An essential element in a contract claim is legal consideration. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). "Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Id.* at 740-741. Such a contract would appear to fail for lack of consideration. *Puett v Walker*, 332 Mich 117, 122; 50 NW2d 740 (1952). In other words, because the county board has a preexisting duty to appropriate a serviceable level of funding to its court, a county cannot be compelled under contract law to appropriate "reasonable and necessary" funds to enable the court to function serviceably in carrying out its constitutional responsibilities.

Moreover, there was no "meeting of the minds" between the Trial Court and Crawford County because the terms of the retiree health care plan were altered after the Crawford County resolution was passed. *West Bloomfield Hosp v Certificate of Need Bd (On Remand)*, 223 Mich App 507, 519; 567 NW2d 1 (1997). Here, the resolution passed by Crawford County authorized a $4,087 cap on payments made in the first year of the benefit program. However, the actual first year cap was $5,763. The board never amended the resolution to reflect that new figure, and never voted on any amended resolution. The circuit judge and the Court of Appeals majority held that the resolution constituted a valid acceptance of the Trial Court's offer because "[t]he annual payment cap was not an essential term." 266 Mich App at 160. We disagree. One of the principal concerns raised by Crawford County was that the

retiree health care plan would create "massive liabilities [for Crawford County] in the future." Defendants' appendix at 330a. A higher first-year premium would exacerbate these concerns, because the health care plan would potentially have to pay an extra $1,676 for each person covered by the plan in the first year. Obviously, if the fund is required to pay a higher annual premium, the amount of money set aside for the benefit would be depleted faster than anticipated when the board passed its resolution. We conclude that the unambiguous language of the resolution is consistent with the understanding that Crawford County was willing to agree to the plan only if the starting health insurance cost was $4,087 for each employee. Because this figure was not the eventual starting cost of the health insurance, there was simply no meeting of the minds and therefore no contract. Further, no one disputes that the enhanced benefits plan could not have been implemented without the consent of all three funding units. Because the purported contract fails with respect to Crawford County inasmuch as there was no meeting of the minds, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

In summary, a county board's duty to appropriate funds to the judiciary arises from the Constitution. Because a county has a preexisting duty to fund its trial courts, a county cannot enter into a contract with the Trial Court to fund the enhanced benefits plan at a specific level. Moreover, the purported contract fails with respect to Crawford County because there was no meeting of the minds. Because all three funding units had to agree to implement the enhanced benefits plan, any contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

IV. CONCLUSION

We conclude that the Michigan Constitution only permits the judicial branch to directly compel the legislative branch to appropriate when a court has not received sufficient funding to operate at a serviceable level. *Hillsdale Co, supra* at 722. A court deciding an "inherent power" claim must set forth findings of fact identifying specifically those judicial functions that will be in jeopardy if the appropriation requested is denied, and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary. We hold that the Trial Court here has failed to demonstrate by clear and convincing evidence that the requested appropriation for enhanced benefits was "reasonable and necessary" to the "serviceability" of the court. The Trial Court has failed to produce any evidence that even one employee was planning to leave if the enhanced benefits were not adopted or that anyone has refused to accept employment with the court because of the preexisting benefits plan. Moreover, the evidence demonstrates that the Trial Court has continued to carry out its essential judicial functions adequately. While the Trial Court may or may not have been functioning "happily" or "optimally," it is nonetheless reasonably functioning, which is all that is required to preclude the exercise of the judiciary's "inherent power."

We also conclude that because a county has a preexisting constitutional duty to fund its courts, the defendant counties could not enter into a contract with the Trial Court to fund the enhanced benefits plan at a specific level. Moreover, the purported contract fails with respect to Crawford County because there was no meeting of the minds. Since all three funding units had to agree to implement the enhanced benefits plan, any

contract between the Trial Court and the other funding units for the enhanced benefits plan must also fail.

Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the circuit judge for entry of judgment in favor of the defendant counties. Increased public employee benefits in defendant counties must be enacted through the democratic processes of government— through the decision-making of the legislative branch— not by judicial order.

TAYLOR, C.J., and YOUNG, J., concurred with MARKMAN, J.

CORRIGAN, J. (*concurring*). I concur in the result and virtually all of the reasoning of Justice MARKMAN's lead opinion. In particular, I agree that "the judiciary has the inherent power to seek the funding necessary to sustain its ability to function serviceably in carrying out its constitutional responsibilities." *Ante* at 145-146. Further, I agree with the lead opinion that on the facts of this case, the enhanced retirement benefits sought by plaintiff do not fall within the judiciary's inherent authority to compel funding. I do not, however, join the portion of the lead opinion that adopts the reasoning set forth in *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114; 286 NW2d 62 (1979).

In general, this Court does not reach constitutional issues that are not necessary to resolve a case. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). In my view, the existing authorities *of this Court* fully support the conclusion in Justice MARKMAN's opinion that the enhanced retirement benefits at issue here are not reasonable and necessary to the serviceability of plaintiff's court. See, e.g., *Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1; 190 NW2d 228 (1971)

(*Wayne County II*), and other decisions of this Court discussed in the lead opinion.

Therefore, because plaintiff's inherent-powers claim must fail under this Court's own case law, I do not decide whether to adopt the analytic approach set forth by the Court of Appeals in *Wayne Co Prosecutor*. In particular, I do not find it necessary to adopt the assertions in *Wayne Co Prosecutor* that "[a] serviceable level of funding is the *minimum* budgetary appropriation at which statutorily mandated functions can be fulfilled," and that "[a] function funded at a serviceable level will be carried out in *a barely adequate manner*, but it will be carried out." *Wayne Co Prosecutor*, *supra* at 124.

In my view, it is simply not necessary in this case to decide whether the judiciary's inherent authority to compel funding should be limited to "minimum budgetary appropriation[s]" and to functions that are carried out "in a barely adequate manner." Rather, I decide this case on the basis of the existing authorities of this Court, which fully support our decision in this case.

For these reasons, I express no view on whether this Court should adopt the analysis outlined in *Wayne Co Prosecutor*. In all other respects, I concur in the analysis and conclusions set forth in Justice MARKMAN's lead opinion.

WEAVER, J. (*dissenting*). I respectfully dissent from the result and reasoning of the lead opinion. I would hold that Judge Dennis C. Kolenda, the trial judge who conducted the six-day hearing in this case and reviewed the 300 exhibits totaling approximately 5,500 pages, did not clearly err in finding that the enhanced pension plan and the retiree health care plan were reasonable

and necessary to the 46th Circuit Trial Court's ability to perform its mandated responsibilities.

I would affirm the judgment of the Court of Appeals in holding that Judge Kolenda did not clearly err in finding that the requested appropriation to fund the enhanced pension plan and the retiree health care plan was reasonable and necessary.

A

This funding dispute between the 46th Circuit Trial Court (Trial Court) and two of the three counties it serves arose out of the consolidation of certain courts in Kalkaska, Crawford, and Otsego counties, pursuant to Administrative Order No. 1996-9, 451 Mich civ.

During the early stages of unification, the Trial Court concluded that all employees doing the same job, regardless of the county in which they physically worked, should earn equal pay and receive equal benefits. After negotiations with Chief Judge Alton Davis of the Trial Court, the employees agreed to phase out longevity pay and dedicate a portion of all future wage increases to fund the retiree benefits package. The court employees also agreed to accept a cost-saving health care insurance plan that offered less coverage and had a higher prescription copay. Chief Judge Davis then secured the agreement of the three counties, Crawford, Kalkaska, and Otsego, to fund an enhanced pension plan and a retiree health care plan.

After Judge Davis entered an order implementing those new plans, Crawford and Kalkaska counties reneged on their agreement and passed resolutions disapproving those plans. Thus, at the time that Judge Davis entered the implementation order that gave the employees their new benefits, he was acting according to

the existing approval of the counties. After lengthy negotiations failed, this suit followed.

As a coequal, independent branch of the government, the judiciary has the inherent power " 'to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice. . . .' "[1] When a court and funding unit cannot reach agreement, the court may initiate suit to compel expenditures in excess of appropriations.[2]

The question before us is whether the enhanced pension plan and the retiree health care plan are reasonable and necessary for the Trial Court to carry out its mandated responsibilities, and its powers and duties to administer justice.[3]

The lead opinion attempts to limit the judiciary's inherent power to compel funding by adopting the Court of Appeals reasoning in *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs*,[4] that "[a] serviceable level of funding is the *minimum* budgetary appropriation at which statutorily mandated functions can be fulfilled," and that "[a] function funded at a serviceable level will be carried out in *a barely adequate manner*, but it will be carried out." But Justice CORRIGAN writes separately to say that "it is simply not necessary in this case to decide whether [to adopt the *Wayne Co Prosecutor* standard]."[5] An opinion of this Court that does not

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[1] *Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1, 9; 190 NW2d 228 (1971) (citation omitted).

[2] *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 716; 378 NW2d 744 (1985).

[3] *Wayne Circuit Judges v Wayne Co (On Rehearing), supra* at 9.

[4] *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs,* 93 Mich App 114, 124; 286 NW2d 62 (1979) (emphasis added).

[5] *Ante* at 162.

obtain four signatures is not binding precedent.[6] Consequently, the lead opinion does not change the existing standards used to determine whether a court can use its inherent power to secure funding.

B

This Court reviews the factual findings underlying the trial court's determination whether a requested appropriation was "reasonable and necessary" for clear error.[7] "An appellate court should not reverse the findings of a trial court in such a case unless its findings are clearly erroneous. 'A finding is "clearly erroneous" [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' "[8] The fact-finder has not clearly erred "simply because [the appellate court is] convinced that it would have decided the case differently."[9] If there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.[10] Further, assessment of credibility lies within the trial court's province.[11] Under MCR 2.613(C), "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."[12]

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[6] *People v Jackson,* 390 Mich 621, 627; 212 NW2d 918 (1973).

[7] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). *Morris v Clawson Tank Co*, 459 Mich 256; 587 NW2d 253 (1998).

[8] *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (citation omitted).

[9] *Anderson v Bessemer City*, 470 US 564, 573; 105 S Ct 1504; 84 L Ed 2d 518 (1985).

[10] *Id.* at 574.

[11] *Id*.

[12] *Morris, supra* at 275.

Although the lead opinion purports to review Judge Kolenda's factual findings for clear error, it in fact engages in a review de novo. The lead opinion does not give due deference to Judge Kolenda's ability to assess the credibility of the witnesses before him, and imposes its own inaccurate interpretation of the record to conclude that the enhanced pension plan and the retiree health care plan were not reasonable and necessary.

In his 53-page opinion, Judge Kolenda specifically found that the "Trial Courts witnesses [were] credible and persuasive" and the defendant's witnesses were "ignorant of many pertinent facts"; Judge Kolenda also found that the defendant's witnesses' answers were "shallow," "evasive," and "conclusive." Judge Kolenda stated:

> This Court found the Trial Court's witnesses to be credible and persuasive. They gave testimony which reflected careful and thoughtful assessments of the pertinent facts. Crawford County's expert was a witness who rationalized a pre-ordained opinion. He was ignorant of many pertinent facts and his assessments were shallow. Furthermore, much of his testimony was evasive, betraying a realization that he could not sustain his conclusions. Crawford County's controller was not dishonest, but he could not articulate any persuasive bases for the conclusory positions he took. The several county commissioners who testified were not helpful. They testified only to what they have convinced themselves, or have been convinced, happened and was intended.[13]

Judge Kolenda's candid assessment of the credibility of the witnesses must provide guidance to this Court's review of his factual findings.

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[13] Unpublished opinion of the Trial Court for the 46th Judicial Circuit, issued July 25, 2003 (Docket Nos. 02-05951-CZ and 02-10014-CZ), p 4 n 4 (hereafter Trial Court opinion).

C

Judge Kolenda first found that the enhanced pension plan and the retiree health care plan are *necessary*. As Justice RILEY stated in her dissent in *Hillsdale, supra*, "to be reasonable and necessary the need must not only be practical rather than relative, but it must be shown that the funds are needed for the effective administration of justice."[14] Judge Kolenda's ultimate finding on the issue of necessity was that

> [t]his Court is also convinced that funding the proposed retiree healthcare and upgraded pensions are indispensable to the Trial Court continuing to function at a serviceable level. Without those benefit enhancements, staff morale, which is already low, will plummet, with the result that *productivity will suffer badly, soon falling below serviceable levels*. In addition, good employees will leave, and competent replacements will not be found. Those prospects establish that the benefits which the Trial Court seeks to fund are indispensable to maintaining a workforce which is itself indispensable to the Trial Court fulfilling its obligations, making those benefits themselves indispensable. The prospect is enough. The Trial Court need not wait for its operations to actually fall below serviceable levels. [*Seventeenth Dist Probate Court v*] *Gladwin County* [*Bd of Comm'rs,* 155 Mich App 433, 449; 401 NW2d 50 (1986)]. [Emphasis added.][15]

Judge Kolenda's ultimate finding that the enhanced pension plan and the retiree health care plan are necessary was based in part on Judge Kolenda's factual determination that employees were quitting work while waiting for the new benefit package:

> Some employees have left out of dissatisfaction with the delay in finalizing the healthcare fund and pension up-

[14] *Hillsdale*, *supra* at 744 (RILEY, J., dissenting).

[15] Trial Court opinion, *supra* at 45.

> grade, but many have stayed in anticipation of getting those benefits. However, if not awarded them, many employees are expected to leave. Moral [sic] will be affected even more; and the judges' ability to lead the Court will be destroyed. The ultimate effect would, obviously, be a serious loss of productivity.[16]

The lead opinion asserts that the proposed benefits are not necessary because the Trial Court has utterly failed to demonstrate the necessity:

> [T]he Chief Judge testified that there "probably" would be people who would quit their jobs and that the Trial Court would have trouble finding new employees. However, the Chief Judge's opinion was utterly unsupported. The Trial Court failed to demonstrate that even *one person* had either left its employ or was planning to leave its employ as a result of the alleged inadequacy of the preexisting benefits plan.[17]

This statement mischaracterizes the record. Rudi Edel, the trial court administrator and magistrate for the 46th Circuit Trial Court, testified that six employees left for wages and benefits:

> [W]e had a turnover rate in the court . . . 36 employees, and by now I think it's around 46/47 employees. Some of those—three or four or five . . . were discharged. Some of those employees left the court as a result of moving out of the area. Some of those employees left the court because they were dissatisfied with wages, benefits. And some of them even with court reform; they were not happy with a shift in their job duties. . . . Another component is that we wanted to attract employees to our court, and to do that we need to have a good benefit structure.[18]

Rudi Edel later quantified the exact number of employees who recently quit because of poor wages and

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[16] *Id.* at 18.

[17] *Ante* at 150 (emphasis in original).

[18] Bench trial volume I, p 132.

benefits. "Out of the 36 people identified on this list, I can definitely identify that six left for wages and benefits."[19]

In *Gladwin Co*[20] the Court of Appeals held that enhanced pay for a position is "reasonable and necessary" for a court to carry out its assigned functions where there was testimony that the court employees had protested the present rate of compensation in writing and orally, that the present rate of compensation had created a morale problem in the court, and the plaintiff's expert witness testified that the current compensation structure was not rational.[21] The lead opinion attempts to distinguish *Gladwin Co,* stating that

> employee morale alone was not the determinative factor in *Gladwin Co*. As noted by the Court of Appeals, the irrational pay scheme instituted by the funding unit had caused the court to fill the position of juvenile probation officer six times in less than 12 years.[22]

This attempted distinction between the facts of *Gladwin Co* and the present case fails. In *Gladwin Co*, the plaintiff went through six juvenile probation officers in less than 12 years. Here, Judge Kolenda noted in his opinion that "[s]ome employees have left out of dissatisfaction with the delay in finalizing the healthcare fund and pension upgrade,"[23] and Rudi Edel testified that "six [employees] left for wages and benefits."

Benefit packages are necessary when at least six frustrated employees quit work because of poor wages

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[19] Bench trial volume I, p 283.

[20] *Seventeenth Dist Probate Court v Gladwin Co Bd of Comm'rs*, 155 Mich App 433; 401 NW2d 50 (1986).

[21] *Id.* at 455.

[22] *Ante* at 151 (emphasis omitted).

[23] Trial Court opinion, *supra* at 18.

and benefits at a court already staffed at bare bones and just getting by. Here, as in *Gladwin Co*, something more than morale establishes that the additional funding is necessary. In both cases, six employees had quit their jobs.

The lead opinion also attempts to refute Judge Kolenda's finding of necessity by stating that there is no evidence that the employees' productivity has diminished to any extent:

> [T]here is *no evidence* here that the productivity of court employees has diminished to such an extent that the court cannot carry out its constitutional responsibilities *or indeed that it has diminished to any extent*. Rudi Edel, administrator of the Trial Court, testified that the court was not suffering from any speedy-trial problems either before or after the current funding controversy. [24]

Again, the lead opinion's conclusion ignores evidence adduced at trial to support Judge Kolenda's factual findings. Judge Kolenda found that without the benefit enhancements, "productivity will suffer badly, soon falling below serviceable levels." This was supported by testimony that the Trial Court cannot comply with its statutory and court-ordered requirements at the current staffing level. Rudi Edel stated that the court was not complying with at least one administrative order of this Court, three or four federal statutes, and three or four state statutes:

> I found that with our current staffing levels we are complying with all the requirements with very few exceptions. And I would need to see the report to specifically outline those exceptions. I know one is administrative order 1991-4. There is [sic] three or four federal statutes that our Friend of the Court does not comply with; three or

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[24] *Ante* at 152 (emphasis added).

> four state statues. And these are issues that we just don't have the manpower to get to.[25]

Furthermore, the testimony of Rudi Edel establishes that the court workers are currently working "110 percent." He testified that "[i]f nobody goes on vacation and if nobody gets sick with our current staffing level, once we replace the assignment clerk, we'll get the job done."[26]

The lead opinion asserts that the enhanced benefits were not reasonable and necessary to address the Trial Court's failure to comply with its court-imposed and statutory requirements because the "requested appropriation is for *retiree* benefits and would not result in a single additional person being hired."[27] Under the lead opinion's rationale, retiree benefits will never be "necessary." But retiree benefits are part of a comprehensive compensation package; contrary to the lead opinion's contention, people *do* choose jobs on the basis of adequacy or inadequacy of retiree benefits.

The lead opinion also quotes from the testimony of expert witness Ross Childs, the county executive of Grand Traverse County, to support its contention that the Trial Court was "not suffering from any speedy-trial problems . . . ."[28] The lead opinion states:

> In fact, the Trial Court's own expert testified that the employees were functioning "within the ranges that are expected to be there by the State."[29]

But this quote takes Mr. Childs's testimony out of context. Ross Childs's statement was made in the

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[25] Bench trial volume I, p 284.

[26] Bench trial volume I, p 121.

[27] *Ante* at 152 n 11 (emphasis in original).

[28] *Ante* at 152.

[29] *Ante* at 153.

context of excess budgets.[30] Mr. Childs actually said that the Trial Court's *budget* is "within the ranges that are expected to be there by the State."[31] Mr. Childs's *full* statement was:

> *I looked at the—the budgets that were prepared. I read some of the documents. I—I looked at it and made an assessment as to whether there was what I thought "fat" in the budget. I didn't see a lot of fat in the budget.* I looked at the caseloads and I went through the State Court Administrator's Officer and looked at the reports that were there, the assignments and the staff and the caseload per staff for caseworkers in the Friend of the Court and probation officers and so on were consistent; that they are well in—within the ranges that are expected to be there by the State. *I didn't find the fat in the budget*.[32]

Mr. Childs's statement had nothing to do with the ability of the employees to perform their jobs. The statement was in the context of "fat" within the Trial Court's budget. The lead opinion's statement that the "Trial Court's own expert testified that the employees were functioning 'within the ranges that are expected to be there by the State' " is a mischaracterization.

To summarize, evidence presented at trial demonstrates that the friend of the court cannot meet all of its duties mandated by court administrative order and state and federal statutes. Furthermore, the rest of the court's work can only be performed if the employees work at "110 percent" and no one goes on vacation or gets sick. As previously stated, clear error exists only when the appellate court ' "is left with the definite and firm conviction that a mistake has been made.' "[33] The

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[30] Bench trial volume II, p 485.

[31] *Id*.

[32] Bench trial volume II, pp 484-485 (emphasis added).

[33] *In re Miller, supra* at 337 (citation omitted).

lead opinion has not provided a factual basis to justify its "definite and firm conviction that a mistake has been made" because there is evidence on the record to support Judge Kolenda's factual finding that the Trial Court cannot comply with its statutory requirements because of its shortage of manpower.

Finally, the lead opinion asserts that the Trial Court *created* the morale problem:

> [A]ny claimed morale problems that did exist among the Trial Court's employees seem predicated upon the Chief Judge's own unilateral promise to provide the enhanced benefits. To this extent, the Trial Court is seeking to require the counties to pay for a problem that it has arguably created.[34]

The lead opinion misstates the facts. Judge Davis did not make a unilateral promise to provide enhanced benefits, nor did he create the morale problem.

Judge Kolenda specifically found that on December 4, 2000, Chief Judge Davis "issued an implementation order which recited that '[e]ach of the Funding Units has passed resolutions accepting the benefit shifts which are governed by this order.' "[35] One week later, the Kalkaska board rescinded its approval of the retiree health care fund and the pension upgrade; then on February 1, 2001, the Crawford board also rescinded its acceptance of the health care fund for retirees.[36]

Thus, at the time that Judge Davis entered the implementation order that gave the employees their new benefits, he was acting according to the existing approval of the counties. The morale problem was

[34] *Ante* at 154.

[35] Trial Court opinion, *supra* at 16.

[36] *Id.* at 17.

created when the counties reconsidered their decision to adopt the retiree health care and pension benefits.

There was testimony offered to establish that Judge Davis did not make a unilateral promise of benefits. Linda Franklin, the probate register in Crawford County, explained how Judge Davis informed the employees of the proposed benefit package. She describes the process as a "*proposed*" exchange of "certain substantial benefits" for "better benefits." At no time did Linda Franklin state that the enhanced benefits were "promised" to her or the other employees:

> Judge Davis called a staff meeting for the court employees in all three counties, I believe in the summer of 2000. *At that meeting he explained to the employees what he was going to propose as far as standardizing and increasing the benefits for the three county court employees.*
>
> In return he requested that we give up certain substantial benefits that we had as a contribution to obtaining those better benefits for all of us.
>
> He asked us to give up our longevity payments. He asked us to give up a certain percentage of our wage increases over a three-year period. And he asked us to accept a different health plan that would gave a higher co-pay for prescription drugs and doctor visits, I believe.
>
> * * *
>
> The Court's employees, I believe, were excited *and we wanted to do what we could to try to obtain these better benefits,* and so we all assented at that meeting that we would be willing to give up those substantial benefits if he were able to increase our benefits to these higher levels.[37]

This evidence refutes the lead opinion's theory that Chief Judge Davis created the morale problem by making a unilateral promise to provide enhanced benefits.

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[37] Bench trial volume II, pp 533-534 (emphasis added).

D

Judge Kolenda found that the benefits are *reasonable* because they were modest, not excessive, the product of sound judgment, and available to other employees in the counties.[38]

First, Judge Kolenda found the retiree health care benefit was reasonable because it was "capped at a modest annual sum," stating:

> The counties are not being asked to provide healthcare benefits to court employees. That could be expensive, although, given the need for healthcare coverage, what fair compensation might require, but the counties are being asked only to make modest, defined annual contributions to a fund from which the Court will buy whatever benefits can be acquired with the assets in that fund. The counties have no exposure beyond the annual contribution, which, even as it escalates, is capped at a modest annual sum.[39]

Second, Judge Kolenda found that the amount requested for the benefits package was "reasonable" because the benefits were not excessive, and the product of sound judgment, stating:

> In sum, a proposed appropriation is reasonable, even though considerably more than what a funding unit is willing to provide, if it is not excessive, e.g., is comparable to what other courts spend on like activities; if it is within the funding unit's ability to pay; and if it reflects sound judgment, e.g., is the product of careful analysis and thought. The budget which the Trial Court proposes in these cases meets those tests. Therefore, that court is entitled to have that budget fully funded.[40]

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[38] The majority does not address whether the benefits were reasonable. *Ante* at 155 n 15.

[39] Trial Court opinion, *supra* at 48.

[40] *Id.* at 47.

Third, Judge Kolenda determined that the pension plan is reasonable because it is available to some other employees in Crawford and Kalkaska counties, as well as some employees in nearby counties.[41]

Finally, Judge Kolenda found that the enhanced pension was "not excessive" even though it is the "top of the line" pension available through the state pension system. The lead opinion disagrees with this finding, and contends that the benefits are not reasonable and necessary because the requested appropriation is the "maximum" necessary to improve employee morale, asserting:

> Also, the Chief Judge admitted at trial that he specifically asked for "the best [pension] plan that's available." Trial transcript at 342. In other words, the requested appropriation, by its own terms, comprises the *maximum* necessary to improve employee morale, not what was "reasonable and necessary" to ensure that its employees could carry out the Trial Court's constitutional responsibilities.[42]

The statement that the requested appropriation is the "*maximum* necessary to improve employee morale" is taken out of context. At trial, Judge Davis testified:

> [U]nder the [old benefit package], you offer to pay a pension benefit to somebody that either is not sufficient or is barely sufficient to pay . . . [for] the group health care plan once they retire.
>
> So 20 years of service, [and] out the door they go. . . . [Their health care costs] just [eat] up every nickel of [their pension]. And what are you living on? Social Security or your savings or maybe you get another job.[43]

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[41] *Id*.

[42] *Ante* at 154 (emphasis in original).

[43] Bench trial volume II, p 346.

With this pension deficit in mind, Judge Davis made the following statements regarding the "maximum" pension:

> So the time has come . . . to recognize that these people have done what's been asked of them and I feel for a variety of reasons that we have . . . two glaring deficits in our overall structure.
>
> Number one, we have not a good pension circumstance with the MERS [Municipal Employees' Retirement System] pensions that are afforded to . . . court people. Plus they are different county to county and I want unification. . . . [T]hat's our goal. And so what I want from you is the best MERS plan that's available . . .
>
> The second thing that is a glaring problem . . . is there's no provision for these people when they leave work for any kind of healthcare. They're just on their own. . . . It's a problem in attracting people. It is a double-edged sword in that respect: In all the time I've been involved in county government, I've seen circumstances where people . . . who should go because they are tired, they're worn out, they're sick . . .; [but] they don't go because this is the only place they can get their medical benefits. . . . So I want some kind of medical retirement plan for these people.[44]

Judge Davis was asserting that the "maximum" pension is reasonable because the larger pension keeps the retirees from having to dip into their life savings or take a second job to pay for their living expenses.

The lead opinion would establish as a rule of law that the "maximum" benefit out of those available to a court could *never* be considered reasonable and necessary. But Judge Kolenda found that the "maximum" pension was both necessary and reasonable under these specific circumstances, stating:

> The proposed pension upgrade is also not excessive. That it is the "top of the line" pension available through

[44] *Id.* at 342-343.

> MERS does not mean that it is extravagant. First of all, being more generous than other pensions does not mean extravagant. It simply means more than something which is less. . . .
>
> * * *
>
> Further buttressing the conclusion that the B-4 pension is not excessive is the fact that it is part of the benefit package which the Trial Court must provide in order to retain its employees and compete for qualified replacements. What is needed to be competitive cannot possibly be deemed excessive, even if somewhat generous.[45]

Under *In re Miller*,[46] clear error exists only when the appellate court " 'is left with the definite and firm conviction that a mistake has been made.' " Review of the record does not show that Judge Kolenda clearly erred in finding that the enhanced pension plan and the retiree health care plan are reasonable.

CONCLUSION

As Judge Kolenda noted, the evidence in this case consists of six days of hearings, 14 witness testimonials, and 5,500 pages of exhibits. Judge Kolenda "read and carefully considered" all of the evidence before he held that the employee benefits were both reasonable and necessary. The lead opinion has failed to justify its "definite and firm conviction that a mistake has been made." Without the facts necessary to establish a "definite and firm conviction," the judgments of Judge Kolenda and the Court of Appeals should be upheld.

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[45] Trial Court opinion, *supra* at 48. As stated above, Judge Kolenda also found that the benefits are reasonable because they were modest, not excessive, the product of sound judgment, and available to other employees in the counties.

[46] *In re Miller, supra* at 337 (citation omitted).

The fact-finder has not clearly erred simply because the appellate court is convinced that it would have decided the case differently.[47]

CAVANAGH and KELLY, JJ., concurred with WEAVER, J.

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[47] *Anderson*, *supra* at 573.

In re HALEY

Docket No. 127453. Argued December 14, 2005 (Calendar No. 1). Decided July 31, 2006.

The Judicial Tenure Commission (JTC) filed a complaint with the Supreme Court against Judge Michael J. Haley of the 86th District Court, alleging impropriety or the appearance of impropriety in the judge's acceptance of football tickets from the attorney of a criminal defendant while the judge was on the bench presiding over a court session that involved the defendant. The Supreme Court appointed retired Circuit Judge Casper O. Grathwohl to act as master in the matter. Judge Grathwohl subsequently concluded that, while Judge Haley's actions were improper, they did not constitute judicial misconduct. The examiner who conducted the proceeding on behalf of the JTC objected. The JTC heard oral argument on the objection, found judicial misconduct, and issued a recommendation and order of discipline. Seven of the nine members of the JTC recommended public censure and two recommended public censure and a suspension without pay for 30 days. Judge Haley appealed.

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

The respondent violated Canon 5(C) of the Code of Judicial Conduct. The tickets did not fall within any of the listed exceptions for gifts. The acceptance of the tickets was not an instance of "ordinary social hospitality." The misconduct of the respondent significantly harmed the public's perception of the judiciary and warrants a public censure.

1. The determination whether the acceptance of a particular gift is consistent with ordinary social hospitality requires an objective analysis regarding how a reasonable observer would view the gift.

2. Social hospitality, for purposes of the phrase "ordinary social hospitality," requires a social context. Here, the context of the acceptance of the tickets was a judicial context, not a social context. The fact that the gift was offered in open court by a litigant in a pending case excludes the possibility that the event can objectively be characterized as ordinary social hospitality.

3. The more general "appearance of impropriety" standard of Canon 2 does not govern an act of judicial conduct when a specific canon or court rule controls and explicitly either authorizes or prohibits that act. Where there is no specific canon or court rule that pertains to a particular act, the "appearance of impropriety" standard of Canon 2 may be used to determine whether a judge engaged in an act of misconduct.

4. Public censure is a proportionate measure of discipline in this matter where the respondent failed to uphold a specific canon in the Code of Judicial Conduct and jeopardized public confidence in the integrity and impartiality of the judiciary by his inappropriate lapse in ethical judgment.

Justice CAVANAGH, concurring, agreed with the result reached by Justice KELLY in her concurring opinion, namely, that the tickets qualify as ordinary social hospitality but that Judge Haley's acceptance of the tickets in open court gave rise to an appearance of impropriety. In light of Judge Haley's exemplary record and long history of distinguished service, Justice CAVANAGH would have preferred the JTC to have resolved this matter involving Judge Haley's exercise of poor judgment without the issuance of a complaint. However, public censure appears to be an appropriate discipline in light of Const 1963, art 6, § 30 and MCR 9.205.

Justice WEAVER, concurring, agreed with the majority's decision to adopt the JTC's recommendation of a public censure for Judge Haley. She stated, however, that the majority errs in rejecting consideration of whether the judge also violated Canon 2(A) of the Code of Judicial Conduct by creating an appearance of impropriety and in refusing to consider the JTC's findings of seven additional instances of judicial misconduct. Each violation of a canon is its own breach of judicial duty and needs to be determined and recognized as a reason for the discipline imposed.

Justice KELLY, concurring, would hold that the gift of the tickets was ordinary social hospitality within the meaning of Canon 5(C)(4)(b). In making a determination on this question, the gift itself should be analyzed, not the situation surrounding the gift-giving. The circumstances surrounding the gift-giving should be analyzed under the appearance of impropriety standard of Canon 2. A judge's acceptance of a gift while on the bench during a regular court proceeding gives the appearance of impropriety under an objective test that considers what a reasonable person would believe. A judge must scrupulously observe the canons of judicial ethics when accepting gifts, and under no circumstances should a judge accept a gift while on the bench adjudicating a

proceeding. Because the misconduct in this case was spontaneous, public censure is sufficient discipline.

Public censure ordered.

1. JUDGES — CODE OF JUDICIAL CONDUCT — GIFTS — ORDINARY SOCIAL HOSPITALITY.

In determining whether a judge's acceptance of a particular gift is permitted "ordinary social hospitality" for purposes of Canon 5(C)(4)(b) of the Code of Judicial Conduct, the judge's conduct must be viewed objectively; the relevant inquiry is how a reasonable observer would view the gift.

2. JUDGES — CODE OF JUDICIAL CONDUCT — GIFTS — WORDS AND PHRASES — SOCIAL HOSPITALITY.

Social hospitality for purposes of Canon 5(C)(4)(b) of the Code of Judicial Conduct, which permits judges to accept gifts of ordinary social hospitality, requires a social context; a judge's acceptance of a gift in open court in the course of executing judicial duties does not occur in a social context and is prohibited by Canon 5(C).

3. JUDGES — CODE OF JUDICIAL CONDUCT.

The more general "appearance of impropriety" standard of Canon 2 does not govern an act of judicial conduct when a specific canon or court rule controls and explicitly either authorizes or prohibits that act; where there is no specific canon or court rule that pertains to a particular act, the "appearance of impropriety" standard of Canon 2 may be used to determine whether a judge engaged in an act of misconduct.

Paul J. Fischer, Examiner, and *Anna Marie Noeske*, Associate Examiner, for the Judicial Tenure Commission.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Brian D. Einhorn, Theresa M. Asoklis,* and *Regina T. Delmastro*), for Judge Michael J. Haley.

YOUNG, J. The Judicial Tenure Commission (JTC) has recommended that this Court publicly censure respondent 86th District Court Judge Michael Haley for accepting in open court football tickets from an attorney appearing before him. Canon 5(C)(4) of the Michi-

gan Code of Judicial Conduct prohibits a judge or family member residing in the judge's household from accepting "a gift, bequest, favor, or loan from anyone . . . ." This general prohibition is subject to three exceptions. Consistent with the JTC recommendation, we conclude that respondent violated Canon 5(C)(4), and that the gift at issue did not fit within any of the listed exceptions. In particular, respondent's acceptance of the football tickets was not an instance of "ordinary social hospitality," an exception found in Canon 5(C)(4)(b). Having decided that respondent was in violation of a specific, controlling judicial canon, we conclude that it is inappropriate to also consider whether respondent created a general appearance of impropriety under Canon 2, as urged by the examiner.

The JTC concluded, after applying the *Brown* factors,[1] that respondent's misconduct significantly harmed the public's perception of the judiciary and that this ethical lapse warranted a public censure. We agree. Accordingly, we adopt the recommendation of the JTC that respondent be publicly censured.

I. FACTS AND PROCEDURAL HISTORY

Respondent Judge Michael Haley is a member of the 86th District Court in Traverse City, Michigan. On October 14, 2003, he presided over a plea proceeding in a criminal case involving a defendant who allegedly lost control of her vehicle and destroyed a florist's sign. The prosecutor reached a plea agreement with the defendant whereby she would plead guilty of using a vehicle with improper license plates and pay restitution. The defendant and the prosecutor disagreed about the appropriate amount of restitution.

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[1] *In re Brown*, 461 Mich 1291, 1292-1293 (2000).

Respondent accepted the guilty plea and stated that the court would sentence the defendant at a future date. The defendant's attorney, Richard Benedict, a retired district judge who had resumed private practice, then approached the bench. Benedict placed two University of Michigan football tickets on the bench, at which time Benedict and respondent engaged in the following colloquy:

> *Mr Benedict*: You got to promise to go.
>
> *The Court*: It's a week from Saturday?
>
> *Mr Benedict*: No, Saturday.
>
> *The Court*: This Saturday. Hmm, I could go.
>
> *Mr Benedict*: Promise.
>
> *The Court*: I promise to go? I've got to make a phone call. Today's Tuesday, where are you tomorrow?
>
> *Mr Benedict*: The office. No, I'm in Kalkaska. If you want it, take it.
>
> *The Court*: Okay. If there's anybody else that—
>
> *Mr Benedict*: When you said you were interested, I indicated that I still have to ask another. If you can't go, somebody's got to go.
>
> *The Court*: I'll make sure somebody goes and that you get paid.
>
> *Mr Benedict*: I don't need to get paid.
>
> *The Court*: Okay. All right.
>
> *Mr Benedict*: I need to make sure there's [sic] two people sitting in the seats.

Respondent accepted the tickets. He then reconsidered his earlier decision to postpone sentencing, and sentenced the defendant to a $100 fine, $250 in court costs, a $40 state fee, an undetermined amount of restitution, and six months of probation. He later determined restitution to be $4,116.35, which was the full amount sought by the victim and the prosecutor.

Officer Terry Skurnit was the court officer present in the courtroom at the time of the plea proceeding, and he watched respondent accept the tickets. Officer Skurnit told a supervisor about the incident, who informed the prosecutor, who in turn told respondent about Skurnit's complaint. On October 31, 2003, respondent wrote a letter to Skurnit's superior, Sheriff Terry Johnson, notifying Johnson that respondent had banned Skurnit from respondent's courtroom. Skurnit then filed a request for investigation with the JTC.

After conducting a preliminary investigation, on November 18, 2004, the JTC filed a two-count complaint against respondent. Count one alleged that respondent engaged in impropriety or created an appearance of impropriety by accepting the football tickets. Count two alleged that respondent misrepresented facts to the JTC and demonstrated a lack of candor in the course of the investigation. On January 5, 2005, this Court appointed as master the Honorable Casper O. Grathwohl to preside over the hearing.

After hearing the matter, the master submitted a written report recommending no discipline on either count. The master conceded that respondent's acceptance of the football tickets was "inappropriate" and "displayed poor judgment." However, he concluded that the examiner had not proven by a preponderance of the evidence that respondent engaged in misconduct. The examiner filed an objection to the master's report, challenging the master's conclusions of law regarding count one.[2] The JTC scheduled a public hearing for July 11, 2005.

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[2] The examiner did not challenge the master's conclusion regarding count two, and dismissed that count. Accordingly, count two is no longer at issue in this case.

Following the public hearing, the JTC issued a written opinion rejecting the master's conclusions of law[3] and recommending that this Court publicly censure respondent.[4] It concluded that respondent's acceptance of the football tickets constituted:

(1) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

(2) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

(3) Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

(4) Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(5) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, 2A;

(6) Failure to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(7) Improper acceptance of a gift from a donor whose interests have come or are likely to come before you, contrary to Canon 5C(4)(c);

(8) Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2); and

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[3] The JTC criticized the master's legal conclusions for lacking any explanation or legal support.

[4] Two members of the nine-member JTC panel dissented in part from the recommendation. Although they concurred with the public censure, they also urged this Court to suspend respondent without pay for 30 days.

(9) Conduct that is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3).

The JTC rejected respondent's contention that he had not engaged in misconduct because his actions fell within two of the three exceptions to the general prohibition of accepting gifts in Canon 5(C)(4). The JTC analyzed both exceptions and concluded that the tickets did not constitute "ordinary social hospitality" and that the gift was not offered by a disinterested party.

Having found that respondent engaged in misconduct, the JTC considered the appropriate sanction under the *Brown* factors.[5] It considered five factors relevant to this disciplinary matter. First, the accep-

[5] *In re Brown*, *supra* at 1292-1293. In *Brown* this Court articulated standards for judicial discipline so that the JTC could "undertake a reasonable effort . . . to ensure a consistent rule of law" when dispensing discipline, thereby protecting the judge's due process rights. *Id*. at 1295. Thus, the *Brown* decision sought to ensure that disciplinary sanctions were both proportionate to the ethical infraction and reasonably consistent with sanctions given for similar judicial misconduct.

The standards announced in *Brown* are:

(1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;

(2) misconduct on the bench is usually more serious than the same misconduct off the bench;

(3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of impropriety;

(4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal contro-

tance of the tickets was an isolated instance rather than part of a pattern or practice of misconduct. Second, the misconduct took place on the bench rather than off the bench. Third, the misconduct was not prejudicial to the *actual* administration of justice, because respondent ordered the exact amount of restitution that had been sought by the prosecutor. Thus, there was no judicial act that appeared to favor Benedict's client. Fourth, the acceptance of the football tickets, by itself, created an appearance of impropriety. Fifth, the misconduct was not spontaneous, because respondent and Benedict had discussed the gift in the prior week. Because the misconduct took place while respondent was on the bench, it created an appearance of impropriety and was not spontaneous, the JTC believed that the conduct in question warranted some form of a sanction.

In addition to balancing the relevant *Brown* factors, in its effort to determine a proportionate sanction, the JTC considered similar disciplinary actions both from this state and from other jurisdictions. It found that disciplinary actions in Michigan provided "little guidance" because of their factual dissimilarity.[6] Therefore,

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versy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship. [*Id.* at 1292-1293.]

[6] See, e.g., *In re Lawrence*, 417 Mich 248; 335 NW2d 456 (1983) (the respondent censured, suspended, and ordered to return funds for, among other things, accepting free representation from an attorney in exchange for assigning that attorney indigent criminal cases and improperly retaining campaign funds); *In re Jenkins*, 437 Mich 15; 465 NW2d 317 (1991) (the respondent was removed from office for accepting gifts from litigants appearing before him, soliciting and accepting bribes, commu-

it turned to similar cases from other jurisdictions where the judge improperly accepted sports tickets and received a public reprimand.[7] In light of these considerations, the JTC recommended that this Court publicly censure respondent in order to restore public confidence in the integrity of the judiciary.

II. STANDARD OF REVIEW

The Michigan Constitution authorizes this Court to discipline judges upon recommendation by the JTC.[8] This Court reviews the JTC's factual findings and disciplinary recommendations de novo.[9] Findings of misconduct must be supported by a preponderance of the evidence.[10] Although we review the JTC's recommendations de novo, this Court generally will defer to the JTC's recommendations when they are adequately supported.[11]

III. ANALYSIS

a. RESPONDENT'S ACTIONS VIOLATED CANON 5(C)
OF THE CODE OF JUDICIAL CONDUCT

Respondent challenges the JTC's conclusion that he engaged in misconduct and the JTC's recommendation that he receive a public censure.[12]

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nicating ex parte with litigants, soliciting perjury from an individual, and intentionally misrepresenting information on an insurance application).

[7] See *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St 3d 213; 761 NE2d 1037 (2002); *Inquiry Concerning a Judge,* 756 So 2d 76 (Fla, 2000); *In re Daghir*, 657 A2d 1032 (Pa Ct of Judicial Discipline, 1995).

[8] Const 1963, art 6, § 30(2).

[9] *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005).

[10] *Id*.

[11] *In re Brown, supra* at 1293.

[12] Respondent argues, additionally, that the JTC violates respondent's due process rights by mixing prosecutorial and judicial functions. We

Canon 5 of the Michigan Code of Judicial Conduct regulates a judge's extrajudicial activities to "Minimize the Risk of Conflict With Judicial Duties." It specifically addresses a judge's avocational pursuits, civic and charitable involvement, financial activities, fiduciary responsibilities, arbitration, practice of law, and extrajudicial appointments. Of interest to this case is Canon 5(C), which lists financial activities from which a judge should either abstain or carefully limit his participation. For purposes of this case, we turn our attention to Canon 5(C)(4), which declares that "[n]either a judge nor a family member residing in the judge's household should accept a gift, bequest, favor or loan from anyone . . . ."

Notwithstanding its clear prohibition against accepting gifts, Canon 5(C)(4) permits a judge to do so in carefully defined situations set forth in three provisions of the canons. A judge may accept

> a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.[13]

A judge or a family member residing in the judge's household may also accept

> *ordinary social hospitality*; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not

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have considered and rejected this argument and regard the question as settled. We decline to address this claim. See *In re Chrzanowski*, 465 Mich 468, 485; 636 NW2d 758 (2001).

[13] Code of Judicial Conduct, Canon 5(C)(4)(a).

> judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.[14]

Finally, a judge or a member of the judge's household may accept

> any other gift, bequest, favor, or loan *only if the donor is not a party or other person whose interests have come or are likely to come before the judge*, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C.[15]

We agree with the JTC that respondent violated Canon 5(C) by accepting football tickets from Benedict in open court. Two of the aforementioned provisions clearly do not apply in this case. The first, Canon 5(C)(4)(a), permits specific types of gifts valued under $100, such as gifts associated with public testimonials, complimentary books provided by publishers for official use, or bar-related functions and activities devoted to the improvement of the law, the legal system, or the administration of justice. The football tickets do not fit into any of these narrow categories, so this first exception is inapposite. Second, Canon 5(C)(4)(c) permits gifts from a donor that "is not a party or other person whose interests have come or are likely to come before the judge . . . ." The record established that Benedict routinely appeared before respondent representing his clients and was actually appearing before respondent when he offered the gift. Canon 5(C)(4)(c) also does not fit the present case.

The remaining provision, Canon 5(C)(4)(b), permits the judge to accept "ordinary social hospitality." The focus of our analysis, then, is whether respondent's

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[14] Code of Judicial Conduct, Canon 5(C)(4)(b) (emphasis added).

[15] Code of Judicial Conduct, Canon 5(C)(4)(c) (emphasis added).

acceptance of the football tickets was a permissible instance of "ordinary social hospitality."

In deciding this issue, the JTC imported a multi-factor test from Illinois, *In re Corboy*, 124 Ill 2d 29, 42-43; 528 NE2d 694 (1988), to analyze whether respondent received the gift as ordinary social hospitality.[16] The *Corboy* test is an attempt to add objectivity to an inquiry that is otherwise quite fact-intensive. It considers (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor, (3) social practices and customs associated with gifts, and (4) the particular circumstances surrounding the gift.

The canons do not define the phrase "ordinary social hospitality." However, one of our guiding principles in matters of judicial discipline is that we must measure respondent's conduct objectively.[17] That is, when determining whether the acceptance of a particular gift is consistent with "ordinary social hospitality" we view the conduct through an objective lens. Whether the donor or the judge *intended* the gift to be ordinary social hospitality is irrelevant. Rather, we must inquire how the reasonable observer would view the gift.

We note that the *Corboy* test straightforwardly states some commonsense principles that help to assess whether the acceptance of a gift is an instance of "ordinary social hospitality." A reasonable observer would

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[16] In addition to referencing the Illinois test, the JTC briefly mentioned California's definition of "social hospitality" as a gift that no reasonable person would believe that (1) the donor intended to or would receive any advantage, or (2) the donee would believe that the donor intended to obtain any advantage. *Adams v Comm on Judicial Performance*, 10 Cal 4th 866, 880; 897 P2d 544 (1995). Because we resolve this case without relying on either Illinois or California's respective definitions of "ordinary social hospitality," we take no position on the propriety of these definitions to the extent they do not conflict with our reasoning in this opinion.

[17] In matters of judicial discipline, we have repeatedly used an objective approach. See *In re Ferrara*, 458 Mich 350, 362; 582 NW2d 817 (1998).

likely look to the value of the gift, the type of relationship between the donor and the recipient, the social practices associated with gifts of like kind, and the particular circumstances surrounding the particular gift-giving instance. To that extent, the *Corboy* test is not offensive to the plain meaning of the phrase "ordinary social hospitality."

However, we need not engage in the intricate balancing of the *Corboy* factors to resolve this case. Given our objective focus, we can conclude, simply from the plain meaning of the phrase "ordinary *social* hospitality," that social hospitality requires a *social* context. Here, the context of respondent's acceptance of the football tickets was not social, but rather a *judicial,* context. The singularizing fact of this case is that *respondent accepted a gift in open court in the course of executing his judicial duties*. That the gift of tickets might well be deemed "ordinary" in other contexts does not make its acceptance in a nonsocial setting consonant with the canon. It would not have mattered, for example, that Benedict and respondent had a longstanding tradition of giving and receiving football tickets. The fact that the gift was offered in open court by a litigant in a pending case excludes the possibility that the event can objectively be characterized as "*social* hospitality." We do not believe that a reasonable observer would conclude that "ordinary social hospitality" fairly describes an exchange of gifts in open court between a litigant in an immediately pending case and a judge in that same case.[18] We believe these facts are dispositive of

[18] We disagree with the assertion by the concurring justices that whether a gift is social hospitality does not depend on where the gift was made. Clearly, the context in which the gift is given and accepted bears significantly on whether the gift is "ordinary" and "social." To conclude that respondent did not violate Canon 5(C), a canon that specifically addresses the prohibition against gifts, but did violate Canon 2, would put the Code of Judicial Conduct at odds with itself. As we discuss later in this opinion, this conclusion is untenable.

this case and that they are not balanced or alleviated by any other factors.[19]

In addition to violating the explicit prohibition of Canon 5(C) against receiving gifts, the examiner also urges this Court to find that respondent created an "appearance of impropriety" in violation of Canon 2.[20] We decline to create an independent "appearance of impropriety" standard to judge respondent's behavior when there is an express, controlling judicial canon. A majority of this Court has recently agreed that

> [t]he "appearance of impropriety" standard is relevant not where there are specific court rules or canons that pertain to a subject . . . but where there are *no* specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct. Otherwise, such specific rules and canons would be of little consequence if they could always be countermanded by the vagaries of an "appearance of impropriety" standard.[21]

We reaffirm and apply that reasoning in this case. The more general "appearance of impropriety" standard does not govern when the specific prohibition in Canon

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[19] We do not mean to disapprove of all gifts given to a judge by practicing attorneys or of all gifts accepted by the judge in his or her official capacity. For example, the gift here was not merely a symbolic gift that might be provided to a judge, for example, during a ceremonial occasion such as an investiture. See Canon 5(C)(4)(a). We do not and cannot, in this decision, delineate between "ordinary social hospitality" and improper acceptance of a gift in every circumstance. However, as a basic proposition, members of the judiciary may not accept personal gifts in open court and believe that they merely are accepting "ordinary social hospitality."

[20] Code of Judicial Conduct, Canon 2(A) ("A judge must avoid all impropriety and appearance of impropriety.").

[21] *Adair v Michigan*, 474 Mich 1027, 1039 (statement of TAYLOR, C.J., and MARKMAN, J.), 1051 (statement of CORRIGAN, J.), 1053 (statement of YOUNG, J.) (2006).

5(C) controls. Otherwise, the "appearance of impropriety" standard would undermine, and potentially countermand, the remaining canons' authority to proscribe and prescribe specific judicial conduct. We reserve application of the "appearance of impropriety" standard to conduct by a judge that is neither permitted nor forbidden by a specific canon. We decline to allow general allegations of impropriety that might overlap specifically authorized or prohibited behavior and conduct to supersede canons that specifically apply to the conduct in question. Accordingly, we find respondent engaged in misconduct by accepting a gift in contravention of Canon 5(C) and is thus subject to sanctions under the Michigan Constitution[22] and our court rules that implement the Constitution.[23]

b. THE JTC'S RECOMMENDATION OF PUBLIC CENSURE IS PROPORTIONAL

The JTC recommended that respondent be publicly censured. Respondent contends that public censure is disproportionate because he did not engage in intentional conduct, intentional retaliation, crimes of violence, or physical misconduct. Respondent asserts that this Court has imposed public censure only in such instances. We disagree with respondent's position.

When determining the appropriate sanction, this Court seeks not to punish the judge, but to maintain the integrity of the judicial process and protect the citizenry from corruption and abuse.[24] With that goal in mind, we agree with the JTC that public censure is a proportionate measure of discipline. Our consideration of the pertinent *Brown* factors confirms our decision. The

[22] Const 1963, art 6, § 30.

[23] MCR 9.205(B)(2).

[24] *In re Ferrara*, *supra* at 372.

most applicable *Brown* factor cautions that misconduct on the bench is usually more serious than the same misconduct off the bench. By accepting football tickets while on the bench, respondent failed to uphold a specific canon in the Code of Judicial Conduct. He jeopardized public confidence in the integrity and impartiality of the judiciary. While respondent was clearly not accepting a bribe, his actions were an inappropriate lapse of ethical judgment, and his casual acceptance of the football tickets reflected poorly on the court—an institution that the people of this state must be able to hold in the highest regard.[25] Respondent exposed the court to unfavorable public scrutiny. Indeed, this is the type of errant behavior that the drafters of Canon 5(C) specifically intended to avoid by generally prohibiting judges from accepting gifts. For the sake of protecting the public's confidence in the impartiality of the judiciary, we believe that public censure is an appropriate sanction in this matter and reinforces a basic standard of acceptable conduct for members of the judiciary.

IV. RESPONSE TO JUSTICES KELLY AND CAVANAGH

Justices KELLY and CAVANAGH conclude that respondent's acceptance of the football tickets was, in fact, an instance of "ordinary social hospitality" within the meaning of Canon 5(C)(4)(b), but that it created an appearance of impropriety under Canon 2. In other words, although they believe that respondent's conduct is specifically *permitted* under Canon 5(C)(4)(b), they conclude that respondent nevertheless should be sanctioned. However, if we agreed with Justices KELLY and CAVANAGH that respondent's acceptance of the football tickets in open court was nothing more than an in-

[25] We agree with Justice CAVANAGH that respondent has an "exemplary record and a long history of distinguished service." *Post* at 202.

stance of "ordinary social hospitality" (which, of course, we do not) and, thus, specifically permitted under Canon 5(C)(4)(b), we would be compelled to hold that respondent should not be sanctioned. Conduct that is permitted by the canons simply cannot create an "appearance of impropriety." As observed by Chief Justice TAYLOR and Justice MARKMAN in *Adair*, it would be an ethical "snare" for judges if they could be sanctioned for actions that are permitted under the canons. We simply cannot tell judges that they are allowed to accept "ordinary social hospitality" and then sanction them for accepting the same. As with all other citizens, judges are entitled to be governed by the rule of law rather than by standardless and amorphous decision-making, in which even compliance with written law is insufficient to ensure that a judge will not be found to be in violation of such law. If Justices KELLY and CAVANAGH believe that Canon 5 is inadequate, they are free to seek its modification; however, they are not free to invoke an "appearance of impropriety" for conduct that they believe is permitted under Canon 5, but of which they personally disapprove.

Further, our determination to rely on specific judicial canons where applicable, rather than a general and less determinate "appearance of impropriety" standard, employs a principle of construction similar to that used in *Cain v Dep't of Corrections*[26] and is consistent with established principles of statutory interpretation.

In *Cain*, this Court held that a trial judge could not be disqualified under MCR 2.003(B)(1) where there was no showing of "actual bias." This Court looked *primarily* to that court rule, which specifically governs disqualification matters, and only when it found there was no violation of the disqualification rules did it *then* turn

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[26] 451 Mich 470; 548 NW2d 210 (1996).

to the more amorphous due process disqualification test found in *Crampton v Dep't of State*.[27]

Also, it is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls.[28] We have used principles of statutory construction to construe our court rules,[29] and we see no reason not to apply principles of statutory construction to the Code of Judicial Conduct to give effect to its terms.[30] Therefore, since respondent violated the specific provision in Canon 5(C), there is simply no reason to apply the more general "appearance of impropriety" standard in this case.

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[27] 395 Mich 347; 235 NW2d 352 (1975).

[28] *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

[29] See, e.g., *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

[30] Although Justice KELLY accuses the majority of upsetting past practice with this decision, it is Justices KELLY and CAVANAGH who seek to interject a remarkable principle of textual interpretation that exposes a judge to ethical violations where the judge has *complied* with a specific provision in the canons. Indeed, in not one of the cases of judicial discipline cited by Justice KELLY, *post* at 226 , did this Court find the judge in violation of Canon 2 but not in violation of a more specific court rule or canon.

We are unable to understand why Justice KELLY takes us to task for failing to "double count" for any purpose in this case a presumed violation of the "appearance of impropriety" standard in Canon 2. Justice KELLY fails to appreciate why, when there is an *actual impropriety* created by a violation of a *specific* canon, there can be no mere *appearance* of impropriety for the same conduct. An appearance of impropriety violation is subsumed by a *frank violation* of another canon. When there is a violation, there is no mere appearance of one. This is a concept that obviously eludes our colleagues.

Justice KELLY's discussion of *In re Ellender*, 889 So 2d 225 (La, 2004), misapprehends today's holding that, if a judge's action was controlled and either permitted or proscribed by a specific judicial canon, we would not separately analyze whether that act created an appearance of impropriety. It is unclear why the Louisiana decision cited by Justice KELLY is a critique of our construction of the canons.

Although our concurring colleagues' unfounded hand-wringing suggests otherwise, we are not diminishing, trivializing, or undermining the potency of the "appearance of impropriety" standard by assigning it its proper role within the Code of Judicial Conduct. We are not giving license to members of Michigan's judiciary to exercise their duties unethically. Indeed, where no canon applies that specifically allows or prohibits particular judicial conduct, the "appearance of impropriety" standard *is* appropriate and we certainly would undertake that analysis. But as we have clearly shown, such is not the case here, where respondent failed to observe the prohibition in Canon 5(C) against accepting gifts.

Justice CAVANAGH criticizes the majority because our decision today is consistent with *Adair*, in which two members of the majority responded to motions for disqualification and explained their views in this regard. Had the two justices not responded to those motions, doubtless Justice CAVANAGH would have been the first to declaim their failure to do so. Now, with the two justices having explained at length their perspectives on the relationship between the "appearance of impropriety" and specific Michigan court rules, it is apparently Justice CAVANAGH's view that the Court should not apply these same perspectives to the conduct of other judges even though a majority of justices agree with their construction.

Just as we differ with Justice CAVANAGH in our conclusion that the rule of law requires that judges, like all other citizens, should be permitted to rely on the written law in conforming their conduct without those written laws being trumped by the general and less determinate "appearance of impropriety" standard, we also differ with Justice CAVANAGH in our conclusion that

the rule of law requires the *consistent* application of controlling legal principles. We apply the *Adair* standard to Judge Haley because we conclude that it is the correct standard and, as such, it must be applied consistently to similarly situated members of the judiciary.

We believe that the "public's trust" in the judicial ethics process is far more likely to be enhanced where there is a consistent rule of law, rather than where matters are left to our concurring colleagues' evolving sense of conscience.

V. RESPONSE TO JUSTICE WEAVER

Rather than engage the members of this Court on the legal issues relevant to this case, Justice WEAVER has abandoned any pretense of persuasion or an appeal to reason and delivered herself of an unwarranted and intentionally vile personal diatribe whose sole purpose is to denounce and injure her colleagues in the majority. Her opinion here is a prologue to the more venomous allegations Justice WEAVER makes in *Grievance Administrator v Fieger*.[31] As we have responded to such allegations in *Grievance Administrator v Fieger*, we decline to dignify Justice WEAVER's splenetic opinion here by responding further to it.

VI. CONCLUSION

For the reasons stated above, we adopt the JTC's conclusion that respondent violated Canon 5(C) of the Code of Judicial Conduct and its recommendation that public censure is appropriate discipline. We consider the question whether respondent created an appearance of

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[31] 476 Mich 231; 719 NW2d 123 (2006).

impropriety by his actions on the bench to be unnecessary where a specific canon addresses his conduct and such canon has been violated. We hereby order respondent to be publicly censured, with an order to that effect to be issued immediately.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*concurring*). I concur in the result reached by Justice KELLY in her concurring opinion, namely, that the tickets qualify as ordinary social hospitality but that Judge Haley's acceptance of the tickets in open court gave rise to an appearance of impropriety.[1]

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[1] The majority's avoidance of the appearance of impropriety standard and Canon 2 can easily be explained. The majority uses this case as a vehicle to effectuate its own view on how Canon 2 is to be interpreted. It is readily apparent from today's decision that the majority does not fully embrace the appearance of impropriety standard. Indeed, it is becoming increasingly clear that the majority does not believe that the appearance of impropriety standard deserves any meaningful consideration because the majority will simply discover and rely on a more "specific" court rule or canon in a given case, as is evident from this case and the individual disqualification statements filed in *Adair v Michigan*, 474 Mich 1027 (2006). Having been the target of multiple motions for disqualification, it is understandable that the current majority prefers this approach and characterizes such accusations as "vague, subjective, and increasingly politically directed." *Adair*, *supra* at 1039 (statement by TAYLOR, C.J., and MARKMAN, J.). Without question, the majority is entitled to its own view.

But I am disappointed that the majority uses this case to transform its own view on the appearance of impropriety standard into new law. Simply stated, this case is not the proper vehicle by which to make this change, and the majority's analysis will virtually eliminate Canon 2. This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner. Accordingly, the majority's timing in this case could not be worse. If the majority has already made up its mind on the weight afforded to the appearance of impropriety standard, then I fear today's decision has the

Further, even though Judge Haley exercised poor judgment on this occasion, he has an exemplary record and a long history of distinguished service. Accordingly, I would have preferred the Judicial Tenure Commission to have resolved this matter without the issuance of a complaint. But under these particular circumstances, and in light of Const 1963, art 6, § 30 and MCR 9.205, public censure appears to be an appropriate discipline.

WEAVER, J. (*concurring*). I concur in the majority's decision to adopt the Judicial Tenure Commission's (JTC's) recommendation of a public censure for Judge Haley's acceptance of University of Michigan football tickets from a defense attorney while on the bench, in open court, during sentencing, but I strongly disagree with the majority's reasoning.

Every judicial discipline case is important, but the significance of this case goes beyond disciplining an individual judge. This case has been used by the majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) as a vehicle to rewrite how the rules of conduct that govern judges will be applied by question-

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potential to undermine this entire process and the public's trust. To many, soliciting public comment on a matter on which the majority has issued an opinion just months before will be seen as merely an exercise in futility.

Moreover, I find it troubling that the majority elected to use the disqualification statement circulated by Chief Justice TAYLOR and Justice MARKMAN in *Adair* to set forth new law in this case. Given that the statement was itself made in response to allegations of appearance of impropriety against the authors, the election to issue that statement was highly unusual, and because the statement was not binding on this Court, I question the rationale behind relying on that statement to effectuate change in this particular case. Rather, I would have preferred the current majority to address its preference on how Canon 2 should be interpreted in a more transparent manner and in a more appropriate and public forum; namely, the upcoming public hearing that has been scheduled for this precise purpose.

ing and rejecting the application of the appearance of impropriety standard in Canon 2 of the Code of Judicial Conduct.

The majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) attempts to distract from the substance of the legal issues by persistent mischaracterization of my concurrence and motives.

The two nonlawyer citizens on the nine-member JTC first raised the point that Judge Haley's actions gave the appearance of accepting a bribe:

> On its appearance the most severe conclusion that can be drawn is a bribe was offered and accepted by a judge during a trial.

Let me make it clear that I do not contend that Judge Haley *actually* accepted or was even offered a bribe. But to an objective, informed observer, it would *appear* that Judge Haley was offered and accepted a bribe for favorable treatment.

Further, I do not stand alone in disagreeing with the majority's rejection of the appearance of impropriety standard set out in Canon 2(A) of the Code of Judicial Conduct. Justices CAVANAGH, KELLY, and I agree that the majority errs in rejecting consideration of and trivializing the *appearance* of impropriety created by Judge Haley's conduct under Canon 2(A) of the Code of Judicial Conduct.

It is true, as the majority concludes, that Judge Haley violated Canon 5(C)(4)(c) of the Code of Judicial Conduct by accepting a gift during a hearing from an attorney representing a criminal defendant. But that is not the only judicial duty that the JTC found that Judge Haley's acceptance of the University of Michigan football tickets while on the bench violated.

The JTC based its recommended discipline on its conclusion that Judge Haley's acceptance of the tickets violated a total of nine judicial duties articulated by the Michigan Constitution, the Michigan Court Rules, and the Michigan Code of Judicial Conduct. Unprecedented and incorrect is the majority's holding that consideration of only the one most specific violation of judicial duty is appropriate in determining the discipline to be imposed.

The timing of the majority's new approach to JTC cases, and its vigorous rejection of the appearance of impropriety standard of Canon 2(A), is noteworthy. Canon 2(A) states in pertinent part:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. *A judge must avoid all impropriety and appearance of impropriety*. [Emphasis added.]

Members of the majority have recently been accused of their own appearances of impropriety for their participation in various cases. They have attempted to characterize these accusations as politically and philosophically motivated, but it is alarming that now the majority's apparent solution to their predicament is to rewrite how the rules that govern the conduct of judges will be applied.[1]

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[1] There have been a number of motions for disqualification against the justices in the majority based on the justices' actions. For example:

• On February 20, 2006, the Committee to Re-elect Justice Maura Corrigan sent out a fund-raising letter from former Governor John Engler stating that "[w]e cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack." This statement was one of the grounds listed in the motion for disqualification filed against Justice CORRIGAN by the respondent, Geoffrey Fieger, in *Grievance Administrator v Fieger,* 475 Mich 1211 (2006).

The majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) seriously errs in rejecting consideration of and trivializing the appearance of impropriety created by Judge Haley's conduct under Canon 2(A) of the Code of Judicial Conduct. The majority also errs in its unexplained failure to consider the JTC's findings of seven additional instances of judicial misconduct.

A

While Judge Haley was on the bench, in open court, he accepted a gift of two University of Michigan football tickets, valued at $92, from attorney Richard Benedict, during a criminal hearing in which Mr. Benedict was representing the criminal defendant. Transcripts from

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• In a speech at the Republican Party state convention on August 26, 2000, Justice YOUNG said that "Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that." This statement was one of the grounds listed in the motion for disqualification filed against Justice YOUNG by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003).

• A campaign ad paid for by "Robert Young for Justice," "Stephen Markman for Justice," and "Clifford Taylor for Justice" included the language "No wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson, Fitzgerald and Thomas" (who ran against Chief Justice TAYLOR and Justices YOUNG and MARKMAN in the 2000 Supreme Court election). This statement was one of the grounds listed in the motion for disqualification filed against Chief Justice TAYLOR and Justices YOUNG and MARKMAN by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert*.

• In *Adair v Michigan,* 474 Mich 1027 (2006), there was a motion filed asking for the disqualification of Chief Justice TAYLOR and Justice MARKMAN. Chief Justice TAYLOR's wife and Justice MARKMAN's wife are lawyers employed by the state Attorney General's office. Sharing a household and sharing income with a spouse who was given an at-will job by a public official whose office regularly appears before the Court formed the basis for the motion for disqualification filed against Chief Justice TAYLOR and Justice MARKMAN in *Adair*.

the hearing reveal that Judge Haley planned to sentence the defendant, Mr. Benedict's client, at a later date. However, after accepting the gift from the defendant's attorney, Judge Haley immediately imposed a sentence on the defendant, stating to Mr. Benedict, "I'll just sentence her right now and save you the trip back." Saving Mr. Benedict a "trip back" meant that Mr. Benedict would not have to repeat the time-consuming, approximately two-hour round trip from Traverse City to the court in Bellaire for sentencing at a second hearing.

The Judicial Tenure Commission (JTC) found that this conduct violated two provisions of the Michigan Constitution and a related Michigan court rule, two separate Michigan court rules, and five canons of the Code of Judicial Conduct. In light of these violations of judicial conduct, the JTC recommended to this Court that Judge Haley be publicly censured.

The JTC majority highlighted in its reasons for the recommended sanction that Judge Haley's acceptance of the tickets created an appearance of impropriety, noting that the appearance of impropriety "goes right to the heart of a fair, impartial, and unbiased judiciary."

The two nonlawyer, citizen members of the JTC recommended not only a public censure, but also a 30-day suspension without pay. They emphasized the appearance of impropriety created by Judge Haley's acceptance of the tickets, and stated:

> There was no reasonable argument or fact presented convincing us the Respondent [Judge Haley] appreciates the severity of his action. It is abundantly clear to us, though, that a judge taking a gift from a lawyer with a case before him—while sitting on the bench no less—severely harms the judiciary and the appearance of propriety. His

> actions may well have a negative reflection on judges everywhere. The ultimate result is erosion of the public's respect and confidence in the judiciary and our judicial system.
>
> What is most offending is this whole thing took place on the bench of a courtroom that belongs to the people of the state of Michigan. By popular vote the people bestowed on him the honor of serving them. They put their confidence and *trust* in him to render justice fairly to all who come before him. His actions violated that trust.
>
> On its appearance the most severe conclusion that can be drawn is a bribe was offered and accepted by a judge during a trial. The least is that the judge's behavior was inappropriate. Either way it was wrong. [Emphasis in original.]

B

The majority errs in refusing to consider whether Judge Haley's acceptance of football tickets on the bench violated Canon 2(A) of the Code of Judicial Conduct by creating an appearance of impropriety. The majority concludes that it is "inappropriate" to consider whether Judge Haley created an appearance of impropriety under Canon 2(A). *Ante* at 183. In so doing, the majority questions and rejects the application of the appearance of impropriety standard. Canon 2(A) provides in full:

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

Despite the Judicial Tenure Commission (JTC)'s finding that Judge Haley's acceptance of the tickets from a defense attorney while on the bench during the sentencing of the defense attorney's client created an appearance of impropriety, the majority explicitly refuses to consider whether the judge's conduct violated Canon 2(A) of the Code of Judicial Conduct by creating an appearance of impropriety.

The majority misleadingly states that it "decline[s] to create an independent 'appearance of impropriety' standard to judge respondent's [Judge Haley's] behavior when there is an express, controlling judicial canon." *Ante* at 194. In purporting to "decline to create" an appearance of impropriety standard, the majority misstates the law governing judicial disciplinary cases. There is no need to *create* an appearance of impropriety standard. That standard already exists as an express, controlling judicial canon—Canon 2(A) of the Code of Judicial Conduct. The JTC found that the violations of Canon 2(A) supported the discipline that it recommended for the judge. By refusing to consider whether there was an appearance of impropriety, the majority effectively dispenses with one of the canons in the Code of Judicial Conduct, Canon 2(A), which states that a judge should avoid the appearance of impropriety in all activities.

For the first time in the context of a JTC case, the majority opines that the Court must rely on the one most specific violation to the exclusion of any additional violations. A violation of one canon has never been deemed to subsume a violation of other canons. Any violation of any canon is its own breach of judicial duty and every separate violation needs to be determined and recognized in the reasons for the discipline imposed. This issue, whether the Court can refuse to

consider a violation of the appearance of impropriety standard of Canon 2(A), was not argued or briefed by the parties. Nevertheless, the majority uses this case to expand upon the foundation laid by Chief Justice TAYLOR and Justice MARKMAN's statement in *Adair v Michigan,*[2] where the two justices strongly criticized the appearance of impropriety standard and declined to disqualify themselves from participating in the case where their own appearance of impropriety was raised.[3]

The majority now relies on *Adair* to attack the appearance of impropriety standard of Canon 2(A). It is noteworthy that the majority now uses the statement in *Adair,* in which a party was seeking the disqualification of two justices, to rewrite how the rules governing the conduct of all judges, including the justices of this Court, will now be applied.

Moreover, it must be noted that the members of today's majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) joined in the creation of a set of required factors for the JTC to apply in judicial discipline cases to ensure that equivalent misconduct is treated equivalently.[4] Two of the *Brown*

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[2] *Adair v Michigan,* 474 Mich 1027 (2006).

[3] In their January 31, 2006, statement in *Adair,* Chief Justice TAYLOR and Justice MARKMAN explained their decisions not to recuse themselves from participating in a case in which the Attorney General was representing a party and the motion for disqualification was based on their spouses' employment with the office of the Attorney General. Justices CORRIGAN and YOUNG agreed with the legal reasoning and analysis of the statement. The alleged appearance of impropriety created by sharing household and income with a spouse who was given an at-will job by a public official whose office regularly appears before the Court was the grounds for the motion for disqualification filed against Chief Justice TAYLOR and Justice MARKMAN in *Adair*.

[4] See *In re Brown,* 461 Mich 1291, 1292-1293 (2000), authored by Justice MARKMAN.

factors that this Court determined are "relevant to the level of sanctions" to be imposed include consideration of the appearance of impropriety.[5] It is inconsistent and lacks common sense for the majority to require that the JTC consider the appearance of impropriety on the one hand, and then preclude consideration of the appearance of impropriety on the other.

The appearance of impropriety violation here—the *appearance* that the judge was accepting a bribe—is a most serious threat to the public's trust and confidence in the judiciary. This *appearance* of accepting a bribe, putting preference in the legal system on sale, and giving favored treatment in return for a gift is inherently detrimental to the legal system.

Let me make it clear again I do not contend that Judge Haley *actually* accepted or was even offered a bribe. But to an objective, informed observer, it would *appear* that Judge Haley was offered and accepted a bribe for favorable treatment.

As the JTC found, "[t]he *appearance* of impropriety in this matter, however, goes right to the heart of a fair, impartial, and unbiased judiciary."[6] The public's confidence in the judiciary is deeply shaken by the belief that some attorneys or litigants are treated differently than others on the basis of the gifts offered to a judge.

C

In addition to the majority's stated refusal to consider Judge Haley's appearance of impropriety, in violation of Canon 2(A), the majority inexplicably fails to address an additional seven instances of misconduct.

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[5] *Id.* at 1292.

[6] Judicial Tenure Commission Decision and Recommendation for Order of Discipline, p 13 (emphasis in original).

The Judicial Tenure Commission (JTC) found that Judge Haley's conduct constituted: (1) misconduct in office as defined by Const 1963, art 6, § 30 and MCR 9.205; (2) conduct clearly prejudicial to the administration of justice as defined by Const 1963, art 6, § 30 and MCR 9.205; (3) a failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to Code of Judicial Conduct, Canon 1; (4) irresponsible or improper conduct that erodes the public's confidence in the judiciary in violation of Canon 2(A); (5) conduct involving impropriety and the appearance of impropriety in violation of Canon 2(A); (6) a failure to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to Canon 2(B); (7) improper acceptance of a gift from a donor whose interests have come, or are likely to come, before the judge, contrary to Canon 5(C)(4)(c); (8) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2); and (9) conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(A)(3).

The majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) premises its acceptance of the recommended discipline on only one of the nine violations cited by the JTC. The majority apparently concludes that the violation of Canon 5(C)(4)(c), which specifically involves the improper acceptance of a gift, makes all the other violations of the Michigan Constitution, court rules, and canons enumerated by the JTC irrelevant.

But the majority's reliance on one violation does not comport with the obligations imposed on judges by the

Constitution, court rules, and canons. Nor is such reliance consistent with this Court's precedent. The separate provisions of the Constitution, court rules, and canons have consistently been understood to impose separate obligations and duties upon judges.[7] A violation of a judicial duty is its own separate offense and should continue to be recognized as such.

CONCLUSION

I accept the Judicial Tenure Commission (JTC)'s conclusion that Judge Haley was telling the truth when he stated that the gift of the tickets did not influence the sentence imposed on Mr. Benedict's client. Further, Judge Haley is to be commended for his leadership and hard work in establishing the therapeutic drug courts in the district courts of the counties of Leelanau, Grand Traverse, and Antrim, which have been of great value to the community and the judicial system.

But what occurred on the bench was wrong and unworthy of both Judge Haley and retired Judge, now

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[7] See *In re Trudel,* 468 Mich 1243 (2003) (The judge engaged in judicial misconduct in violation of Canons 1, 2[A], 2[B], 2[C], 3[B][1], 3[B][2], and 3[C].); *In re Lawrence,* 417 Mich 248; 335 NW2d 456 (1983) (The judge was found to have violated Canons 2, 3[C], and 5[C][1] of the Code of Judicial Conduct.); *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001) (The judge was found to have violated Canons 2[A], 2[C], and 3[B][4] of the Code of Judicial Conduct.); *In re Hocking,* 451 Mich 1; 546 NW2d 234 (1996) (The judge was found to have violated Canons 1, 2[A], 2[B], 3[A][3], and 3[A][8] of the Code of Judicial conduct.); *In re Del Rio,* 400 Mich 665; 256 NW2d 727 (1977) (The judge was found to have violated Canons 1, 2[A], 2[B], and 3[A][3] of the Code of Judicial conduct.); *In re Moore,* 464 Mich 98; 626 NW2d 98 (2001) (The judge was found to have violated Canons 1, 2[A], 2[B], 3[A][3], 3[A][8], 3[A][9], and 3[A][10] of the Code of Judicial Conduct.); *In re Seitz,* 441 Mich 590; 495 NW2d 559 (1993) (The judge was found to have violated Canons 1, 2[A], 2[B], 3[A][3], 3[A][5], 3[A][9], 3[B][1], and 3[B][2] of the Code of Judicial Conduct.).

practicing attorney, Richard Benedict. Judge Haley's actions in accepting the tickets on the bench, during a criminal hearing in which Mr. Benedict was representing the defendant, created an appearance of impropriety that deeply damaged the judicial system.

When confronted with Mr. Benedict's offer of free football tickets during a criminal proceeding, Judge Haley should have simply said, "Mr. Benedict, you are out of order. Please take your seat."

It should be remembered by both judges and attorneys that informality, familiarity, acts of personal friendship, and "Good Ole Boy" activity have no place in a court hearing. Court business is the only business that should be conducted during a court hearing; there should be no impropriety or appearance of impropriety in the courtroom.

The comments of the nonlawyer, citizen members of the JTC bear repeating:

> What is most offending is this whole thing took place on the bench of a courtroom that belongs to the people of the state of Michigan. By popular vote the people bestowed on [Judge Haley] the honor of serving them. They put their confidence and *trust* in him to render justice fairly to all who come before him. His actions violated that trust.
>
> On its appearance the most severe conclusion that can be drawn is a bribe was offered and accepted by a judge during a trial. The least is that the judge's behavior was inappropriate. Either way it was wrong.[8]

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[8] Because of the seriousness of the appearance of impropriety created here, I could agree with the two nonlawyer, citizen members of the JTC that Judge Haley should not merely be publicly censured, but should also be suspended without pay for 30 days. However, the JTC's recommendation of a public censure is reasonable in light of its thorough review of the *Brown* factors. Therefore, I concur with the majority's decision to adopt the recommended public censure.

The people of the state of Michigan have also put their confidence and trust in the members of this Court to uphold the law as written. It is not expected that when the going gets tough, justices who so ardently and frequently claim to be champions of judicial restraint will conveniently change the manner in which the laws governing their own conduct are to be applied.

KELLY, J. (*concurring*). This appeal is from the recommendation of the Judicial Tenure Commission (JTC) that we publicly censure respondent 86th District Court Judge Michael J. Haley. After having the benefit of full briefing and oral argument of counsel, I agree with the JTC's recommendation to publicly censure Judge Haley. However, my reasons are different from those of the majority and the JTC.

FACTUAL BACKGROUND

On October 14, 2003, after Judge Haley accepted a defendant's guilty plea, the defendant's attorney, Richard L. Benedict, asked permission of the judge to approach the bench. When Judge Haley granted the request, both Benedict and the prosecutor approached the judge. Benedict placed on the bench two tickets to an upcoming University of Michigan Wolverines football game and slid them toward the judge. The following conversation ensued:

> *Benedict*: You got to promise to go.
>
> *The Court*: It's a week from Saturday?
>
> *Benedict*: No, Saturday.
>
> *The Court*: This Saturday, Hmm, I could go.
>
> *Benedict*: Promise?
>
> *The Court*: I promise to go? I've got to make a phone call. Today's Tuesday, where are you tomorrow?

Benedict: The office. No, I'm in Kalkaska. If you want it, take it.

The Court: Okay. If there's anybody else that—

Benedict: When you said you were interested, I indicated that I still have to ask another. If you can't go somebody's got to go.

The Court: I'll make sure somebody goes and that you get paid.

Benedict: I don't need to get paid.

The Court: Okay. All right.

Benedict: I need to make sure there are two people sitting in the seats.

Then, although Judge Haley had previously stated on the record that he would sentence Benedict's client on November 6, 2003, he proceeded to sentence the defendant immediately. He later indicated that he had decided to sentence the defendant on the spot in the interest of judicial economy.

PROCEEDINGS BELOW

These events and Judge Haley's responses to the JTC investigation of them led the JTC to file a formal two-count complaint against the judge alleging: (I) "Impropriety and/or the Appearance of Impropriety" and (II) "Misrepresentation/Lack of Candor." Count II was later dismissed.

The complaint alleged that Judge Haley's conduct on October 14, 2003, constituted:

a. Misconduct in office as defined by Michigan Constitution 1963, Article VI, § 30 as amended, MCR 9.205, as amended;

b. Conduct clearly prejudicial to the administration of justice as defined by the Michigan Constitution 1963, Article VI, §30 as amended, MCR 9.205, as amended;

c. Failure to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

d. Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

e. Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of the code of Judicial Conduct, Canon 2A;

f. Failure to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

g. Allowing family, social, or other relationships to influence judicial conduct or judgment, contrary to Canon 2C;

h. Improper acceptance of a gift from a donor whose interests have come or are likely to come before the court, contrary to Canon 5C(4(c)[sic];

i. Conduct in violation of relevant portions of MCR 9.104 in that such conduct is: prejudicial to the administration of justice, contrary to MCR 9.104(1); exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(2); contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3); and violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

This Court appointed retired Circuit Court Judge Casper O. Grathwohl to act as master in this case. After hearing the evidence and reviewing the facts, Judge Grathwohl concluded that, while respondent's actions were improper, they did not constitute judicial misconduct.

The examiner, who conducted the proceeding on behalf of the JTC, objected to the master's finding that respondent's conduct did not constitute judicial misconduct. The JTC heard oral argument on the objection, found judicial misconduct, and issued a recommendation and order of discipline.

In making its recommendation, the JTC applied the factors stated in *In re Brown*, 461 Mich 1291, 1292-1293 (2000). It listed all relevant factors and applied the facts of the case to them. Mindful of this Court's desire for proportionality, the JTC also considered other case holdings involving the acceptance of gifts made in this state and in other jurisdictions.

All nine members of the JTC disagreed with the master and found that Judge Haley had indeed committed judicial misconduct. Seven of the nine recommended public censure. The two members who concurred in part and dissented in part would have publicly censured the judge and suspended him without pay for 30 days.

ISSUES ON APPEAL

On appeal, Judge Haley argues that this Court should reject the JTC's recommendation. He asserts that the finding that acceptance of the football tickets constitutes misconduct was erroneous. He argues that the Code of Judicial Conduct, Canon 5(C)(4)(b), permits the gift of football tickets as an "ordinary social hospitality." He asserts also that the JTC erred in concluding that his conduct gave the appearance of impropriety. Finally, he argues that the recommended sanction of public censure is inappropriate in light of the facts of the case.

In another argument, Judge Haley claims that combining the judicial and prosecutorial functions of the

JTC in one body violates due process. This Court recently decided this issue in *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001). I agree with the majority that combining the investigative and adjudicative functions of the JTC into one body does not offend due process. No persuasive reason has been given to revisit that decision today.

RELEVANT STANDARDS

The power to discipline a Michigan judge lies exclusively in this Court, and the Court exercises it on the recommendation of the JTC. Const 1963, art 6, § 30. This Court reviews the JTC's factual findings and disciplinary recommendations de novo. *In re Hathaway*, 464 Mich 672, 684; 630 NW2d 850 (2001). The appropriate standard of proof is a preponderance of the evidence. *In re Noecker,* 472 Mich 1, 8; 691 NW2d 440 (2005).

THE SOCIAL HOSPITALITY EXCEPTION TO CANON 5(C)

Judge Haley argues that, under the Code of Judicial Conduct, Canon 5(C)(4)(b), his act of accepting the football tickets cannot constitute misconduct. He asserts that the tickets were nothing more than a form of ordinary social hospitality.

Canon 5(C)(4) creates the category of social hospitality. It provides an exception from the prohibition regarding gifts. It states in relevant part:

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

> (b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan . . . .

The Michigan Code of Judicial Conduct does not define "ordinary social hospitality," nor has this Court defined it in case law. Other courts have developed tests to determine when a gift may be considered ordinary social hospitality.

California and Illinois courts have set out such tests. California defines a gift that qualifies as ordinary social hospitality as

> "[a] type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." [*Adams v Comm on Judicial Performance*, 10 Cal 4th 866, 880; 42 Cal Rprt 2d 606; 897 P2d 544 (1995), quoting California Judges Ass'n, Judicial Ethics Com, Opinion No 43 (1994), p 4, published in Rothman, California Judicial Conduct Handbook.]

The California Supreme Court in *Adams* emphasized that, in deciding whether something qualifies as social hospitality, the focus should be on "the reasonable perceptions of an objective observer, rather than the motive or intent on the part of the judge." *Adams, supra* at 880.

The Illinois Supreme Court in *In re Corboy*,[1] defined "social hospitality" as "routine amenities, favors, and courtesies, which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer." The court emphasized that the test is objective, the touchstone being a "careful consideration of

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[1] 124 Ill 2d 29, 42; 528 NE2d 694 (1988).

social custom." *Id*. The court in *Corboy* stated that such an evaluation should include the following factors:

> (1) The monetary value of the gift,
>
> (2) the relationship, if any, between the judge and the donor/lender lawyer,
>
> (3) the social practices and customs associated with gifts and loans, and
>
> (4) the particular circumstances surrounding the gifts and loans. [*Id.* at 43.]

I am persuaded that the *Corboy* test is in conformity with the language of Canon 5(C)(4)(b). It expresses the same meaning of "ordinary social hospitality" as is found in standard dictionaries.[2] Therefore, I would adopt the test.

The JTC weighed the *Corboy* factors and concluded that the gift of football tickets did not qualify as "ordinary social hospitality." My application of the factors yields the following findings. The monetary value of the two tickets was $92. I agree that their value is within the range of what an ordinary person would find reasonable. Therefore, this factor should be weighed in favor of Judge Haley.

The JTC placed great emphasis on the fact that the relationship between Judge Haley and Benedict did not amount to a friendship. These individuals did not frequent each other's homes or engage in activities together outside the world of legal practitioners. I agree that they did not have a social friendship. But, I disagree with the JTC that the only "social relationship" for purposes of Canon 5(C)(4)(b) is a friendship.

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[2] *Random House Webster's College Dictionary* (1997) defines "ordinary" as "customary; usual; normal." It defines "social" as "characterized by friendly companionship or relations." And it defines "hospitality" as "the friendly reception and treatment of guests and strangers."

Nothing in the canon precludes a finding that a professional relationship can occasion the giving of gifts that qualify as ordinary social hospitality. A judge and an attorney do not need to be friends for a gift to qualify as ordinary social hospitality. *Corboy* specifically states that an acquaintance relationship is sufficient. *Corboy, supra* at 42. I believe that a purely professional acquaintanceship may also give rise to a situation where an attorney may give a judge a gift acceptable under Canon 5(C)(4)(b).

There was testimony in this case that Judge Haley and Benedict have known each other for many years. It appears from the record that they were in one another's company at least two or three times a week for a period of 17 or 18 years. This supports a finding that a long professional relationship existed between them and surely qualified them as acquaintances.

The JTC found and the testimony established that Benedict had never before given Judge Haley football tickets. The JTC used this fact to find that there was no "social practice" of gift-giving between the two. I disagree with the JTC's interpretation of social practices as used in *Corboy*. The term "social practice" has a broader meaning than simply past social activities. It encompasses the local practices and customs associated with gift-giving. *Corboy, supra* at 43. Therefore the question is not only whether Benedict ever gave football tickets to Judge Haley before, but whether persons similarly situated give event tickets as gifts.

It is quite common for one person to offer another an extra ticket to a game, show, or concert. This is especially true if the donor holds season tickets and cannot attend a particular event. The facts of this case show that Benedict holds season tickets to University of Michigan football games. The facts also show that it is

common for Benedict to offer tickets to court employees. Benedict is a former judge of the court in which Judge Haley presides and has maintained a relationship with various court employees.

I find that this factor should be weighed in favor of Judge Haley because of actual social practice. Season ticket holders commonly offer tickets to acquaintances when they cannot attend an event themselves, as occurred here.

The JTC found that the circumstances surrounding the gift, the fact that the gift was made to the judge while on the bench, weigh against finding that it is "ordinary social hospitality." I agree. There is nothing ordinary about the location of the gift-giving here. A judge's acceptance of a gift while on the bench, even from a close friend, is improper. This factor should be weighed against Judge Haley.

In summary, my application of the *Corboy* factors to this case leads to a conclusion different from that reached by the JTC. Three factors weigh in favor of finding that the gift of the tickets was acceptable under Canon 5(C)(4)(b). The fourth factor, regarding the circumstances of the gift-giving, does not. However, because a professional relationship existed, the gift was valued at under $100, and it is common practice to give such gifts, I would find that the tickets qualify as "ordinary social hospitality."

The majority holds that "social hospitality requires a social context." *Ante* at 193 (emphasis omitted). It concludes that the gift of the tickets was improper because the exchange took place in a judicial context. *Id.* I disagree with this approach to determining whether a gift qualifies as "ordinary social hospitality."

It is my interpretation of the canon that the focus should be on the gift itself, not on the situation sur-

rounding the gift-giving. The pivotal fact that leads the majority to find that the gift of the tickets was improper is that the gift-giving took place in Judge Haley's courtroom. This suggests that, if it had taken place outside the courtroom, the gift would not have violated any of the judicial canons. I believe that the circumstances surrounding the gift are best evaluated under the "appearance of impropriety" standard set forth in Canon 2. I do not believe that the location of the gift-giving alone determines whether the gift is "ordinary social hospitality."

THE APPEARANCE OF IMPROPRIETY

Judge Haley argues that the JTC erred in finding that his acceptance of the gift gave the appearance of impropriety.

Canon 1 of the Code of Judicial Conduct provides:

> 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 personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

Canon 2 of the Code of Judicial Conduct provides, in part:

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
>
> A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must

avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

Judge Haley argues that the JTC used the wrong standard for determining whether there was an appearance of impropriety. He argues that this Court should apply the standard set forth in *Fredonia Broadcasting Corp v RCA Corp,* 569 F2d 251 (CA 5, 1978). There, the court applied a "layman's standard." The court held that the appearance of impropriety standard should not be defined by using the perceptions of judges or lawyers, but by using the perceptions of nonprofessional people. *Id.* at 256.

The JTC contends that the correct test is expressed in *In re Johnstone*, 2 P3d 1226 (Alas, 2000). The court in *Johnstone* held that the test is an objective one: whether a reasonable person would believe that an impropriety is afoot.

There are no Michigan cases on point concerning the applicable test for determining when an appearance of impropriety has arisen. I agree with the JTC that the correct test is the objective reasonable person test, one commonly used in the law to determine the validity of a person's conduct.[3]

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[3] The reasonable person standard appears most often in areas of law pertaining to the evaluation of human conduct, specifically, torts and criminal law. See Prosser & Keeton, Torts (5th ed), §§ 32, 31, Michigan Law & Practice, 2d ed, Torts, § 34, and *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

Therefore, the question is whether Judge Haley's conduct would have appeared improper to a reasonable person objectively viewing the transaction. Judge Haley argues that no evidence was presented showing that his conduct brought disrespect on the judiciary or had any significance to the general public.

However, I note that his own witness, Ronald Jolly, a Traverse City radio talk show host, testified that it was not appropriate for the judge to take the tickets while on the bench. Others testified that the community was confused about the transaction. The judge himself testified that he realizes in hindsight that it is improper for a judge to accept a gift from any litigant or attorney while on the bench.

I would find that there was an appearance of impropriety here. It was increased by the fact that, immediately after accepting the tickets, the judge changed his mind about when to sentence Benedict's client. To a casual reasonable observer, this suggests that the tickets had some influence on the judge. Even though in fact that may not have been true, a reasonable observer could well have concluded otherwise. This appearance of improper influence violated Canon 2 of the Michigan Code of Judicial conduct.

Judges must be conscious of their actions and be ever mindful that conduct proper in one location may be improper in another. Although taking the football tickets as a gift was not misconduct under Canon 5(C)(4)(b), it gave the appearance of impropriety when it occurred on the bench during court proceedings. In fact, I cannot think of a situation in which it would be appropriate for a judge to accept a gift, "social hospitality" or not, during a regular court proceeding. Therefore, I conclude that the JTC met its burden of proof to

show that Judge Haley's conduct created the appearance of impropriety in violation of Canon 2.

The majority holds that it is improper to sanction a judge under Canon 2 if a sanction is appropriate under a different court rule or canon which is more specific.[4] In the past, this Court has consistently found a violation of Canon 2 in cases where there was also a violation of a direct court rule or canon. See, e.g., *In re Gilbert*, 469 Mich 1224; 668 NW2d 892 (2003); *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001); *In re Moore*, 464 Mich 98; 626 NW2d 374 (2001); *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998); *In re Hocking*, 451 Mich 1; 546 NW2d 234 (1996); *In re Seitz*, 441 Mich 590; 495 NW2d 559 (1993). I see no reason, nor has the majority given a reason, to depart in this case from this Court's past treatment of Canon 2.

In its opinion, the majority loses sight of the significance of Canon 2 and sadly weakens it. It renders Canon 2 inapplicable to conduct that, although permissible under a specific canon, without question gives the appearance of impropriety. In the past, one of the functions of Canon 2 was to remind judges that with great power comes great responsibility. Benign acts performed by judges are not always perceived as benign by others. But the majority's ruling reduces the service performed by Canon 2 of fostering an atmosphere of trust and respect by those whose legal problems come before Michigan courts.

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[4] In support of its holding, the majority refers to statements in *Adair v Michigan,* 474 Mich 1027, 1039, 1051, 1053 (2006) (TAYLOR, C.J., and MARKMAN, J.) (CORRIGAN, J., concurring with TAYLOR, C.J., and MARKMAN, J.) and (YOUNG, J., concurring with TAYLOR, C.J., and MARKMAN, J.). *Adair* involved a motion for recusal brought against Chief Justice TAYLOR and Justice MARKMAN. As in this case, there was no adversarial briefing or oral argument on the application of Canon 2.

It seems obvious to me that the Code of Judicial Conduct must not only foster behavior but it must occasionally punish judges' acts that appear improper to the reasonable observer. That includes acts that comply with a particular canon but create an impermissible appearance of impropriety under the circumstances in which they are committed. The case before us provides an example of such an act.

The responsibilities of a judge extend not only to the business of the courts in its technical sense, but to the role of the judge in an institutional sense. Judges must not stigmatize the judicial system by the appearance of impropriety. Gray, A*voiding the appearance of impropriety: With great power comes great responsibility,* 28 U Ark Little Rock L Rev 63, 66 (Fall, 2005).

It has been aptly observed:

> The appearance of impropriety standard does not unfairly assume that judges lack integrity, but the alternative of asking the public simply to trust that judges are upright despite appearances ignores the public's suspicions about public officials in general as well as judges, suspicions that unfortunately have been confirmed and aggravated by scandal after scandal, some of which have involved judges. A reasonable level of cynicism by members of the public is justified; it would be naive and foolish for citizens to blindly trust any public official, and it would imprudent for judges to assume, assert, or act as if they should be exempt from that skepticism. [*Id*. at 66-67.]

The case of *In re Ellender*[5] illustrates how a judge's conduct may be innocent, yet appear improper. In that matter, the Louisiana Supreme Court considered whether a white judge's Halloween costume consisting of black face paint, a fake Afro wig, and an orange prison jumpsuit created an appearance of bias. *Id.* at

[5] 889 So 2d 225 (La, 2004).

227. The judge wore the costume at a party held at a restaurant. Five or six patrons who were not party guests were present, the restaurant being open to the public. The restaurant staff, including an African-American employee, were also present. *Id.*

Someone who saw the judge in costume complained to a local newspaper. The paper ran an article entitled "Local Judge's Masquerade Sparks Racial Concerns." *Id.* The story was picked up by local broadcast media, the Cable News Network, and two television stations in New Orleans. *Id.* The Judiciary Commission received complaints from the National Association for the Advancement of Colored People, and the judge's colleagues. *Id.* at 228.

The district attorney's office reviewed the judge's criminal case rulings and found no race-based disparity in his sentencing. *Id.* at 232. However, the Louisiana Supreme Court and the Judiciary Commission agreed that the judge's conduct "called into question his ability to be fair and impartial towards African-Americans who appear before his court as defendants in criminal proceedings, as well as towards any African-American litigant or attorney in any proceeding before him, thereby creating the appearance of impropriety." *Id.* at 229.

Both the court and the commission agreed that the judge did not intend to embarrass African-Americans. But the court concluded that "his behavior exhibits his failure to appreciate the effects of his actions on the community as a whole." *Id.* at 233.

In years past, such conduct in Michigan would have been held to violate Canon 2 and would have subjected the judge to discipline. However, I now question whether, under the majority's interpretation of Canon 2 here and in *Adair*, the judge in *In re Ellender* would be disciplined in this state for creating an appearance of

impropriety. Like Justice CAVANAGH, I question whether the majority's analysis has left anything remaining of Canon 2.

APPROPRIATE DISCIPLINE

This Court's primary concern in determining an appropriate sanction for judicial misconduct is to restore and maintain the dignity and impartiality of the legal system and to protect the public. *In re Noecker, supra* at 12-13, quoting *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998). In *In re Brown,*[6] this Court listed several factors that should be considered in deciding an appropriate sanction for a judge:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious

[6] *Supra* at 1292-1293.

than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

Central to my decision about the appropriate sanction in this case is my conclusion that the judge's conduct adversely affected the appearance of impartiality of the court. It is crucial to the functioning of the judiciary that the courts be fair and impartial and that the public perceive them that way. Judge Haley's acceptance of the tickets in open court made it appear that Benedict had an influence on the judge that was favorable to him and was not shared by others.

The courts of this state can continue to operate as a suitable forum for dispute resolution only as long as the public believes that they are unbiased and fair. Conduct like respondent's undermines the public's belief in the ability of the courts to function impartially.

Because the misconduct was spontaneous, not premeditated or deliberated, I conclude that a public censure is sufficient.

CONCLUSION

I would hold that the gift of the football tickets was ordinary social hospitality within the meaning of Canon 5(C)(4)(b) of the Michigan Code of Judicial Conduct. But the location of the gift-giving together with its timing constituted an appearance of impropriety for which the sanction of public censure is warranted. A judge must scrupulously observe the canons of judicial ethics when accepting gifts, and under no circumstances should a judge accept a gift while on the bench adjudicating a proceeding.

For the reasons stated above I concur with the majority's decision to publicly censure Judge Haley.

GRIEVANCE ADMINISTRATOR v FIEGER

Docket No. 127547. Argued March 8, 2006 (Calendar No. 9). Decided July 31, 2006.

The Attorney Grievance Commission (AGC), through the Grievance Administrator, filed a formal complaint with the Attorney Discipline Board (ADB), alleging that certain comments made by attorney Geoffrey N. Fieger about three Court of Appeals judges violated Michigan Rules of Professional Conduct 3.5(c), 6.5(a), and 8.4(a) and (c). Specifically, the respondent addressed the Court of Appeals judges by name and stated that he "declare[d] war on" them, suggested that the judges should "[k]iss my ass" and that his client should "shove [his finger] up their asses," called the judges "three jackass Court of Appeals judges," suggested that they be sodomized with a "plunger about the size of, you know my fist," and referred to them as Adolf Hitler, Joseph Goebbels, and Eva Braun. The parties stipulated (1) that the respondent would not contest that his remarks violated MRPC 3.5(c) and 6.5(a), (2) that the charges regarding MRPC 8.4(a) and (c) would be dismissed, (3) that the sanction would be a reprimand, and (4) that the respondent would be allowed to appeal. The ADB concluded that MRPC 3.5(c) and 6.5(a) applied to the respondent's statements but also that the rules violated the free speech guarantee of the First Amendment of the United States Constitution. The Supreme Court granted the application for leave to appeal filed by the Grievance Administrator on behalf of the AGC. 472 Mich 1244 (2005).

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

1. The respondent does not contest that his remarks were undignified, discourteous, and disrespectful. MRPC 3.5(c) and 6.5(a) are designed to prohibit only undignified, discourteous, and disrespectful conduct or remarks and to protect the integrity of the judicial branch of government, which requires a respected judiciary to function properly. The rules do not prohibit criticism.

2. The remarks were made while the case to which they were related was still pending in the Court of Appeals under the ordinary definition of "pending" and the applicable court rules. At

a minimum, a Court of Appeals decision is still pending under MCR 7.215(F)(1)(a) until the expiration of the time for filing an application for leave to appeal in the Supreme Court. The time for filing an application for leave to appeal in the Supreme Court had not yet expired when the respondent made the comments at issue.

3. MRPC 3.5(c) and 6.5(a) are not restricted in their application to comments made only in a courtroom or its immediate environs. Because the comments were made "in the direction of" and with respect to the three appellate judges, they were necessarily made "toward the tribunal" in violation of MRPC 3.5(c), and were also made in violation of MRPC 6.5(a) toward judges involved in an ongoing legal process.

4. The ADB, a quasi-judicial body, has no authority to declare a Michigan Rule of Professional Conduct unconstitutional. Under the Michigan Constitution, the courts alone have that authority. Const 1963, art 3, § 2.

5. Although challenges regarding the vagueness of MRPC 3.5(c) and 6.5(a) may be brought, the respondent cannot successfully advance such a challenge in this matter because there is no question that a plain reading of the rules put the respondent on notice that his language would violate the rules.

6. The respondent's remarks were not protected political speech. The comments made by the respondent were not to communicate information, but were personal abuse. Such coarseness warrants no First Amendment protection when balanced against Michigan's strong interest in maintaining a well-respected and fully functional legal system. The contested rules do not preclude the respondent from expressing disagreement, only from abusive comments that go beyond the pale of the rules. The limited restriction the rules place on the respondent's speech is no greater than is essential in furtherance of Michigan's interest in preserving and maintaining a respected and uncompromised legal system that fosters societal acceptance of and compliance with court decisions. The rules serve to vindicate the interest of the Michigan Supreme Court in the good moral character of the lawyers it has licensed to be officers of the court.

7. The respondent's vulgar and discourteous attacks on three members of the Court of Appeals were not constitutionally protected and he may be professionally disciplined for making them. The opinion and order of the ADB must be reversed, and the matter must be remanded to the ADB for entry of an order of reprimand.

Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, in a separate opinion, responded to Justice WEAVER's dissent. Specifically addressing Justice WEAVER's allegations that they are "biased and prejudiced" against the respondent and should not have participated in this case, they stated that such characterizations were false and irresponsible. They believe that their individual records over the past eight years in addressing cases concerning Mr. Fieger personally, as well as his clients, demonstrate their continuing commitment to confer on every attorney and every litigant—Mr. Fieger included—equal and evenhanded treatment under the law.

Moreover, Justice WEAVER would create an untenable judicial environment within this state. A judge could run for election but could not campaign; a judge could be sued but could not defend himself or herself; a judge could witness misconduct but could not report it; and a judge could be removed from cases at the option of attorneys and litigants. Justice WEAVER would allow only justices who have received Mr. Fieger's support, as she has, to decide whether his statements violate standards of attorney conduct, while disqualifying justices who received his opposition.

Reversed and remanded.

Justice CAVANAGH, joined by Justice WEAVER, dissenting, stated that the ADB did not declare MRPC 3.5(c) and 6.5(a) unconstitutional, so the majority erred by addressing whether the ADB can declare a rule unconstitutional. The respondent's speech did not violate those rules, which do not prohibit the type of speech at issue in this case. Considering the plain language and context of MRPC 3.5(a), the conduct challenged must occur in a tribunal or its immediate environs. The respondent's comments, however, were made during a radio broadcast; thus, they were not made "toward" the tribunal, but were far removed from the setting to which the rule applies. For a similar reason, the respondent did not violate MRPC 6.5(a) because he did not "treat" the tribunal discourteously or disrespectfully. Rather, the respondent's comments were permitted public criticism of judges, made outside the judges' presence. The respondent's comments also did not pertain to a pending case. Finally, the respondent's comments were clearly political speech protected by the First Amendment. The respondent should not be disciplined, and the ADB's decision should be affirmed.

Justice WEAVER, dissenting, stated that she joined Justice CAVANAGH's opinion on the substantive issues, but wrote separately to dissent from the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in the case. Those justices

should have recused themselves. Their statements during various judicial campaigns have displayed extreme antagonism toward and bias and prejudice against the respondent, and Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have become so enmeshed in matters involving the respondent as to make it inappropriate for them to participate in a case in which he is a party. Their participation in this case violates the respondent's rights to due process under the Fifth Amendment and the Fourteenth Amendment to an unbiased court.

Justice KELLY, dissenting, stated that the Attorney Discipline Board has the authority to declare unconstitutional a rule of professional conduct by virtue of authority delegated to the board by the Supreme Court. The board may answer constitutional questions involving attorney discipline by virtue of the power delegated to it by the Supreme Court. The respondent did not violate MRPC 3.5(c) or 6.5(a) because the comments in question were not made in court or while the case was pending. These rules are unconstitutionally vague and infringe on speech protected by the First Amendment. They do not provide fair or adequate warning of what conduct will violate the rules, and they permit selective or discriminatory enforcement. As interpreted, MRPC 3.5(c) sets no limit on when and where an attorney is free to speak his or her mind to another person. Thus, the respondent should not be sanctioned.

1. ATTORNEYS — RULES OF PROFESSIONAL CONDUCT.

Michigan Rules of Professional Conduct 3.5(c), which provides that a lawyer shall not engage in undignified or discourteous conduct toward a tribunal, and 6.5(a), which provides that a lawyer shall treat with courtesy and respect all persons involved in the legal process, are not restricted in their application to comments made in a courtroom or its immediate environs.

2. ADMINISTRATIVE LAW — ATTORNEY DISCIPLINE BOARD — CONSTITUTIONAL LAW.

The Attorney Discipline Board has no authority to declare a Michigan Rule of Professional Conduct unconstitutional.

Robert L. Agacinski, Grievance Administrator, *Robert E. Edick*, Deputy Administrator, and *Dina P. Dajani*, Associate Counsel, for the Grievance Administrator.

Mogill, Posner & Cohen (by *Kenneth M. Mogill*), *Hyman Lippitt, P.C.* (by *J. Leonard Hyman*), *Morgan-*

roth & Morganroth (by *Mayer Morganroth*), and *Schwartz, Kelly & Oltarz-Schwartz, P.C.* (by *Michael Alan Schwartz*), for Geoffrey N. Fieger.

TAYLOR, C.J. As a preliminary matter, this opinion addresses the issues raised on appeal in this case. By a separate opinion in this case, the signers of this majority opinion, Chief Justice TAYLOR, Justice CORRIGAN, Justice YOUNG, and Justice MARKMAN, respond to the allegations of Justice WEAVER regarding our suitability to sit in this case.

In this case, we conclude that certain remarks by attorney Geoffrey N. Fieger about the appellate judges who were hearing his client's case violated MRPC 3.5(c) (which prohibits undignified or discourteous conduct toward the tribunal) and MRPC 6.5(a) (which requires a lawyer to treat with courtesy and respect all persons involved in the legal process), and that those rules (sometimes referred to as "courtesy" or "civility" rules) are constitutional. Accordingly, we reverse the opinion and order of a divided Attorney Discipline Board (ADB) that incorrectly concluded the rules were unconstitutional and remand for the imposition of the agreed-to professional discipline, a reprimand, on Mr. Fieger.

I. FACTS AND PROCEEDINGS BELOW

In 1997, a jury in the Oakland Circuit Court returned a $15 million verdict in a medical malpractice action in which Mr. Fieger represented the plaintiff Salvatore Badalamenti. On appeal, the defendants hospital and physician claimed that the verdict was based on insufficient evidence and that they had been denied their constitutional right to a fair trial by Mr. Fieger's intentional misconduct. After hearing argument, a three-judge panel of the Court of Appeals, JANE MARKEY,

RICHARD BANDSTRA, and MICHAEL TALBOT, unanimously ruled on August 20, 1999, that the defendants were entitled to judgment notwithstanding the verdict because the plaintiff had failed to provide legally sufficient evidence that would justify submitting the case to the jury.[1] The panel also held that Mr. Fieger's repeated misconduct by itself would have warranted a new trial. In particular, the Court of Appeals indicated that Mr. Fieger (1) without any basis in fact, accused defendants and their witnesses of engaging in a conspiracy, collusion, and perjury to cover up malpractice, (2) asserted without any basis in fact that defense witnesses had destroyed, altered, or suppressed evidence, and (3) insinuated without any basis in fact that one of the defendants had abandoned the plaintiff's medical care to engage in a sexual tryst with a nurse. The panel described Mr. Fieger's misconduct as "truly egregious" and "pervasive" and concluded that it "completely tainted the proceedings." *Id.* at 289, 290.

Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the *Badalamenti* trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."

Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Ap-

[1] *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 289; 602 NW2d 854 (1999).

peals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think—what was Hitler's—Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."[2]

Subsequently, Mr. Fieger filed a motion for reconsideration before the same panel. After that motion was denied, this Court denied Mr. Fieger's application for leave to appeal on March 21, 2003.[3]

On April 16, 2001, the Attorney Grievance Commission (AGC), through its Grievance Administrator, filed a formal complaint with the ADB, alleging that Mr. Fieger's comments on August 23 and 25, 1999, were in violation of several provisions of the Michigan Rules of Professional Conduct, including MRPC 3.5(c), MRPC 6.5(a), and MRPC 8.4(a) and (c).[4] While the complaint was pending, the parties entered into a stipulation. In

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[2] The three appellate judges did not respond to Mr. Fieger during this period. Code of Judicial Conduct Canon 3(A)(6) states that a judge should abstain from public comments about a pending or impending proceeding in any court. The rationale for this rule is, as we stated in *In re Hocking*, 451 Mich 1, 18; 546 NW2d 234 (1996), the avoidance of a media war of words that may erode public confidence in the judiciary.

[3] *Badalamenti v William Beaumont Hosp-Troy*, 463 Mich 980 (2001).

[4] The ADB is this Court's adjudicative arm for discharging our responsibility to supervise and discipline Michigan attorneys. MCR 9.110(A). MRPC 3.5(c) provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal." MRPC 6.5(a) provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." MRPC 8.4(a) provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so

return for Mr. Fieger's agreement not to contest that his remarks had violated MRPC 3.5(c) and MRPC 6.5(a), the charges alleging a violation of MRPC 8.4(a) and (c) would be dismissed. The parties further stipulated the sanction of a reprimand. The agreement was specifically conditioned on Mr. Fieger's being allowed to argue on appeal, while the discipline was stayed, both the applicability and the constitutionality of MRPC 3.5(c) and MRPC 6.5(a). Mr. Fieger maintained that the rules were inapplicable because his remarks were made after the case was completed and were not made in a courtroom. Further, he maintained that the two rules were unconstitutional because they infringed his First Amendment rights.[5]

On appeal to the ADB, with one member recused, the remaining eight members of the ADB issued three opinions. The lead opinion, signed by board members Theodore J. St. Antoine, William P. Hampton, and George H. Lennon, concluded that MRPC 3.5(c) and MRPC 6.5(a) did not apply to Mr. Fieger's comments because they were made outside the courtroom in a case they regarded as completed. They further observed that, if the rules did apply, then they were in violation of the First Amendment. A second opinion, signed by members Lori McAllister and Billy Ben Baumann, agreed that Mr. Fieger's comments were protected by the First Amendment, but dissented from the lead opinion's conclusion that the rules only apply to remarks made within the courtroom. A third opinion,

through the acts of another[.]" MRPC 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice[.]"

[5] The First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that the government "shall make no law . . . abridging the freedom of speech . . . ." US Const, Am I.

agreeing in part with the second opinion, and signed by members Marie E. Martell, Ronald L. Steffens, and Ira Combs, Jr., held that Mr. Fieger's remarks, even though made outside the courtroom, were prohibited by the rules, and that the remarks were not protected by the First Amendment.

The sum of all this was that a majority (albeit not the same majority for each issue) concluded that the two rules applied to Mr. Fieger's out-of-court statements, while a different majority concluded that those rules were in violation of the First Amendment.[6]

The AGC, through its Grievance Administrator, sought leave to appeal in this Court. We granted leave to appeal to consider whether the remarks by Mr. Fieger, although uncontestedly discourteous, undignified, and disrespectful, nevertheless did not warrant professional discipline because they were made outside the courtroom and after the Court of Appeals had issued its opinion. We also granted leave to appeal to consider whether the ADB possesses the authority to decide issues of constitutionality and whether the two rules in question are constitutional.[7]

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[6] We disagree with Justice CAVANAGH's claim that the ADB did not find the rule unconstitutional. Reading all three opinions issued by the ADB shows that one majority found the rules applied to Mr. Fieger's conduct, but a different majority found that the Constitution forbids sanctioning Mr. Fieger for violating the rules. This is tantamount to declaring the rules unconstitutional.

[7] 472 Mich 1244 (2005). Mr. Fieger then filed a notice of removal on June 8, 2005, removing the case to federal court. Because Mr. Fieger could not "meet his burden to show removal is proper," the federal district judge granted the Grievance Administrator's motion to remand the case back to this Court on October 19, 2005. *Grievance Administrator v Fieger*, 409 F Supp 2d 858, 865 (ED Mich, 2005). Mr. Fieger appealed to the Sixth Circuit Court of Appeals. On March 10, 2006, the Sixth Circuit summarily affirmed the district court, concluding that "there is no conceivable basis to support removal of the action" under 28 USC 1443(1). Unpublished order, entered March 10, 2006 (Docket No. 05-2572).

II. STANDARDS OF REVIEW

We typically review the ADB's factual conclusion that an attorney has violated a rule of professional conduct for proper evidentiary support on the whole record. *In re Freedman*, 406 Mich 256; 277 NW2d 635 (1979); *In re Grimes*, 414 Mich 483; 326 NW2d 380 (1982). Yet, review of the record for evidentiary support of the factual conclusions is unnecessary here because Mr. Fieger's plea agreement did not contest that the remarks were "undignified, discourteous, and disrespectful." The remaining issues to be resolved are questions of law. We decide de novo the legal issues concerning the ADB's authority, construction of the rules of professional conduct, and the constitutionality of these rules. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

III. ATTORNEY LICENSURE AND DISCIPLINE IN MICHIGAN

Const 1963, art 6, § 5[8] and MCL 600.904[9] give this Court the duty and responsibility to regulate and discipline the members of the bar of this state. *Grievance Administrator v Lopatin*, 462 Mich 235, 241; 612 NW2d 120 (2000). Most obviously, this responsibility entails concern for the competence, character, and fitness of

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[8] Const 1963, art 6, § 5 provides that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

[9] MCL 600.904 provides:

> 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.

attorneys, but historically also has included the issuance of rules regulating the manner in which lawyers communicate to the public about other participants in the legal system, primarily judges and other lawyers. While many other professions are regulated with the goal of ensuring competence and fitness, it is only the legal profession that also has imposed upon its members regulations concerning the nature of public comment. The First Amendment implications are easily understood in such a regulatory regime and this Court, like other courts of last resort including the United States Supreme Court, has attempted to appropriately draw the line between robust comment that is protected by the First Amendment and comment that undermines the integrity of the legal system.

Indeed, whether this line can be drawn anywhere to take cognizance of the interests of the legal system is the central issue in this case. The proposition asserted by Mr. Fieger is that, under the First Amendment of the United States Constitution, there can be no courtesy or civility rules at all of this sort and that judges and other lawyers assailed verbally, as public figures, have the same remedies any other public figures have in libel and slander law.[10] As the opinions of the ADB suggest, the absolutism of this argument is not without some allure.[11] Yet, respect for the wisdom of those who have preceded us in the judiciary in this country and the traditions of the legal process counsel that narrow and

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[10] Mr. Fieger does not address the rule restraining judicial speech regarding a pending case. Code of Judicial Conduct, Canon 3(A)(6). See footnote 2 of this opinion.

[11] For a discussion of the "absolutist" view of the First Amendment and its problems see Stanford Law Professor John Hart Ely's *Democracy and Distrust; a Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980), pp 109-112.

carefully tailored regulations of the sort set forth in MRPC 3.5(c) and MRPC 6.5(a) are necessary adjuncts to a responsible legal system and are compatible with the First Amendment. It is first necessary to outline why such regulations are necessary at all. That is, what substantial interests are these courtesy and civility rules designed to further? In particular, are there some interests that such rules further beyond merely protecting judges from the robust criticism that is sometimes a part of the give-and-take of the democratic process? Do such rules merely insulate judges from the inconvenience of being held accountable from their public actions? In establishing rules designed to deter and sanction uncivil and discourteous conduct on the part of lawyers, we believe that this Court is doing far more than protecting the sensitivities of judges; rather, we believe that we are upholding the integrity of that which is being carried out by the judicial branch of government.

The performance of these responsibilities requires a process in which the public can have the highest sense of confidence, one in which the fairness and integrity of the process is not routinely called into question, one in which the ability of judges to mete out evenhanded decisions is not undermined by the fear of vulgar characterizations of their actions, one in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts, one in which discourse is grounded in the traditional tools of the law—language, precedents, logic, and rational analysis and debate. To disregard such interests in the pursuit of a conception of the First Amendment that has never been a part of our actual Constitution would in a real and practical sense adversely affect our rule of law, a no less indispensable foundation of our constitutional system than the First Amendment.

These interests in a responsible legal process heretofore have been unquestioned and have been thought to justify a lawyer discipline system in this state that encompasses rules on courtesy and civility toward others. Accordingly, in cases such as *Attorney General v Nelson,* 263 Mich 686, 701; 249 NW 439 (1933), and more recently in *In re Chmura*, 461 Mich 517, 535; 608 NW2d 31 (2000) (*Chmura I*), we have recognized that in order to preserve the integrity of our legal process, it is of utmost importance that the people have confidence in this process. We have recognized that rules of the sort at issue here have as their purpose considerably more than protecting the sensitivities of judges, but are designed to maintain public respect for a rule of law that is dependent on such public respect. In *Ginger v Wayne Circuit Judge*, 366 Mich 675, 679; 116 NW2d 216 (1962), we indicated that a lawyer's duty to maintain a respectful attitude toward the courts is " 'not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance.' " (Citation omitted.) In furtherance of this, the law has reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court. In this exclusive role, lawyers have special responsibilities in their relations with other officers of the court.[12]

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[12] See, e.g., *Ex parte Garland*, 71 US (4 Wall) 333, 378; 18 L Ed 366 (1867) (describing attorneys as "officers of the court," to whom the court awards that status upon a showing of their "legal learning and fair private character"), and *Goldfarb v Virginia State Bar*, 421 US 773, 792; 95 S Ct 2004; 44 L Ed 2d 572 (1975) (noting the historical treatment of lawyers as officers of the courts).

That a lawyer's role as an officer of the court is distinct and has been recognized as such can be seen, for example, in the frequent discussions

In discussing the scope of this obligation in the 19th century, the United States Supreme Court stated that attorneys are under an implied "obligation . . . to maintain at all times the respect due to courts of justice and judicial officers. This obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Bradley v Fisher*, 80 US (13 Wall) 335, 355; 20 L Ed 646 (1872).

More recently, the United States Supreme Court elaborated on this unique status:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice. [*In re Snyder*, 472 US 634, 644-645; 105 S Ct 2874; 86 L Ed 2d 504 (1985).]

Michigan has statutorily recognized this status in MCL 600.901, which provides:

> The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or

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of the standards of ethical behavior in the regular columns of the President of the Michigan State Bar in the *Michigan Bar Journal*. As merely one illustration of this recognition, in the March 2006 edition, the current President, Thomas W. Cranmer, asserts that "[l]awyers operate under strict ethical rules, and the rules are enforced" and "[o]ur disciplinary system is rigorous and active." Cranmer, *Defending Lawyers*, 66 Mich B J 14 (March, 2006).

> "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

It is to this end that our bar entrance requirements look to character as well as competence, and the bar admissions process culminates in a way unprecedented in other professions with the taking of an oath pursuant to MCL 600.913. This oath provides that the lawyer will, upon being accorded the privileges provided by membership in the bar,[13] (1) maintain the respect due to courts of justice and judicial officers, (2) abstain from all offensive personality, and (3) conduct himself or herself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in Michigan. State Bar Rule 15, § 3(1).

Moreover, MCR 9.103(A) provides:

> The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

As contemplated by this rule, this Court has promulgated the Michigan Rules of Professional Conduct. Of

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[13] The fact that membership in the bar is a privilege subject to conditions was reiterated in *Gentile v State Bar of Nevada*, 501 US 1030, 1066; 111 S Ct 2720; 115 L Ed 2d 888 (1991), in which the Court stated, " 'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo . . . ." (Citation omitted.)

immediate interest is MRPC 3.5(c), which does not preclude criticism by a member of the legal profession, of even the most robust character, but precludes only "undignified or discourteous conduct toward the tribunal." The comment on MRPC 3.5 elaborates:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Similarly, MRPC 6.5(a) provides only that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." The comment on MRPC 6.5 explains:

> A lawyer is an officer of the court, who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met.

As should be clear, these rules are designed to prohibit only "undignified," "discourteous," and "disrespectful" conduct or remarks. The rules are a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism. The wisdom of such rules was recognized by United Stated

Supreme Court Justice Potter Stewart in his concurring opinion in *In re Sawyer*, 360 US 622, 646; 79 S Ct 1376; 3 L Ed 2d 1473 (1959), in which he remarked, "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."

Equally pertinent is the Preamble to our Rules of Professional Conduct, "A lawyer should demonstrate respect for the legal system and for those that serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also the lawyer's duty to uphold legal process."

It is in this historical and professional context that Mr. Fieger's remarks must be reviewed.

IV. ANALYSIS OF THE APPLICABILITY OF THE RULES

A. WERE MR. FIEGER'S REMARKS MADE AFTER THE CONCLUSION OF THE CASE?

Mr. Fieger asserts that the remarks in controversy were made after the *Badalamenti* case was concluded. This matter is consequential because greater restraint, if indeed any is constitutionally allowed, is permissible when a case is ongoing than when it is completed. As the United States Supreme Court said in *Gentile, supra* at 1070, " 'When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.' " (Citation omitted.) Accordingly, "the speech of lawyers representing clients in pending cases may be regulated under a less

demanding standard than that established for regulation of the press . . . ." *Id.* at 1074.

The obvious question here is whether the *Badalamenti* case was actually "pending" at the time of Mr. Fieger's comments. In answering this question, we are guided both by the Michigan Court Rules and by the ordinary definition of "pending." MCR 7.215(F)(1)(a)[14] states that a Court of Appeals decision generally does not become effective until "after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court." Thus, at a minimum, a decision in the Court of Appeals is still "pending" until the expiration of the period for filing an application for leave to appeal that decision in this Court.[15] At

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[14] Similarly, under MCR 7.210(H), the Court of Appeals does not treat a case as disposed of (and so does not return the record to a lower court) until the period for application for leave to appeal before our Court expires and no motion for reconsideration or other special request remains pending in the Court of Appeals.

We note that MCR 7.317(C) and (D), rules applicable in this Court, similarly distinguish between entry of an order or opinion and issuance —i.e., the effectiveness—of the same. This distinction further suggests that time may intervene between when an order or opinion enters and when it reaches finality. Indeed, our own appellate court practice is not to remit the record to the lower court until this time has elapsed. See, e.g., *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 538-541; 539 NW2d 210 (1995) (describing how a trial court did not technically regain jurisdiction over a case until the Court of Appeals remitted the record back to the trial court); see also Black's Law Dictionary (6th ed) (defining "remittitur of record" as "[t]he returning or sending back by a court of appeal of the record and proceedings in a cause, after its decision thereon, to the court whence the appeal came . . ."). Only after the remittitur does our clerk treat a case as disposed of.

[15] We express no opinion about whether a decision of a lower court is still "pending' for attorney speech purposes after an appellate court has taken the case on appeal. It is also unnecessary for us to decide, and we do not

all times pertinent,[16] the period for filing such an application was 21 days from the date of the mailing or filing appealed from, or if a timely motion for rehearing was filed in the Court of Appeals, 21 days from the mailing of an order denying the motion. MCR 7.302(C)(2)(c). Moreover, Black's Law Dictionary (6th ed), defines "pending" as follows:

> Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminancy. Thus, an action or suit is "pending" from its inception until the rendition of final judgment.

Mr. Fieger made his remarks on August 23 and 25, 1999, three days and five days, respectively, after the Court of Appeals issued its decision, when the time for filing either for rehearing in the Court of Appeals or an application for leave to appeal in this Court had not yet expired. Indeed, Mr. Fieger ultimately did file a timely motion for rehearing in the Court of Appeals on September 10, 1999.

Because the Court of Appeals decision had not yet become effective as of the date of Mr. Fieger's comments, and because the Court of Appeals, by granting a motion for reconsideration or rehearing, could still have affected the substantial rights of his client, we conclude that the *Badalamenti* case was "begun, but not yet completed" and that Mr. Fieger's comments were made "during," "before the conclusion of," and "prior to the completion of" that case. Moreover, the case was "awaiting an occurrence or conclusion of action"—namely, the running of the aforementioned periods for

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decide here, the limits our civility rules place on lawyers after a case has been completed.

[16] MCR 7.302(C) now provides than an application must be filed within 42 days in civil cases, or within 56 days in criminal cases.

filing. During this interim, then, the case was in a "period of continuance or indeterminancy."

Thus, the *Badalementi* case was clearly still pending when Mr. Fieger made his remarks.[17]

B. DO THE RULES ONLY APPLY TO COMMENTS MADE IN A COURTROOM?

Mr. Fieger next asserts that MRPC 3.5(c) and MRPC 6.5(a) only apply to comments within a courtroom or its immediate environs. We disagree.

MRPC 3.5(c) provides that a lawyer shall not "engage in undignified or discourteous conduct *toward* the tribunal." (Emphasis added.) We note that the rule does not provide a definition of the word "toward." It is well established that if a term in a court rule is not defined, we interpret the term in accordance with its everyday, plain meaning. See, e.g., *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). *Random House Webster's*

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[17] The dissents contend that the *Badalamenti* case was not "pending" because nothing remained undecided at the time Mr. Fieger made his statements. This position is incorrect and fails to give full meaning to MCR 7.215(F)(1)(a) and MCR 7.302(C)(2)(a) and (b), which make it clear that a Court of Appeals decision does not become effective until after the expiration of the time for filing an application for leave to appeal in this Court. The dissents claim there is a difference between when a case is no longer pending and when it is effective. But, the opposite of "pending" is generally understood as "final" and there is no question that the case was not final when Mr. Fieger made his remarks. Indeed, the fact that Mr. Fieger filed a motion for rehearing in the Court of Appeals after making his comments demonstrates the case was still pending. The Court of Appeals could have changed its mind after considering the motion for rehearing. The fact that Mr. Fieger filed an application for leave to appeal in this Court, after the Court of Appeals denied the motion for rehearing, also demonstrates that the case was still pending, i.e., awaiting rendition of a final judgment. This Court could have taken summary action or action after granting leave to appeal that would have changed the Court of Appeals judgment. Thus, the *Badalamenti* case was indisputably pending when Mr. Fieger made his remarks.

College Dictionary (1997) lists several definitions of the preposition "toward," including "in the direction of" and "with respect to; as regards."

In light of this definition, we disagree with Mr. Fieger's argument that the rule is inapplicable to his statements because those statements were directed toward an audience and outside a courtroom, and, therefore, not toward a tribunal. Mr. Fieger made remarks about (a) the three judges (b) who comprised the panel (c) that ruled against his client (d) with regard to the content and value of that judgment, (e) which remarks aired on a public broadcast. Even though made outside a courtroom, Mr. Fieger's statements attacked the judges in their capacity as judges and in a forum designed to reach both the public and these judges (who were included among the members of the community who could receive this broadcast). Because such comments were "in the direction of" and "with respect to" these judges, they were necessarily comments made "toward the tribunal."

There is nothing in this phrase "toward the tribunal" that limits the applicability of the rule only to remarks made in a courtroom.[18] Mr. Fieger's construction of the rule would effectively insert the requirement that the

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[18] The dissents would limit the phrase "toward the tribunal" to comments made in a courtroom. But there is no warrant for such a limitation in the wording of MRCP 3.5(c), which contemplates a broader prohibition. Moreover, Mr. Fieger called the judges by name. Surely this demonstrates that the remarks were made "toward the tribunal." Notwithstanding Justice KELLY's assertion that this opinion "necessarily chills comment," *post* at 356, it will only "chill," those comments that are properly "chilled" among members of a profession who are bound to conduct themselves in a courteous and civil manner. In contrast with the dissents, we have no difficulty concluding that the interests of the rule of law, one of the towering achievements of our society, outweigh the interests of an officer of the court in uttering vulgar epithets toward a judge in a pending case.

conduct "actually disrupt the proceeding." Yet this language, which is in the American Bar Association version of this rule, is absent from our rule. Further, if MRPC 3.5(c) applies only when an attorney is in a courtroom, the rule would be largely superfluous, and of little practical utility, given that a court's contempt power, enforceable by fine or incarceration pursuant to MCL 600.1711(1), is always available to restore or maintain order when the offending conduct or remarks occur before the judge in the courtroom.

The construction of the rule asserted by Mr. Fieger fails to accord consideration to the importance the courtesy and civility rules serve as a vehicle for preserving the public's confidence in the integrity of the legal process. Most significantly, however, it is a construction that is not in accord with the actual language of the rule. Thus, we agree with the conclusion of the majority of the ADB that MRPC 3.5(c) applies to Mr. Fieger's remarks.

MRPC 6.5(a) provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." Mr. Fieger argues that somehow this rule does not apply to a lawyer's use of abusive language directed toward judges in the context of a radio program. Again, we disagree. MRPC 6.5(a) applies in this instance because, as the previous discussion makes obvious, the Court of Appeals judges were "persons involved in an ongoing legal process."[19]

Therefore, we conclude that the comments made by Mr. Fieger are in violation of both MRPC 3.5(c) and MRPC 6.5(a).

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[19] Mr. Fieger also asserts that this rule has only been applied in situations involving assaultive, threatening, or obstructive direct behavior. In this regard we point out that in *Grievance Administrator v Vos*, 466 Mich 1211 (2002), we specifically stated that MRPC 3.5(c) and MRPC 6.5(a) address discourteous behavior and "do not require proof of threatening behavior or statements."

V. CAN THE ADB DECLARE A RULE UNCONSTITUTIONAL?

The AGC, through its Grievance Administrator, asserts that the ADB has no authority to declare unconstitutional a rule of professional conduct. We agree.

A disciplinary proceeding in Michigan commences upon the filing of a formal complaint and is heard before a panel of three lawyers. Appeals are then taken to the ADB. The ADB is an administrative body, comprised of nine individuals appointed by this Court, three of whom are not attorneys.[20] While the ADB, like all other governmental entities, must operate in accord with the Constitution, for example, on questions such as compelled witness self-incrimination,[21] it does not possess the power to hold unconstitutional rules of professional conduct that have been enacted by this Court. As we said in *Wikman v Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982), administrative agencies generally do not possess the power to declare statutes unconstitutional because this is a core element of the "judicial power" and does not belong to an agency that is not exercising this constitutional power. The power of judicial review is one that belongs exclusively to the judicial branch of our government. *Lewis v Michigan*, 464 Mich 781, 788-789; 629 NW2d 868 (2001). Const 1963, art 3, § 2. See, also, *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968).[22]

[20] See *State Bar Grievance Administrator v Estes*, 390 Mich 585, 592; 212 NW2d 903 (1973), where this Court held that the power of the ADB's predecessor was "administrative and quasi-judicial in nature" rather than judicial.

[21] See MCR 9.113(B)(3).

[22] The dissents would hold that the ADB, although none of its members is a judge, and although some of its members are not even lawyers, may declare unconstitutional a rule of professional conduct enacted by this Court. We disagree for the reasons already stated. The power of judicial review belongs only to the judicial branch of government and nothing

Should any attorney appearing before the ADB believe a rule itself to be unconstitutional, such as in this case, resort must be made to an appeal to this Court, and, if we concur in this assessment, it is our responsibility to declare such rule unconstitutional. See MCR 9.122(A)(1) and *Fieger v Thomas*, 74 F3d 740, 747 (CA 6, 1996).[23]

VI. ARE MRPC 3.5(c) AND MRPC 6.5(a)
UNCONSTITUTIONALLY VAGUE?

Mr. Fieger next argues that whatever the other constitutional shortcomings of MRPC 3.5(c) and MRPC 6.5(a), they are unconstitutionally vague because a lawyer cannot know ahead of time which of his or her remarks might run afoul of the rules. Such a challenge cannot be successfully advanced here because there is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a). To invite the sodomization of a judge, with a client's finger, a plunger, or his own fist, and to invite a judge to kiss one's ass are statements that do not come close to the margins of the "civility" or "courtesy" rules.[24] While MRPC 3.5(c) and MRPC 6.5(a)

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within our Constitution has extended this power to the ADB. Given that only judges can exercise the core judicial power of declaring a statute or rule unconstitutional, there is no basis for the dissents' assumption that this Court could delegate this power to an agency we have created that is not composed of judges.

[23] It is also the case that a lawyer may institute an original action in the Michigan Supreme Court to implement the Court's superintending control over the ADB. MCR 7.304(A). A lawyer may also raise constitutional challenges in a complaint seeking mandamus in this Court. *Fieger v Thomas*, *supra* at 747.

[24] Justice KELLY's dissent states a concern that our rules of professional conduct might be arbitrarily or discriminatorily enforced by the AGC. Yet, we note that *any* validly enacted rule, regulation, or statute carries

are undoubtedly flexible, and the AGC will exercise some discretion in determining whether to charge an attorney with violating them, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. *Ward v Rock Against Racism*, 491 US 781, 794; 109 S Ct 2746; 105 L Ed 2d 661 (1989). A statute or rule is not required to define an offense with "mathematical certainty." *Grayned v City of Rockford*, 408 US 104, 110; 92 S Ct 2294; 33 L Ed 2d 222 (1972). Because statutes and rules are presumptively valid, they " 'are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.' " *Parker v Levy*, 417 US 733, 757; 94 S Ct 2547; 41 L Ed 2d 439 (1974) (citation omitted).

If "civility" and "courtesy" rules can *ever* satisfy constitutional muster, as we believe they can, it is beyond peradventure that the comments at issue in this case clearly violated such rules.

Mr. Fieger also argues that his remarks are political speech and thus fit within the protection afforded campaign speech in *In re Chmura (After Remand)*, 464 Mich 58, 72-73; 626 NW2d 876 (2001) (*Chmura II*). In *Chmura II* we considered the propriety of a variety of remarks made by an incumbent judge during a reelection campaign that had served as the basis for sanction by the Judicial Tenure Commission of our state. We concluded in light of the First Amendment that the

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with it the risk of arbitrary or discriminatory enforcement. Such concerns, when they arise, are typically addressed on a case-by-case basis, and Justice KELLY's dissent offers no reason to believe that alleged violations of MRPC 3.5(c) or MRPC 6.5(a) could not be handled in such a manner. Moreover, neither respondent nor Justice KELLY points to a single case in which an attorney was charged with violating our courtesy or civility rules for inconsequential behavior.

judge's statements were all constitutionally protected.[25] But, the *Chmura II* political context is entirely missing here. There was no political campaign underway nor was Mr. Fieger attempting by his comments to participate in such a campaign.[26] Thus, *Chmura II* offers no safe harbor for Mr. Fieger. See, also, *In re Palmisano*, 70 F3d 483, 487 (CA 7, 1995) (courts may require attorneys to speak with greater care and civility than is the norm in political campaigns).

Not only was Mr. Fieger's speech not campaign speech, it was not political speech of any kind. In discussing political speech, the United States Supreme Court has stated:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." [*Thornhill v Alabama*, 310 US 88, 101-102; 60 S Ct 736; 84 L Ed 1093 (1940).] The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v United States*, 354 U. S. 476, 484 [77 S Ct 1304; 1 L Ed 2d 1498] (1957). [*Meyer v Grant*, 486 US 414, 421; 108 S Ct 1886; 100 L Ed 2d 425 (1988).]

To invite the sodomization of a judge, with a client's finger, a plunger, or one's own fist, and to invite a judge to kiss one's ass can hardly be considered an "interchange of ideas for the bringing about of political and social changes." "Resort to epithets or personal abuse is not in any proper sense communication of information

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[25] The later holding of the United States Supreme Court in *Republican Party of Minnesota v White,* 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), is, we believe, harmonious with *Chmura II*.

[26] None of the three Court of Appeals judges who were the target of Mr. Fieger's comments was up for reelection until November 2002 for a six-year term beginning January 1, 2003.

or opinion safeguarded by the Constitution . . . ." *Cantwell v Connecticut*, 310 US 296, 309-310; 60 S Ct 900; 84 L Ed 1213 (1940).[27]

Mr. Fieger further urges that his remarks should receive the same broad protection the First Amendment was found to provide in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). We disagree because this is an attorney discipline matter and more restrictive rules are permissible in such a circumstance. In *Sullivan,* the United States Supreme Court created a high standard of proof for a public official seeking civil damages for defamation. Damages can only be recovered if the public figure can prove by clear and convincing evidence that the offending statements were made with knowledge that they were false or with reckless disregard of their falsity. Yet here, we deal with a matter of professional discipline. There is no

[27] In discussing cases that have given vulgar and offensive speech First Amendment protection, the dissents lose sight of the fact that we are dealing here, not with the general context of the right of citizens to speak freely, but with the very specific context of the right of attorneys, who are licensed in terms of character and fitness and who serve as officers within our legal system, to engage in such speech in the course of their professional responsibilities. In conflating these two contexts, the various dissents lose sight of the governing legal standard. In *Gentile,* the United States Supreme Court supplied the standard for a First Amendment challenge to a professional conduct rule. The Court concluded that the state had an interest in the integrity of its judicial system and that the regulation at issue there was narrowly tailored, viewpoint neutral, and left open alternative avenues for expression. *Gentile, supra* at 1071-1076. Although First Amendment jurisprudence contains a plethora of colorful cases, including *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971), and *Fed Communications Comm v Pacifica*, 438 US 726; 98 S Ct 3026; 57 L Ed 2d (1978), we need not address every imaginable argument that could be marshaled from them. As in *Chmura I*, we are bound to apply the governing standard of *Gentile*, rather than consider and dispose of every possible objection that may be found in more "general" First Amendment jurisprudence.

civil action, and, thus, *Sullivan* is inapplicable.[28] Nor are the interests that prompted *Sullivan* at all in evidence here. Whereas *Sullivan* was designed to further robust public discussion in the press, and to avoid the chilling effects on the media of defamation or libel lawsuits predicated upon mere mistakes or inaccuracies in reporting, neither of these constitutional concerns is implicated by court rules allowing the sanctioning an attorney for crude or vulgar language directed against a judge in a pending proceeding.

Further, that the First Amendment is not offended by Michigan's disciplinary rules is suggested by *Gentile v State Bar of Nevada*, *supra* at 1071, where the United States Supreme Court stated:

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Even outside the courtroom*, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U.S. 622, 3 L. Ed. 2d 79, S. Ct. 1376 (1959), observed that *lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be*. [Citations omitted; emphasis added.]

Gentile, supra at 1073, also held that in analyzing whether an ethics rule violates a lawyer's First Amendment rights, the court must engage "in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at

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[28] In *Garrison v Louisiana*, 379 US 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964), overruled on other grounds by *Curtis Publishing Co v Butts*, 388 US 130, 134 (1967), the United States Supreme Court extended the *Sullivan* standard to criminal defamation cases. But, there are no criminal charges at issue here.

issue." These state interests include promoting the respect of the courts by the citizenry and maintaining the integrity of the judicial process so as to enhance compliance with adjudications. Further, in a system with hundreds of judges, each of whom is subject to popular election, the state also has an interest in limiting attorney comment that takes the form of personal attacks on judges, because a system in which intimidating attacks are permitted fosters the risk of eventually realizing the intended effect of such attacks: a potentially cowed judiciary.

In *Sawyer*, the United States Supreme Court considered an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline to be improper, concluded that the comments had not in fact impugned the judge's integrity. But Justice Stewart, who provided the fifth vote for reversal of the sanction, observed in his concurring opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct . . . ." *Sawyer, supra* at 646. He concluded that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id*. at 646-647.

As observed, pursuant to *Gentile, supra* at 1073, to assess the constitutionality of a rule of lawyer discipline, a court must weigh the state's interests in support of the rule against an attorney's First Amendment interests in the kind of speech at issue. In this case, we must balance Mr. Fieger's right to criticize judges as he did, using foul and vulgar language, against the state's interest in the maintenance of a system of lawyer discipline that imposes some measure of limitation on such language.

Before undertaking this balancing process, it may be appropriate to consider this Court's demonstrated solicitude for lawyer speech, and in particular this lawyer's freedom of speech, by reviewing how we struck the balance with Mr. Fieger in an earlier professional disciplinary matter. In *Grievance Administrator v Fieger*, 469 Mich 1241 (2003), we declined to review a dismissal by the ADB of an AGC claim that Mr. Fieger had violated MRPC 8.2(a) when he accused a county prosecutor of covering up a murder because the ADB arguably had considered Mr. Fieger's accusations to constitute a comment or opinion on the office holder's performance of his duties. As a result, Mr. Fieger was found not to be subject to sanction for his statement. Although Mr. Fieger's comment was an irresponsible and baseless comment, and altogether unfair to the prosecutor,[29] this Court gave every benefit of the doubt to Mr. Fieger in its interpretation of what he had meant to communicate by his statement. However, there can be no similar benefit to any doubt in the current case in which Mr. Fieger has uttered the crudest and most vulgar statements concerning judges in a pending lawsuit. As the United States Supreme Court stated in *Chaplinsky v New Hampshire*, 315 US 568, 572; 62 S Ct 766; 86 L Ed 1031 (1942), quoting *Cantwell v Connecticut*, *supra* at 309-310, " 'Resort to epithets or personal

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[29] Justice CAVANAGH stated the following in his concurring statement:

> This order should not be construed as signaling any reduced interest on the part of this Court in upholding standards of professional civility and in enforcing attorney discipline when allegedly libelous or slanderous remarks are made by attorneys. I believe that the respondent's remarks here were irresponsible and reprehensible, but ultimately I would defer to the judgment of the Attorney Discipline Board that they were not sanctionable . . . . [469 Mich 1241.]

abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .' "

There is no reasonable construction of Mr. Fieger's remarks that could lead to the conclusion that these were mere comment on the professional performance of these three judges of the Court of Appeals. To call a judge a "jackass," a "Hitler," a "Goebbels," a "Braun" and to suggest that a lawyer is "declar[ing] war" on them and that the judge should "[k]iss [the lawyer's] ass," or should be anally molested by finger, fist, or plunger, is, to say the least, not to communicate information; rather, it is nothing more than personal abuse. We conclude that such coarseness in the context of an officer of the court participating in a legal proceeding warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process. *United States v O'Brien,* 391 US 367, 377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

MRPC 3.5(c) and MRPC 6.5(a) did not preclude Mr. Fieger from expressing disagreement with the judges in his case, and they did not preclude criticism, even strong criticism, from being directed toward these judges; rather, they only precluded him from casting such disagreement and criticism in terms that could only bring disrepute on the legal system. The limited restriction placed by the rules on Mr. Fieger's speech is narrowly drawn and is no greater than is necessary to maintain this state's longstanding and legitimate interests in the integrity of its legal system. *Chmura I, supra.*

As the United States Supreme Court stated in *In re Snyder, supra* at 647:

> All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.

It is also the case that our civility and courtesy rules serve to vindicate this Court's interest in the good moral character of the lawyers it has licensed to serve as officers of the court.[30] Implicit in being an officer of the court is the recognition that " 'obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.' " *Gentile, supra* at 1071 (citation omitted).[31]

Mr. Fieger's comments then are not protected under his various theories of vagueness, of political speech, or of public-figure comment. It is important, however, to reiterate that we are not now, nor have we ever in the

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[30] Judges are also subject to courtesy or civility rules and may be sanctioned for violating such rules upon recommendation of the Judicial Tenure Commission. Canon 2(B) of the Michigan Code of Judicial Conduct similarly requires judges to treat others with courtesy. MCR 9.205(B)(1) also requires judges to treat others with courtesy and respect. We have not ignored this requirement. See, e.g., *In re Moore*, 464 Mich 98, 122, 131-133; 626 NW2d 374 (2001), in which we suspended a judge after we concluded, among other things, that he had violated Code of Judicial Conduct, Canons 2(B) and 3(A) by making abusive, berating, and sarcastic comments to jurors, defendants, and attorneys. See, also, *In re Del Rio*, 400 Mich 665, 716-722; 256 NW2d 727 (1977), in which we sanctioned a judge after we concluded that he had violated Canons 2(B) and 3(A) by making crass comments, engaging in extended tongue-lashings, and making threats of retaliation against attorneys who appeared in his courtroom.

[31] This Court explained over 100 years ago in *In re Mains*, 121 Mich 603, 608-609; 80 NW 714 (1899), that an attorney has no right to so conduct himself or herself as to dishonor his or her profession or to bring the courts of this state into disrepute.

past, suggested that judges are beyond criticism.[32] As we stated in *Attorney General v Nelson, supra* at 701:

> An attorney owes devotion to the interests of his clients. He should be zealous in the maintenance and defense of their rights, and should be in no way restrained in the discharge of such duty by fear of judicial disfavor. But at the same time he should be at all times imbued with the respect which he owes to the court before whom he is practicing. It is of the utmost importance to the preservation of our system of government that our people have confidence in the integrity of our courts.

The point is that lawyers have an unquestioned right to criticize the acts of courts and judges. *In re Estes*, 355 Mich 411, 414; 94 NW2d 916 (1959). Moreover, there is no prohibition on a lawyer engaging in such criticism even during the pendency of a case. There are limitations only on the form and manner of such criticism, limitations that serve compelling interests within our constitutional and legal systems.[33]

Because Mr. Fieger does not contest that MRPC 3.5(c) and MRPC 6.5(a) were in fact violated if the questions he has raised on appeal are decided unfavorably to him, given our answers to these questions, he must now be viewed as having violated both rules.

We close by quoting the following remarks of the Ohio Supreme Court nearly a century ago when faced with the same duty to deal with a misbehaving lawyer as we are today:

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[32] Indeed, we believe that even a casual observer of Michigan government will not fail to recognize that there have been many full-throated and aggressive comments made in recent years by some members of the State Bar of Michigan concerning the performance of the courts of this state, including this Court.

[33] Justice KELLY inexplicably suggests that under our opinion, the "mere utterance of dissatisfaction could subject an attorney to harmful sanctions." *Post* at 370. This is entirely baseless, as we have clearly indicated that judge's are not beyond criticism.

> When a man enters upon a campaign of vilification he takes his fate into his own hands and must expect to be held to answer for the abuse of the privilege extended to him by the constitution. An attorney of more than twenty years' standing at the bar must be presumed to know the difference between respectful, fair and candid criticism, and scandalous abuse of the courts which gave him the high privilege, not as a matter of right, to be a priest at the altar of justice. [*In re Thatcher,* 80 Ohio St 492, 669; 89 NE 39 (1909).]

It is for all these reasons that we conclude that Mr. Fieger's vulgar and crude attacks on three members of our Court of Appeals were not constitutionally protected and that he is subject to professional discipline for having made them.

VII. RESPONSE TO JUSTICE KELLY'S AND JUSTICE CAVANAGH'S DISSENTS

In their repudiation of "courtesy" and "civility" rules, the dissents would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove. It is a legal culture in which rational and logical discourse would come increasingly to be replaced by epithets and coarse behavior, in which a profession that is already marked by declining standards of behavior would be subject to further erosion, and in which public regard for the system of law would inevitably be diminished over time.[34]

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[34] Given the position advanced by the dissenting justices in this case and in *Maldonado v Ford Motor Co,* 476 Mich 372; 719 NW2d 809 (2006),

By allowing a lawyer to say anything short of libel under *New York Times v Sullivan,* the position of the dissents would also necessarily and inevitably require that judges—persons who are periodically subject to popular reelection under our Constitution—be allowed to engage in the same kind of "free speech" to which attorneys are entitled—if only for the purposes of electoral self-defense.[35] Further, such a required loosening of the canons of judicial conduct would also likely have other lamentable effects that could quickly jeopardize even the freedom of speech lawyers currently enjoy. It is hard to imagine the lawyer who would want to test the proposition of how much effect a judge's retaliatory comment adverting to the lawyer's lack of competence, character, or the like would have on the lawyer's practice. Thus, the newly given lawyer right of speech the dissents would recognize would perversely conduce to a situation where lawyers would be silenced. While surely all would hope judges would not use this

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one wonders whether the dissenting justices would simply surrender the legal process to the least-restrained and worst-behaved members of the bar. With increasingly little need to adhere to the rules necessary to ensure public confidence in the integrity of the legal process, the dissenters would create a world in which legal questions come increasingly to be decided, not by a fair and rational search for truth, but by bullying and uncivil behavior, personal abuse, one-upmanship, and public exhibitionism on the part of those who are custodians of this system, the bar. Justice under the law cannot flourish within such a system.

[35] For a glimpse into the likely future, see Ill Sup Ct R 67, which provides:

> (3) A candidate for a judicial office:
>
> * * *
>
> (e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subsection A(3)(d).

new opportunity to intimidate the bar, the history of how authority is eventually used by those empowered is not encouraging. The dissents accord virtually no consideration to these ramifications of their position. To the majority, however, such consequences are of grave concern.

VIII. CONCLUSION

For the reasons set forth in this opinion, we reverse the opinion and order of the ADB and remand to the ADB for entry of the agreed-to order of reprimand.

CORRIGAN, YOUNG, and MARKMAN, concurred with TAYLOR, C.J.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ. With her dissent, Justice WEAVER completes a transformation begun five years ago, when all six of her colleagues voted not to renew her tenure as Chief Justice of this Court. This transformation is based neither on principle nor on "independent" views, but is rooted in personal resentment. This transformation culminates today in irresponsible and false charges that four of her colleagues are "bias[ed] and prejudice[d]" against attorney Geoffrey Fieger and therefore must be disqualified from hearing his cases—a call that Justice WEAVER, who has received Mr. Fieger's political support, seems to believe that she is uniquely privileged to make. See *post* at 328. But just as troubling, Justice WEAVER's personal agenda causes her to advance arguments—adopted wholesale from Mr. Fieger's past disqualification motions—that would lead to nonsensical results, affecting every judge in Michigan and throwing the justice system into chaos. We have addressed these

arguments on a number of occasions, but we do so again here in light of Justice WEAVER's unwarranted accusations.

In essence, Justice WEAVER would create an environment within this state that would affect every judge and that would prove utterly untenable. A judge could run for election, but could not campaign. A judge could be sued, but could not defend himself or herself. A judge could witness misconduct, but could not report it. Judges could be removed from cases at the option of attorneys and litigants, who could instigate public attacks and lawsuits against judges to force their disqualification. Judges would be intimidated, subtly and not so subtly, from carrying out their constitutionally ordained duties.

In Justice WEAVER's view, only justices who have received Mr. Fieger's support—as she has—can decide whether Mr. Fieger's public statements (suggesting the sodomization of judges who rule against his client and characterizing such judges as "assholes") violate Michigan's standards of attorney conduct. Judges who have been the object of his opposition would not be allowed to participate. It is interesting that Justice WEAVER largely grounds her arguments of "bias and prejudice" in statements that occurred between six and ten years ago. And, until very late in the process of handling this case, Justice WEAVER—who was well aware of these statements through prior disqualification motions from Mr. Fieger—did not take the position that those statements required our disqualification. One can measure the sincerity of Justice WEAVER's accusations today by her own conduct in this case. She claims today that she was compelled to publish her belief that our bias disqualifies us to participate in this case because Mr. Fieger is a "party." But Mr. Fieger has always been a party in this

case. Moreover, in two sets of disqualification motions filed by Mr. Fieger in this case, not once did Justice WEAVER ever state in the statements she filed in response to those motions that we were disqualified from participating in this case. As late as last month, when Mr. Fieger's last motion to disqualify was rejected, Justice WEAVER declined to participate and failed to state that any of the Fieger accusations she now adopts compelled our disqualification. See *Grievance Administrator v Fieger*, 475 Mich 1211 (2006). Nothing has changed since June 1, 2006.

It is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice WEAVER inflicts damage not only on her colleagues, but also on this Court as an institution. However, we do not intend to be deterred by false accusations from carrying out our constitutional duty to hear cases, including those in which Mr. Fieger is involved, and to decide these cases fairly and evenhandedly, as we have always done in the past. In particular, we invite public scrutiny of this Court's record in cases in which Mr. Fieger, personally, and his clients have been involved.

In making her charges of "bias and prejudice" Justice WEAVER essentially adopts verbatim arguments made by Mr. Fieger in various disqualification motions that each of us has already considered and rejected. However, in light of Justice WEAVER's unwarranted characterization of our positions, we explain here why we did so.

I. STATEMENTS CONCERNING MR. FIEGER

Justice WEAVER first focuses on statements made during the campaigns of three of us in 2000. (It is puzzling that Justice WEAVER has never before cited

these statements as a basis for our disqualification, given that Mr. Fieger has repeatedly cited the same statements in earlier disqualification motions that he has brought since 2000.) None of these statements properly serves as a basis for disqualifying any of us; indeed, such statements merely reflect the reality of Michigan's constitutionally mandated system of democratically electing its judiciary.

Under our Constitution, candidates for the Supreme Court are nominated at party conventions and run for election. Const 1963, art 6, § 2. In 1998, Mr. Fieger ran for Governor of Michigan on the Democrat ticket. As such, in 2000, he was the most visible member and the titular head of the Michigan Democrat Party, which was then channeling millions of dollars in opposition to our election campaigns. Mr. Fieger was outspoken, particularly about his views of our state's legal and judicial systems, and his statements received a great deal of exposure through both the media and opposition campaign communications. In addition, Mr. Fieger himself contributed substantial amounts of money in opposition to our campaigns while also being highly vocal in his political opposition.

These were Mr. Fieger's prerogatives. Yet under Justice WEAVER's analysis, neither we nor our supporters could exercise our own prerogatives to ever mention these facts in our campaigns. That is, despite our individual judgments that references by our campaigns to Mr. Fieger's opposition would assist the public in understanding our judicial positions, and would effectively contrast these positions with those of the candidates running against us, Justice WEAVER would preclude judicial candidates from communicating truthful statements to the public. In her view, statements concerning the identity of political opposition could never

be uttered lest a judicial candidate be forever precluded from hearing cases involving such persons. The public would not benefit by having less, rather than more, information about a judicial candidate. A highly visible and outspoken public figure, who is an integral part of the political opposition to a judicial candidate, cannot be insulated from mention, or even criticism, in a judicial campaign because he also happens to be a lawyer. Yet this follows if every such mention, or criticism, of political opposition requires judicial disqualification. Even more troubling, Justice WEAVER's approach to disqualification would sharply skew the campaign process. Her approach would silence judicial candidates criticized by those with regular contact with the legal system—e.g., lawyers—while permitting forceful responses from judicial candidates whose opposition comes from different quarters. Justice WEAVER would tie the hands of some—but only some—judicial candidates in defining themselves and in characterizing their judicial philosophies, not only to the detriment of those candidates, but to the detriment of the public's ability to intelligently distinguish between candidates for judicial office.

In perhaps her most troubling premise, Justice WEAVER suggests that a judicial candidate is biased with regard to individuals or organizations identified as *opposing* his or her candidacy. Yet Justice WEAVER fails to recognize that the reverse would then also be true. Would not a judicial candidate who has received the public support or endorsement of an individual or organization be, by the same token, "biased or prejudiced" in favor of those parties? "Bias or prejudice" is not a one-way street. "Bias or prejudice" can be shown either in favor of or in opposition to an individual or organization. Judges in this state (including each of the justices of this Court) who have run for election have

sought, and garnered, support from individuals and organizations, both in the form of financial assistance and endorsements. Examples of those who have offered support include labor unions, businesses and business organizations, lawyer organizations, trade associations, interest groups, prominent citizens, political leaders, and the like. Moreover, judges in this state (including, again, each of the justices on this Court) have routinely communicated such support through campaign advertising, public speeches, newspaper interviews, and fund-raising efforts.[1]

Indeed, to apply her own rule to herself, Justice WEAVER would certainly be precluded from participation in the instant case in light of the fact that she received financial contributions—the most compelling form of all endorsements—from Mr. Fieger in her most recent campaign.[2]

In short, Justice WEAVER's position has far-reaching implications for judicial selection in Michigan, which

[1] There is no reason why the *absence* of support or opposition cannot also be viewed as triggering respectively negative or affirmative "biases or prejudices." Surely, for example, if support or opposition from some person or organization that has traditionally been directed toward a candidate nominated by one political party does not occur in a particular instance, there is no reason why such a candidate could not, under Justice WEAVER's analysis, be viewed as "biased or prejudiced."

[2] Justice WEAVER dismisses Mr. Fieger's $400 contribution as "the only 'support' that Mr. Fieger gave my campaign committee," *post* at 343, as if somehow a financial contribution does not constitute *real* support for a judicial candidate. Moreover, a financial contribution has meaning beyond the dollar amount. It expresses, in a very public and concrete way, the contributor's confidence in the candidate and legitimizes the candidate within the area of the contributor's influence; that expression of confidence becomes all the more meaningful when the contributor enjoys a certain stature or is emblematic of some point of view. Precisely because of these considerations, Mr. Fieger's support of Justice WEAVER, and her acceptance and public announcement of that contribution, communicates far more than simply the dollar amount of the contribution.

the people of this state, through their Constitution, have placed into the political process. None could contest—and tellingly, Justice WEAVER herself does not contend—that any of the statements she cites in support of her allegation that we are "bias[ed] and prejudice[d]" was untrue. It shows no inherent "bias or prejudice" to point out Mr. Fieger's opposition. Similarly, it shows no "bias or prejudice" to identify the number of cases Mr. Fieger had on appeal at the time as a possible explanation for his interest in who sat on this Court. Such reference states no animus toward him, but only suggests the obvious: that Mr. Fieger is supporting and opposing candidates at least in part because he wants judges who will be most philosophically predisposed toward his cases. These statements, in our judgment, as well as identifying whom Mr. Fieger supported and whom he opposed, were a reasonable way of explaining his active participation in our campaigns and drawing relevant and comprehensible distinctions between us and our opponents. In this regard, the United States Supreme Court has observed:

> [O]pposition [to judicial elections] may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. "The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." [*Republican Party of Minnesota v White*, 536 US 765, 787-788; 122 S Ct 2528; 153 L Ed 2d 694 (2002) (citation omitted).]

In Michigan, and in other states with an elected judiciary and competitive and well-financed judicial campaigns, statements of the sort referenced by Mr. Fieger and Justice WEAVER must be permissible to help the people make informed choices among judicial candidates of differing philosophies.

The statements that were made in 2000 were accurate, relevant, and, we believe, entirely fair commentary on aspects of that year's judicial election. As was noted in *Adair v Michigan*, 474 Mich 1027, 1042 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.), if a judge does that which the law and the standards of conduct permit, such action cannot ordinarily serve as the basis for disqualification. To hold otherwise would be to make the law into a "snare" for those who are operating well within its boundaries.

There is nothing in these statements made in 2000 that would suggest that Mr. Fieger cannot obtain a fair hearing in our courtroom. We believe that this is underscored by this Court's treatment of cases in which Mr. Fieger was counsel, as well as cases in which he was a party himself, over the past seven years. We are content to maintain Michigan law as it has always been; a judge is not automatically disqualified from hearing a case involving those who have been either the judge's campaign supporters or opponents.

II. "ENMESHMENT" WITH MR. FIEGER

Justice WEAVER next focuses on the lawsuits that Mr. Fieger has filed against us as justices of this Court. Here, Justice WEAVER again essentially adopts verbatim Mr. Fieger's novel theory that a judge becomes "enmeshed" with one who sues him and that, as a result, that judge necessarily must be tempted to "vent his spleen" against the person. Under Justice WEAVER's

reasoning, a judge becomes "enmeshed" at the sole option of the person who sues the judge. As one of us recently wrote in response to Mr. Fieger's "enmeshment" argument:

> [Such "enmeshment" exists] only because [Mr. Fieger] by his own actions, specifically by initiating a series of federal lawsuits against me and other Justices of this Court, has so "enmeshed" me. It cannot be that a judge can be required to disqualify himself or herself simply on the basis of such lawsuits. *Grace v Leitman*, 474 Mich 1081 (2006); *People v Bero*, 168 Mich App 545, 552 [425 NW2d 138] (1988). To allow [Mr. Fieger's] lawsuits to constitute a basis for my disqualification because I have thereby become "enmeshed" with him would simply be to incentivize such lawsuits on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case. [*Grievance Administrator v Fieger*, 475 Mich 1211, 1212 (2006) (statement by MARKMAN, J.).]

Moreover, Justice WEAVER's argument that a judge cannot defend himself or herself against a frivolous lawsuit, or attempt to deter future frivolous lawsuits, by seeking sanctions when such lawsuits are brought would merely encourage frivolous lawsuits against judges. Indeed, if anyone can force a judge's disqualification merely by suing that judge, then any litigant would have an easy method of judge-shopping, eliminating disfavored judges until the desired judge has been obtained. The destructive effect of such a rule is too obvious to require further elaboration.

In the same "enmeshment" vein, Justice WEAVER cites several occasions on which Mr. Fieger has called us names or impugned us (e.g., "stupid," never "practiced law," has a "political agenda"), and again asserts that this has predisposed us against him. Again, Justice WEAVER's reasoning makes disqualification available at the instigator's sole option. But, it is clearly the law that

a lawyer cannot precipitate a basis for disqualification by being a provocateur. *People v Bero*, *supra* at 552. As one of us wrote earlier in response to Mr. Fieger when he originally raised this same argument:

> [Mr. Fieger] argues that I have been a "target of personal abuse" from him and cannot be fair toward him. Whatever "abuse" respondent may or may not have directed toward me, I have never once called into question the propriety of his conduct. I have never questioned his right to direct any public criticism toward me or to undertake any financial contributions against me in the course of my campaigns for judicial office. Once again, it cannot be that a judge can be required to disqualify himself or herself on the basis of "abuse" that he has allegedly received from an attorney or litigant. To allow such conduct to constitute a basis for my disqualification would again simply be to incentivize such conduct on the part of any attorney or litigant desirous of excluding a disfavored judge from participation in his or her case. [*Grievance Administrator v Fieger, supra* at 1212 (statement by MARKMAN, J.).]

It may sometimes be the case that, under circumstances such as these, a judge must conclude that he or she cannot decide a matter impartially. But, for the first 169 years of this Court's existence, that decision has always belonged to the justice alone.

III. LETTER REFERENCING MR. FIEGER

Justice WEAVER next focuses on a statement from a fund-raising letter, sent by former Michigan Governor John Engler, that mentions Mr. Fieger's name.[3] How-

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[3] The complete letter is as follows:

> One of my proudest legacies as Governor was having the honor of first appointing, then supporting jurists like Justice MAURA CORRIGAN. Justice CORRIGAN has worked to recast the Michigan Supreme Court into a nationally recognized court. Today, the MSC is one of the most important voices of judicial restraint and limited

ever, far from showing any "bias or prejudice" on any judge's part, this letter again merely bespeaks the reality of our state's system of democratic judicial elections. In order for candidates for the Supreme Court to successfully run statewide campaigns for judicial

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government. So esteemed is Justice CORRIGAN that she has twice been on President Bush's short list for the U.S. Supreme Court.

Justice CORRIGAN was elected to the Michigan Supreme Court in 1998 and served two terms as Chief Justice from 2001-2004. This November, she is seeking reelection to another eight-year term. Justice CORRIGAN has proven unequivocally by her record that Michigan will benefit from her continuing service on our state's highest court. We must work to retain our best and brightest.

In Michigan, we no longer have a Court where judges think that it is their prerogative to decide important policy questions. The majority on the Court understands the constitutional role of the judiciary.

Naturally, judicial activists in Michigan have been unhappy with our Supreme Court. They had grown accustomed to winning court rulings that they couldn't achieve through the democratic and representative process of government. Every time there is a state Supreme Court election, these activists are on the prowl, seeking to restore those good old days. This year will be no exception! We cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack.

I believe our Michigan Supreme Court is truly exceptional. We simply cannot risk a return to the days of legislating from the Bench. The court needs to keep Justice CORRIGAN, a proven, experienced, and thoughtful jurist. In the past you have contributed to the Supreme Court race. I ask that you consider making a similar contribution or as much of the maximum amount allowed by law for any individual which is $3,400. Please show your support by sending your contribution today.

Your help in returning Justice Maura CORRIGAN to the Michigan Supreme Court will protect the growing reputation of Michigan's highest court.

office, their campaign committees must raise sufficient funds to pay for campaign advertising and other campaign costs.

Indeed, as this letter indicates, the need for such funds has recently become substantially more intense. Judicial campaigns have become considerably more expensive as an increasing range of interest organizations have come to participate in these campaigns, "independent opposition" campaigns have emerged, and substantial last-minute infusions of opposition campaign spending have appeared, on one occasion on an anonymous basis.[4] In 2004, Mr. Fieger, by his own later admission in October 2005, orchestrated just such an anonymous campaign days before the election, spending $460,000 on opposition advertising. Raising money to address such efforts is a new and critical focus of contemporary judicial campaigns. The potential for significant, and well-funded, opposition requires fund-raising to offset the high costs of responding. That a fund-raising letter from a supporter cites these relevant historical facts in order to make more persuasive a plea for campaign contributions does not prevent a judge from faithfully performing his or her sworn duties.

IV. REFERRAL OF MR. FIEGER

Justice WEAVER next cites the fact that one of us referred Mr. Fieger to the Attorney Grievance Commission in 1996. In essence, she faults that justice for complying with attorney ethics rules. The Michigan Rules of Professional Conduct provide:

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[4] Moreover, the fact that Mr. Fieger would wish to maintain his anonymity by failing to report a contribution, as occurred in the 2004 campaign, may suggest precisely why those who are the targets of his contributions would wish, as occurred during 2000, to identify Mr. Fieger as a contributor to their opponents.

> A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer *shall* inform the Attorney Grievance Commission. [MRPC 8.3(a) (emphasis added).]

In other words, a judge is obligated to inform the Attorney Grievance Commission about an attorney's perceived misconduct; to fail to do so is to violate an explicit ethics rule. This rule does not distinguish between a judge who observes the alleged misconduct and a judge who is the object of it. But, under Justice WEAVER's reasoning, a judge must either turn a blind eye to attorney misconduct or risk disqualification. This simply cannot be. On the contrary, a judge who meets his or her ethical obligation to report attorney misconduct is not thereby assumed to be biased or unable to review impartially cases that come before him or her.[5]

Additionally, our Court—usually with Justice WEAVER's participation—has at times directed our clerk of court to refer attorneys to the Attorney Grievance Commission and judges to the Judicial Tenure Commission for investigation. No one has ever suggested that this practice, necessary when attorney or judicial conduct warrants further inquiry, bars justices from later considering either those cases or other cases involving

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[5] Moreover, even if, for the sake of argument, an Attorney Grievance Commission referral may have required a judge's disqualification at some point in time—which we emphatically believe it does not—the thread running through Mr. Fieger's (and Justice WEAVER's) analyses is that, once a judge has ever done something that may require his or her disqualification—utter a remark six years ago about a lawyer, refer a lawyer ten years ago to a disciplinary body—this effectively imposes a lifetime disability on that judge. This is manifestly incorrect. The proper inquiry is not whether a judge, *at some point in time* may have been unable to consider a person's case impartially, but whether the judge is *presently* unable to do so.

these attorneys or judges. By Justice WEAVER's logic, because the mere act of referral displays actual bias, justices could never again sit whenever an attorney's or a judge's prior act had warranted a referral for investigation.

V. FURTHER OBSERVATIONS

(1) Justice WEAVER, until late in the consideration of this case, did not mention what she now cites as evidence of our actual "bias and prejudice," statements made during the 2000 campaign. Six years have passed, during which none of us has made any additional statements concerning Mr. Fieger, and during which Mr. Fieger has filed numerous disqualification motions in which he has referenced the same campaign statements from 2000.

(2) In concluding that we have actual "bias and prejudice" toward Mr. Fieger, Justice WEAVER not only professes to read our minds, but intimates that she does so on the basis of access to information not generally available to the public. Neither is true.

(3) Justice WEAVER here departs from her previous practice in which, in numerous cases, she adhered to exactly the rule the majority is maintaining—that a justice resolves his or her own disqualification. In fact, as Justice WEAVER conceded in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 n 1; 693 NW2d 358 (2005) (WEAVER, J., concurring), she herself has elected not to participate in cases 251 times—a determination reached on each occasion without the participation of any other justice. As recently as June 1, 2006, she declined to decide Mr. Fieger's motions for disqualification directed at us in this case, deferring instead to our determinations as the justices targeted by these motions. *Grievance Administrator v*

Fieger, 475 Mich 1211 (2006) (statement by WEAVER, J.). Without explanation, she now abandons all her previous practices on this Court and asserts that she may participate in deciding disqualification motions directed at another justice, at her sole discretion.[6] (It is also noteworthy that Justice WEAVER's particularized concerns about Mr. Fieger's disqualification motions began only after Mr. Fieger ceased targeting *her* with these motions.)

(4) Justice WEAVER's concerns about alleged "bias and prejudice," grounded in large part on statements made in 2000 and a referral to the Attorney Grievance Commission made in 1996—neither of which has ever before been a concern of hers—is of a kind with other newfound concerns: (a) after 31 years on the bench, and, not surprisingly, never having uttered a word in favor of judicial term limits, and with the four of us having become a philosophical majority on the Court, Justice WEAVER, after announcing her intention to resign, suddenly announces her intention to not resign, promising to use her position on this Court to garner legislative support for judicial term limits; (b) after 31 years on the bench, having never uttered a word concerning the disqualification procedures that this Court has followed since 1837, and with the four of us having become the exclusive subject of disqualification motions, overwhelmingly offered by Mr. Fieger, Justice WEAVER has suddenly become a champion of altering

[6] Moreover, when, on rare occasion, Justice WEAVER herself has been the object of a disqualification motion, as in *Graves v Warner Bros,* 469 Mich 853, 854 (2003), she has been comfortable to conclude, "I am neither biased nor prejudiced for or against any of the parties or their attorneys in this case, and plaintiff asserts no grounds supporting my recusal from participating in this appeal." Thus, as long as disqualification motions have been directed against her, Justice WEAVER has been content to conform with the longstanding disqualification practices of justices of this Court. When, however, such motions are directed toward other justices, she now advocates that her own involvement is required.

disqualification procedures to make it easier to disqualify a justice for frivolous or political reasons; and (c) after 31 years on the bench, never having uttered a word about court rules that specify when judges may participate in cases involving parties that employ relatives, Justice WEAVER suddenly demands a new standard applicable to a select group of her colleagues.

VI. CONCLUSION

Each of us during our judicial service has sought to follow the highest standards of ethics and professionalism. We have sought to give faithful meaning to the law, to decide disputes fairly and impartially, and to approach each case without bias or prejudice. We are each proud of our records on this Court and, as long as we serve, are committed to conferring on every attorney and every litigant—Mr. Fieger not excepted—equal and evenhanded treatment under the law. And that is exactly what we have done in this case. A judge need not admire an individual, or respect his or her actions, in order to be able to accord the individual that which every party before this Court deserves—equal justice under law. We have looked into ourselves, as we must do whenever there is a motion for disqualification, and indeed even sometimes when there is not, and each of us has concluded that he or she is able to accord fair and impartial treatment to Mr. Fieger in this case. We believe that our individual records over the past eight years in addressing cases concerning Mr. Fieger personally, as well as his clients, clearly demonstrate this commitment.

The people of Michigan deserve better than they have gotten from Justice WEAVER today, and so do we, her colleagues.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

CAVANAGH, J. (*dissenting*). As the Attorney Discipline Board (ADB) has before explained, indeed, in the context of offensive remarks made by this very respondent,

> [f]ew if any members of the Michigan judiciary will be cowed by such outbursts. . . . [O]ur system of justice is not put at risk if these statements are not censored. The public and the profession can express their revulsion at such crudity, while at the same time feeling pride in belonging to a society that allows its expression. If we write rules governing speech to quell such antics, then we will have truly lost our bearings. The judiciary is not so fragile. It is the First Amendment that needs protection. [*Grievance Administrator v Fieger*, ADB No. 94-186-GA, opinion issued September 2, 1997 (*Fieger II*).]

Such protection has been lost today. The majority not only decides a question not before it, but, more troubling, its erroneous conclusions mark a sweeping expansion of the Michigan Rules of Professional Conduct. This expansion precipitates serious constitutional implications and, despite the majority's protestations to the contrary, does in fact impermissibly exalt the protection of judges' feelings over the sanctity of the First Amendment's guarantee of freedom of speech. Thus, I respectfully dissent.

I. THE ADB DID NOT DECLARE THE RELEVANT RULES OF PROFESSIONAL CONDUCT UNCONSTITUTIONAL, SO THE ISSUE IS NOT RIPE FOR REVIEW

Although this Court granted leave to consider whether the ADB can declare a rule of professional conduct unconstitutional, that issue is not ripe for review because the ADB did not declare a rule unconstitutional, a majority of the ADB did not opine that it had the authority to do so, and the ADB's dismissal of the complaint against respondent was not premised on the purported unconstitutionality of a rule. Thus, the majority errs in addressing this question.

In deciding respondent's appeal, the ADB issued a splintered opinion. Three of the eight participating board members wrote that respondent's conduct did not fall within the cited rules of professional conduct because the comments were not made "to" or "in" the tribunal. Framing it as an alternative basis for its holding, the lead opinion reasoned that the rules should be read narrowly to avoid constitutional problems. The lead opinion stated that even if remarks made outside the context of a pending case were actionable, the rules did not sufficiently inform a person "what statements might be deemed impermissibly discourteous or disrespectful by the Attorney Grievance Commission, or by a hearing panel, or this Board."

Two members concurred in part and dissented in part. They wrote that the rules did encompass respondent's statements, but the First Amendment protected his right to make those statements. The three remaining members dissented, opining that the rules were constitutional and that respondent violated them.

Thus, there is no need to answer the question into which the majority delves because the ADB neither declared the rules unconstitutional nor purported authority to do so. Rather, the ADB's lead opinion first held that the rules did not cover respondent's comments. Only then did it mention the constitutional aspects of the rules, but instead of declaring the rules unconstitutional, it merely held that because of the constitutional principles of free speech, the rules should be read narrowly. It then concluded that under a narrow reading, respondent's comments did not violate the rules. Of course, this view did not garner a majority, and respondent was only vindicated because two of the five remaining board members believed that respondent's comments were protected by the First Amendment. But

the true disagreement between those two factions was over whether respondent's conduct was even covered by the rules, not over whether the rules themselves were unconstitutional.[1] In other words, the rules survived the ADB's decision—the board did not purport to invalidate them. As such, any opinion by this Court regarding the ADB's power to declare rules of professional conduct unconstitutional is purely advisory in nature and outside the bounds of our constitutionally imposed duty.

Nonetheless, because the majority persists in issuing its statement on this matter, it is necessary to illuminate the error in the majority's analysis, which analysis asserts that the ADB lacks the authority to render a rule unconstitutional. In carrying out our duty to regulate the legal profession in the state of Michigan, see Const 1963, art 6, § 5 and MCL 600.904, we created a governing body that operates as a court system reserved for attorney disciplinary matters, and which mirrors the ordinary trial and appellate system. See MCR 9.101 *et seq.* The attorney discipline system consists of a prosecutorial component (the Attorney Grievance Commission [AGC]), MCR 9.108; hearing panels composed of members who act as judges by conducting public, trial-like proceedings during which they receive evidence and after which they render any necessary discipline, MCR 9.111; and a review board (the ADB),

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[1] According to the majority, this is "tantamount" to declaring the rules unconstitutional. *Ante* at 239 n 6. This is a bizarre notion to say the least. A holding that the Constitution prohibits the board from punishing this respondent's conduct is, of course, in no way an excoriation of the *rules*. Rather, the board simply found that the rules, interpreted in light of constitutional principles, could not be applied to this respondent's *conduct*. The majority takes a severely contorted view of the ADB's opinions to justify reaching this issue and, by doing so, troublesomely dilutes the doctrine of ripeness.

which fulfills the judge-like appellate function should an attorney dispute a disciplinary order of a hearing panel, MCR 9.110.

Notably, MCR 9.110(A) describes the authority we bestowed on the ADB as follows: "The Attorney Discipline Board is the adjudicative arm of the Supreme Court for *discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys*." (Emphasis added.) The ADB is further charged with disciplining attorneys, MCR 9.110(E)(5), suspending and disbarring attorneys, MCR 9.110(E)(6), and reviewing the AGC's final orders of discipline, MCR 9.110(E)(4).

It is indisputable, as Justice KELLY points out, that this Court is vested with authority to declare enactments unconstitutional. And it appears from the plain language of the court rule that we have delegated this power to the ADB. When we charged the AGC with "discharg[ing our] constitutional responsibility," we listed no restrictions in this delegation of power. And, importantly, it seems that had we intended to limit the delegation accordingly, we would have explicitly reserved that power unto ourselves when we undertook the task of delegating our constitutional power to another entity, which task was certainly not taken lightly.

Further, it makes little sense to charge the disciplinary board with carrying out this Court's duties and requiring it to discipline attorneys, reinstate them, and review final orders of discipline and dismissal in an appellate function without the benefit of deciding constitutional issues raised in that process. We have certainly not restricted trial or appellate courts from declaring enactments unconstitutional, and such rulings are always subject to this Court's review, just as are

decisions regarding attorney discipline. Moreover, the fact that we created the attorney disciplinary rules or that there are nonattorneys on the ADB is of no moment—this Court remains the final authority on any action the ADB takes, and we can overturn any of its decisions we perceive as erroneous.

In carrying out its duties, and to render a just and complete decision, it is only logical that the ADB consider any and all arguments an attorney raises in his or her defense. And constitutional issues will inevitably be raised during the attorney disciplinary process. Petitioner's assertion that the board can *consider* constitutional principles in its decision-making process, but is nonetheless restricted from finding a rule unconstitutional, is an odd one indeed. This would require our adjudicative arm, to which we gave full charge, to consider only half the question. This Court simply did not restrict the ADB in that way.

In any event, as already discussed, the board did not declare any rule unconstitutional. Rather, it merely considered the constitutional issues respondent raised and construed the rules narrowly in light of those principles, an exercise that the Grievance Administrator acknowledges is permitted. As the Sixth Circuit Court of Appeals has observed:

> Even if the Board could not declare a Rule of Professional Conduct unconstitutional—a proposition about which we are not convinced—"it would seem an unusual doctrine, and one not supported by the cited case[s], to say that the [Board] could not construe [the Rules of Professional Conduct] in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 629, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). The Board could, short of declaring a Rule unconstitutional, refuse to enforce it or, perhaps, narrowly construe it. [*Fieger v Thomas*, 74 F3d 740, 747 (CA 6, 1996).]

Thus, the ADB's actions were within its authority.

Moreover, for the reasons explained by Justice KELLY, the majority's reliance on *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), *Lewis v Michigan*, 464 Mich 781; 629 NW2d 868 (2001), and Const 1963, art 3, § 2 are entirely misplaced because none of those authorities compels the majority's result.

Although, again, the question is not ripe, the majority errs in finding a restriction on the Court's power to delegate constitutional power and in holding that the ADB cannot declare a rule of professional conduct unconstitutional. The majority proffers no persuasive authority to justify its holding. Rather, considering that this Court created the ADB, delegated to it the power to carry out our duty of maintaining discipline in the legal profession, and did not otherwise restrict its authority, it should logically follow that the ADB can both consider constitutional questions and declare a rule of professional conduct unconstitutional.

II. RESPONDENT'S SPEECH DID NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT UNDER WHICH HE WAS CHARGED

The lead opinion of the ADB correctly concluded that respondent's public, out-of-court comments, made after the conclusion of the case about which he spoke, did not violate either Rule 3.5(c) or 6.5(a) of the Michigan Rules of Professional Conduct. The rules alleged to be violated simply do not prohibit the type of speech at issue in this case. The majority's conclusions to the contrary are reached haphazardly and without any regard for the plain language, history, or context of the rules. In a melodramatic fashion, the majority misrepresents respondent as arguing that "there can be no courtesy or civility rules at all of this sort," *ante* at 241, and the dissents as arguing for a "repudiation of 'courtesy' and

'civility' rules," *ante* at 264. Further, the majority loftily declares that the "respect for the wisdom of those who have preceded us in the judiciary in this country and the traditions of the legal process counsel that *narrow and carefully tailored regulations* of the sort set forth in MRPC 3.5(c) and MRPC 6.5(a) are necessary adjuncts to a responsible legal system," *ante* at 241-242 (emphasis added), but then proceeds to interpret these rules with a brush so broad as to now encompass *any offensive language used to criticize a judge*. The majority's troublesome expansion of those rules impermissibly silences harsh criticism of the judiciary about a concluded case, thus invading the purview of the First Amendment's guarantee of the right to speak freely.

A. RESPONDENT DID NOT VIOLATE MRPC 3.5(c) BECAUSE HIS COMMENTS WERE NOT MADE "TOWARD THE TRIBUNAL"

MRPC 3.5(c) restrains attorneys from "engag[ing] in undignified or discourteous conduct toward the tribunal." At the core of the arguments here is the interpretation of the phrase "toward the tribunal." As is evident from the context of this rule, its historical evolution, and its plain language, this phrase pertains only to conduct that occurs in a tribunal or in the immediate environs of a tribunal, such as in judicial chambers.[2] Because respondent did not make his comments in that setting, but, rather, made them during a radio broadcast, he did not violate the rule.

While respondent does not appear to argue that his comments were particularly dignified or courteous, the crux of this rule is to prevent such comments in or in

[2] A Texas court's description is also useful. There, contemptuous behavior is not permitted "in open court, or at least while the court was actively pursuing the business of dispensing justice in its immediate environs." *In re Bell*, 894 SW2d 119, 130 (Tex Spec Ct Rev, 1995).

the immediate environs of a tribunal, *not at any time or in any space*. In other words, conduct in or near a courtroom, such as conduct in judicial chambers or possibly comments made in pleadings filed with the court can be said to be conduct "toward" the tribunal. The majority's removal of the proximate element of this rule does indeed result in "protecting the sensitivities of judges," *ante* at 242, while at the same time raising grave constitutional implications by restricting a lawyer's ability to speak *outside* the context of a judicial proceeding.[3] See part III of this opinion. Further, contrary to the majority's assertion otherwise, such a broad expansion of the rule can and will preclude criticism of the "most robust character," *ante* at 246, because it will prohibit attorneys from commenting on legal proceedings of which they have been a part. Notwithstanding the indisputable ability of this Court to prescribe ethical and disciplinary rules, see *ante* at 240-245, the majority's myopic focus on what we are permitted to do in the abstract eclipses the more critical question whether this particular ethics rule was crafted to apply to this particular conduct.

MRPC 3.5(c) was designed, as is evident from the placement of the rule in the entire set of professional conduct rules, a historic examination of the rule, and the way the rule has been applied, to control the

[3] Out of the multiple entries under "toward" in a dictionary, the majority selects the two definitions that it perceives as useful to its conclusion. This ignores, first, that there are other definitions of "toward" that do not support its conclusion and, second, that there are a substantial number of other sources and considerations that assist us with determining the scope of the ethics rule at issue. Notably, the majority's analysis unhelpfully ends with its selective citation of the first and fourth entries under "toward." See *ante* at 251. Further, discriminating readers will recognize that the majority's choice to use the definition "in the direction of" to support its conclusion is nothing but a truly strained application.

conduct of attorneys in their interactions with the tribunal in their role as advocates for clients, not the conduct or speech of attorneys far removed from the tribunal and the advocatory process. The Michigan Rules of Professional Conduct are divided into eight chapters, each with a descriptive title. Within those chapters, each rule also has a descriptive heading. Notably, Rule 3.5(c) appears in chapter 3, entitled "Advocate," and has a heading entitled "Impartiality and Decorum of the Tribunal."[4] This arrangement is but the first indication that the rules within chapter 3 are meant to govern attorneys in their active role as advocates and that the rules within the subsections of Rule 3.5 are directed toward behavior that affects the decorum of the forum involved, which in turn connotes a required nexus between the conduct and the actual forum.

In keeping with that theme, the other two subsections of Rule 3.5 prohibit an attorney from seeking to influence judges, jurors, prospective jurors, or other officials, MRPC 3.5(a), and prohibit ex parte communications, MRPC 3.5(b). And the remaining provisions in chapter 3 governing the attorney as advocate clearly pertain to an attorney's direct dealings with the court system and the dispensation of justice. Those rules are headed "Meritorious Claims and Contentions," "Expediting Litigation," "Candor Toward the Tribunal," "Fairness to Opposing Party and Counsel," "Trial Publicity," "Lawyer as Witness," "Special Responsibilities of a Prosecutor," and "Advocate in Nonadjudicative Proceedings." None of these rules, by its heading or its

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[4] For comparison purposes, the remaining chapters are "Client-Lawyer Relationship," "Counselor," "Transactions With Persons Other Than Clients," "Law Firms and Associations," "Public Service," "Information About Legal Services," and "Maintaining the Integrity of the Profession."

content, purports to govern conduct that is unrelated to a potential or ongoing proceeding before a tribunal.

Importantly, the rules appearing in other chapters of the Michigan Rules of Professional Conduct do govern the conduct of attorneys outside of a tribunal. Specifically, chapter 8, "Maintaining The Integrity of the Profession," contains two rules that are eminently more suited to curtailing the speech of attorneys outside the context of a legal proceeding than MRPC 3.5(c). For instance, MRPC 8.2(a) forbids an attorney from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office." And MRPC 8.4, which sets forth the rules regarding "Misconduct," expressly forbids attorneys from engaging in behavior "that is prejudicial to the administration of justice[.]" MRPC 8.4(c). It would be difficult to say that the broad sweep of MRPC 8.2 and 8.4 does not extend to conduct that shares no physical nexus with a tribunal. In fact, instances too numerous to mention here exist in which an attorney who acted questionably *outside* the context of a tribunal was charged with violating the rules of chapter 8, but, notably, not Rule 3.5(c). Clearly, then, comments about judges made outside the context of a tribunal are governed elsewhere in the rules, lending further credence to the conclusion that the more precise scope of Rule 3.5(c) encompasses only behavior in or in connection with a tribunal.

Moreover, the comment accompanying this rule sustains the conclusion that the rule is directed only toward conduct that occurs in the tribunal or in the

immediate environment of a tribunal.[5] The comment on MRPC 3.5 states as follows:

> Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. . . .
>
> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Clearly, this comment envisions conduct in the context of tribunal proceedings. The comment speaks of "improper[ly] influenc[ing a] tribunal," "present[ing] evidence and argument," deciding a case, "speak[ing] on behalf of litigants," "stand[ing] firm against abuse by a judge," "present[ing] the cause," "protect[ing] the record for . . . review," and using patience in place of "belligerence" and "theatrics." Each of these phrases is clearly connected with tribunal behavior or behavior with respect to an ongoing proceeding (see Rule 3.5[a], which governs improper influence, and Rule 3.5[b], which prohibits ex parte communication), and the comment does not refer to, and cannot be interpreted to govern, attorney conduct that occurs outside the context of a tribunal proceeding or the tribunal itself.

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[5] The comments on the Michigan Rules of Professional Conduct were written by Supreme Court staff and are an "aid to the reader" in determining the meaning of the rules. See *Grievance Administrator v Deutch*, 455 Mich 149, 164 n 15; 565 NW2d 369 (1997).

Further, when interpreting MRPC 3.5(c), the rule's genesis, which can be traced to the American Bar Association's (ABA) former Model Code of Professional Responsibility Rule 7-106(C)(6), is also instructive. That rule, tellingly titled "Trial Conduct," provided that "[i]n appearing in his professional capacity before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal." Our former disciplinary rule, DR 7-106(C)(6), was identical. Subsequently, the ABA instituted its Model Rules of Professional Conduct, retaining the following concept from DR 7-106(C)(6): "A lawyer shall not . . . engage in conduct intended to disrupt a tribunal." ABA Model Rule 3.5(d).[6] We also replaced our former disciplinary code with rules of professional conduct, and our current MRPC 3.5(c) was fashioned from the new ABA rule as well as the corresponding former disciplinary rules. But despite minor wording changes to the rule, nothing about the current wording of the rule ("toward the tribunal") nor its placement within the rules (under the "Advocate" chapter) suggests any intent of this Court to broaden the scope of the rule to situations beyond the context of tribunal proceedings.

As Justice KELLY explains, the revisions to MRPC 3.5(c), which deviated from the ABA's revisions to its similar rule, merely eliminated the inquiry into an attorney's intent that the ABA retained. Our rule instead focuses purely on whether the conduct can be said to be "undignified" or "discourteous," without respect to whether the lawyer intended it to be so. But both our rule and the ABA's rule contextually and textually preserved the condition that, to be punishable,

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[6] The comment on the ABA's rule is similar to that concerning our own rule, although it takes the additional step of explaining that conduct during a deposition is also regulated by the rule.

the conduct must occur in a tribunal or its immediate environs. The overwhelming contextual evidence of this nexus is the placement of both rules among other rules governing conduct in a tribunal or its environs and under chapter headings referring to the decorum of a tribunal. And the textual evidence of the nexus derives from the ABA's language, "disrupt a tribunal," and the Michigan rule's language, "toward a tribunal."

Of course, it is also important to remark that there has been no warning to the bar that the transformation of DR 7-106(C)(6) into MRPC 3.5(c) allegedly served to extend the reach of the latter to conduct occurring outside a tribunal and removed from the active legal process. Although there is compelling evidence that the new rule was not, in fact, so extended, to the extent that any gray area exists, it is preferable to resolve the question most favorably to respondent. See *State Bar Grievance Administrator v Corace*, 390 Mich 419, 434; 213 NW2d 124 (1973). The inherent fairness of this approach not only is self-evident, but also serves to avoid any precarious trespass over the boundaries of the First Amendment by requiring notice of what type of conduct will be prohibited before punishing it.[7]

[7] Due process requires a person to have notice of conduct that is prohibited, and lack of notice can render an enactment unconstitutionally vague. See, e.g., *United States v Wunsch*, 84 F3d 1110, 1119 (CA 9, 1996) (declaring the term "offensive personality" too vague to inform a reasonable attorney what conduct will be sanctioned). The reader is referred to Justice KELLY's dissent for a fuller explanation of vagueness. But rules of professional conduct that teeter on the edge of vagueness have been saved when it can be said that although the language would ordinarily be too vague to pass constitutional muster, it has been subject to enough interpretation that it provides the notice that is not inherent in the language itself. See, e.g., *In re Frerichs*, 238 NW2d 764 (Iowa, 1976); *In re Beaver*, 181 Wis 2d 12; 510 NW2d 129 (1994). See also *Comm on Legal Ethics of the West Virginia State Bar v Douglas*, 179 W Va 490; 370 SE2d 325 (1988). In *Douglas*, the court was faced with an attorney who posed for a newspaper photograph dressed as Rambo, complete with

Significantly, this Court has not had occasion to interpret MRPC 3.5(c) in its present form before today. Nor has research revealed any ethics opinions regarding this rule—save, critically, one. That ethics opinion involved this same respondent who found himself in quite the same situation as the present case. *Fieger II*, *supra*. There, it was claimed that respondent publicly made "knowingly false or reckless statements about various judges and a county prosecutor," and he was likewise charged with violating MRPC 3.5(c), along with other rules. Both the hearing panel and the ADB refused to find that respondent's statements violated Rule 3.5(c). The ADB agreed with the panel's finding that Rule 3.5(c) is intended to govern only conduct directed to the tribunal in a pending matter. The panel had found that because respondent's comments were made "about judges, and not to them in pending matters," respondent had not violated the rule. The ADB agreed, concluding as follows:

> We agree with the panel that the intent of the rule is to preserve the decorum of the tribunal so that proceedings may be conducted in an orderly fashion. Rude and undignified behavior can detract from the respect an adjudicator must possess in order to effectively manage a courtroom.

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bow and arrow, a knife, and ammunition, above a caption that read, " 'Just like Rambo I'll defend against the judges alone if necessary.' " *Id.* at 492. In an article, he was quoted as saying, among other things, that the judges were " 'power-jockeying,' " that they " 'drew first blood,' " and "that he would 'rise to the challenge.' " *Id.* The attorney also compared the ongoing trial proceeding to the Salem witch trials. *Id.* at 492 n 6. Afterward, he was charged with violating the disciplinary rule prohibiting conduct prejudicial to the administration of justice. Although the court recognized that this language had been routinely upheld as constitutionally sufficient, *id.* at 493, it reasoned that because the complexities of the subject had not been thoroughly analyzed in that state, neither the committee nor the parties had enough guidance to decide the matter, *id.* at 498. After providing that guidance, the court remanded the case for further consideration.

> The rule is obviously directed at preventing proceedings from devolving into chaos because of lack of respect for the judge. [*Fieger II*, *supra* at 31.]

Thus, respondent has already been subject to disciplinary proceedings for speaking out publicly in criticism of the judiciary. Yet he was explicitly absolved of the allegation that public comments about judges violated Rule 3.5(c) by both the hearing panel and the review board. And we denied the Grievance Administrator's application for leave to appeal that decision. 469 Mich 1241 (2003).[8] Today, the majority abruptly changes the rule using a cursory and incomplete analysis that pays no heed to history, context, or even plain text. Those who admire the majority for its professed adherence to textualism may be surprised. Respondent probably will not be.

Under a scrupulous reading of the rule and the comment, and considering their evolution, there should be no other conclusion but that the rule governs only conduct that occurs in or near the tribunal in the context of litigation. Respondent's comments, made during a radio broadcast, were not made in a tribunal,

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[8] As the majority points out, I concurred in the denial of leave, but wrote a statement to convey my belief that respondent's remarks were at the edge of what types of remarks might merit sanction. It is important to note, however, that the statements in that case were allegedly libelous or slanderous, which calls for an entirely different analysis than the one required in this case. Comments with no hint of libel or slander, such as the ones at issue here, are in a different, and more protected, category of speech. Thus, I still believe that the order in that case should not be construed "as signaling any reduced interest on the part of this Court in upholding standards of professional civility . . . ." See 469 Mich at 1241 (CAVANAGH, J., concurring). However, the comments in this case, which cannot be remotely characterized as libel or slander, merit even more protection than those made in *Fieger II*. Thus, to the extent that I believed the statements in *Fieger II* were not sanctionable, that is all the more my belief in this case.

near a tribunal, or in any context remotely related to the litigation process or the dispensation of justice. As such, just as respondent did not violate Rule 3.5(c) in *Fieger II*, he did not violate it in this case.

Justice KELLY also correctly points out the deficiency in the majority's assertion that limiting the rule's application to tribunal environs would make the rule "superfluous" in light of a trial court's contempt powers. See *ante* at 252; MCL 600.1711(1). The most flagrant error in the majority's assertion is its obliviousness to the fact that Rule 3.5(c) applies not just to courts and courtrooms, but to *all* tribunals. Only courts have contempt power. Thus, because not all "tribunals" have contempt power, the disciplinary rule is in no way duplicative of the contempt statute.

Moreover, MRPC 3.5(c), like the rule from which it was adopted, "carries with it the option of a disciplinary sanction as a *supplement* to the traditional power of judges to punish disruptive behavior as contempt of court." *Office of Disciplinary Counsel v Breiner*, 89 Hawaii 167, 173; 969 P2d 1285 (1999) (emphasis added), citing 1 Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, § 3.5:401 (2d ed). Further, because only a court has contempt powers, MRPC 3.5(c) provides an avenue for others who may be offended by an attorney's conduct to seek redress by filing a grievance. And MRPC 3.5(c) allows the body charged with regulating attorney conduct to impose a far more consequential range of discipline on an attorney for violating the rule, from public censure to disbarment. Thus, the rule is in no way rendered "superfluous" by MCL 600.1711(1), and the majority's contention otherwise is irrational.

And I, like Justice KELLY, dispute the majority's assertion that construing MRPC 3.5(c) to limit its

application to tribunals "fails to accord consideration to the importance the courtesy and civility rules serve as a vehicle for preserving the public's confidence in the integrity of the legal process." See *ante* at 252. "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges v California*, 314 US 252, 270-271; 62 S Ct 190; 86 L Ed 192 (1941).

Read in its proper context, which the majority's conclusory analysis fails to do, it is evident that MRPC 3.5(c) applies only to statements and conduct in a tribunal or its immediate environs. Had this Court intended its changes to this rule, which before indisputably governed conduct in a tribunal, to broadly expand the rule to prohibit statements *about* tribunals, it would have used the phrase "*about* a tribunal." And, undoubtedly, such a broad expansion, with such weighty constitutional implications, would have been widely noticed, discussed within the bar, and probably challenged long before now. But this Court did not expand the rule in that manner, as is clear under any fair analysis. Such a change was not needed because other rules govern conduct that occurs elsewhere. Because respondent's comments were far removed from the setting to which the rule applies, he did not violate it.

B. RESPONDENT DID NOT VIOLATE MRPC 6.5(a) BECAUSE HE DID NOT "TREAT" THE JUDGES WITH DISCOURTESY BY CRITICIZING THEIR DECISION

Respondent correctly contends that his conduct did not violate MRPC 6.5(a) because the rule does not apply to "a lawyer's out-of-court, public criticism of the judiciary." The rule states as follows:

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

An issue similar to that discussed with respect to Rule 3.5(c) inheres in this rule. Specifically, just as Rule 3.5(c) contemplates conduct in a courtroom, Rule 6.5(a) is attendant to lawyers' interactions with clients and others with whom the lawyer comes into contact in the course of the legal process. Both the comment to this rule, which illuminates the overarching principles behind the rule's requirements, and the consistent way in which the rule has been applied, support this conclusion. In relevant part, the comment states:

> A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met.
>
> A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion.

* * *

> A judge must act "[a]t all times" in a manner that promotes public confidence in the impartiality of the judiciary. Canon 2(B) of the Code of Judicial Conduct. See also Canon 5. By contrast, *a lawyer's private conduct is largely beyond the scope of these rules*. See Rule 8.4. However, a lawyer's private conduct should not cast doubt on the lawyer's commitment to equal justice under the law. [Emphasis added.]

Again, it is clear from the comment that Rule 6.5(a) is circumscribed to an attorney's treatment of persons with whom the attorney encounters in the legal process. This, of course, accords with the rule's usage of the term "treat." "Treat" means "[t]o act or behave in a specified manner toward." *The American Heritage Dictionary, New College Edition* (1981). Just as respondent did not conduct himself "toward" the tribunal for purposes of Rule 3.5(c), he likewise did not conduct himself "toward" the tribunal for purposes of Rule 6.5(a). To hold otherwise contorts the plain meaning of the word "treat" and culminates in the curious conclusion that when a person speaks disrespectfully about another person outside that other person's presence, the speaker is somehow "treating" that person in a certain manner.

Indeed, our disciplinary arm has sharply limited its application of the rule to instances of direct contact and has neither interpreted nor applied the rule in any other manner. Violations of the rule have been found only in instances of, for example, improper sexual conduct, *Grievance Administrator v Neff*, ADB No. 95-94-GA, notice of suspension issued April 30, 1996; *Grievance Administrator v Bowman*, ADB No. 95-95-GA, notice of reprimand issued January 3, 1996; *Grievance Administrator v Childress*, ADB No. 95-146-GA, notice of suspension issued December 6, 1996; *Griev-*

ance Administrator v Childress, ADB Nos. 97-169-GA and 97-183-FA, notice of suspension issued June 9, 1998; *Grievance Administrator v Williams*, ADB No. 98-203-GA, notice of suspension issued February 1, 2000; *Grievance Administrator v Gold*, ADB No. 99-350-GA, opinion issued May 16, 2002; *Grievance Administrator v Kohler*, ADB No. 01-49-GA, notice of suspension issued December 10, 2001; physical altercations with opposing counsel, *Grievance Administrator v Lakin*, ADB No. 96-166-GA, notice of reprimand issued November 13, 1997; *Grievance Administrator v Golden*, ADB No. 96-269-GA, opinion issued May 14, 1999; *Grievance Administrator v McKeen*, ADB No. 00-61-GA, opinion issued May 7, 2003; vulgar and profane comments that interfered with a deposition, *Grievance Administrator v Farrell*, ADB No. 95-244-GA, notice of reprimand issued December 3, 1996; and threatening statements made directly to another person, *Grievance Administrator v Warren*, ADB No. 01-16-GA, opinion issued October 2, 2003; *Grievance Administrator v Sloan*, ADB Nos. 98-106-GA and 98-176-GA, notice of suspension issued April 1, 1999. Further, in some instances in which the only conduct at issue was name-calling in the course of *direct* communication, the rule was found *not* to be violated. See, e.g., *Grievance Administrator v Szabo*, ADB No. 96-228-GA, opinion issued February 11, 1998; *Grievance Administrator v MacDonald*, ADB No. 00-4-GA, opinion issued January 25, 2001.

As the lead opinion of the ADB correctly observed:

> MRPC 6.5(a), like MRPC 3.5(c), seems clearly to extend to discourtesy toward and disrespect of participants in the legal system when such conduct interferes or has the potential to interfere with the orderly administration of justice. To apply this rule in this case, we would have to hold that "treat" means to make comments about a person

> outside their [sic] presence, after the conclusion of the proceedings. This would sweep in any comment critical of a participant's role in the justice system even after that role had been concluded. In this country, many trials or other proceedings are subject to discussion and analysis after their conclusion. Nothing in Rule 6.5 suggests that "persons involved in the legal process" may not ever be criticized for their role in that process, not even after the involvement has ceased.

Nor is the majority's treatise on our duty to oversee the legal profession and foster rules geared toward maintaining respect for the judiciary persuasive justification for the broad-reaching interpretation it adopts. As the United States Supreme Court has explained:

> We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar. [*Konigsberg v State Bar of California*, 353 US 252, 273; 77 S Ct 722; 1 L Ed 2d 810 (1957).]

Further, as we explained in *In re Chmura*, 461 Mich 517, 540; 608 NW2d 31 (2000), "the state's interest in preserving public confidence in the judiciary does not support the sweeping restraints imposed by Canon 7(B)(1)(d)."[9] Likewise here, the directive of Rule 6.5(a) that attorneys must treat others involved in the legal

[9] That canon prohibited candidates for judicial office from using any form of communication that the candidate knew or reasonably should have known was false, fraudulent, misleading, or deceptive or that contained a misrepresentation, omitted certain facts, or created unjustified expectations.

process with courtesy and respect cannot be interpreted as a sweeping restraint on attorney comment regarding concluded cases.

Reading the rule in its proper context and affording the term "treat" its common and ordinary meaning, it is again clear that respondent, by his comments, did not "treat" anyone involved in the legal process. Rather, his comments were permitted public criticism of Court of Appeals judges. Just as is the case with Rule 3.5(c), an interpretation of this rule that enlarges the realm of sanction to public criticism unrelated to the process of administering justice treads dangerously in the waters of the First Amendment's protections of free speech. Respondent's speech was not prohibited by Rule 6.5(a) and cannot be found to have violated it.

C. RESPONDENT'S COMMENTS DID NOT PERTAIN TO A PENDING CASE, FURTHER DIMINISHING ANY JUSTIFICATION FOR EXPANDING RULES 3.5(c) AND 6.5(a) BEYOND THEIR INTENDED MEANINGS

The majority observes that restraints on speech can be more encompassing if the speech pertains to an ongoing matter. See *ante* at 247; *Gentile v State Bar of Nevada*, 501 US 1030, 1070; 111 S Ct 2720; 115 L Ed 2d 888 (1991). It concludes that the matter about which respondent spoke (*Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 [1999]) was indeed pending and posits that this justified stricter curtailment of respondent's right to speak publicly about it. Notwithstanding that the rules did not apply to respondent because they were not comments "toward" the tribunal and respondent did not "treat" the tribunal discourteously, the majority is quite misguided in concluding that the *Badalamenti* case was "pending."

As Justice KELLY observes, legal and lay dictionaries define "pending" in much the same way: "[r]emaining undecided; awaiting decision," Black's Law Dictionary (8th ed), and "awaiting decision or settlement." *Random House Webster's College Dictionary* (1997). Because of the similarity, it is unnecessary to determine whether the term "pending" has acquired a peculiar meaning in the law. The outcome is identical despite which dictionary is used. A "pending" matter is an undecided matter awaiting decision, which the *Badalamenti* case clearly was not.

The majority points to several court rules and, because they are inapplicable, engages in an exercise of lexical gymnastics to reach its erroneous conclusion. Specifically, the majority cites MCR 7.215(F)(1)(a), which explains when Court of Appeals opinions become "effective." That rule states that an opinion becomes "effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court[.]" Notably, the rule does not use or define the term "pending" and is in no way referenced by or connected to the disciplinary rule at issue. As such, it is a poor source by which to interpret when a case might be "pending" for purposes of restricting attorney comment, particularly when the word's common and legal meanings are flatly ignored.

Similarly unhelpful is the majority's striving attempt to support its position by citing various other procedural rules, specifically MCR 7.302(C)(2)(a), (b), and (c), MCR 7.210(H), and MCR 7.317(C) and (D), that govern filing applications for leave to appeal to this Court and returning the record to the lower court. See *ante* at 248-249 & n 14. Of course, those rules say nothing about when a Court of Appeals opinion is either "effec-

tive" or still pending. But more importantly, the majority fixates on our procedural mechanisms to the complete disregard of the constitutional framework within which the question must be examined. The bounds of free speech are not a function of procedural court rules, as discussed later. Rather, the inquiry must center on whether the type of harm sought to be prevented is imminent if the speech is not curtailed. When a record is returned to the lower court is completely irrelevant to a discussion regarding whether speech about a case can be silenced.

The majority also "reveals" that respondent ultimately moved for rehearing and for leave to appeal as if this were damning evidence of the pendency of the *Badalamenti* case. *Ante* at 249-250 & n 17. It is not. Nothing the majority points to, and nothing uncovered in an exhaustive jurisdictional search, supports the novel notion that speech can be restricted until the time when no further relief from a judgment can ever be sought.

Just as strangely, the majority states that the *Badalamenti* case was " 'begun, but not yet completed' " because the Court of Appeals, "by granting a motion for reconsideration or rehearing, could still have affected the substantial rights" of respondent's client. *Ante* at 249. It further opines that the case was still "awaiting rendition of a final judgment" because "Mr. Fieger filed an application for leave to appeal in this Court . . . ." *Ante* at 250 n 17. This is faulty logic at its core. When respondent made his statements, *there was no motion for reconsideration*. When respondent made his statements, the case was not "awaiting rendition of a final judgment" because *respondent had not, in fact, filed an application for leave to appeal in this Court*. It cannot be said any more simply: *nothing that had begun lacked completion.*

Further, without support, the majority decides that the opposite of "pending" is "final." *Ante* at 250 n 17. Proffering a purported antonym, with nothing more, to divine the meaning of a word is certainly a novel approach, but in any event, the attempted correlation does not withstand scrutiny because the court rules on which the majority relies explain when a judgment is "effective" and when the Court of Appeals should return the record to the lower court. The uncomplicated task the majority confounds is deciphering the meaning of the word "pending." Rather than conduct a simple application of the plain meaning of the word to the facts at hand, the majority circumscribes its assessment of the word "pending" to unrelated court rules, short-shrifting respondent—and any other attorney who wishes to engage his or her right to free speech—and resulting in a contorted analysis.

Further, while MCR 7.302 discusses applications for leave to appeal to this Court, it does not address when a trial court judgment, a matter from this Court, or a matter from any other judicial or administrative agency is "pending." And while the majority does not assert that MRPC 3.5(c) curtails only speech about Court of Appeals opinions, its analysis regarding when a Court of Appeals case is "pending," which focuses only on when the judgment is "effective," fails to consider any potential incongruities that may arise with respect to when it is "safe" to speak about non-Court of Appeals cases. In other words, by failing to apply in a straightforward manner either the common or the legal meaning of "pending," the majority allows for vastly different rules in similar scenarios. And, oddly, the majority suggests that a different rule may apply when a court has accepted a case on appeal. *Ante* at 248-249 & n 15. To suggest that a case is pending after a final judgment is rendered and while no motions for reconsideration or

appeal have been filed, but that it may not be pending after the case has been accepted on appeal, is counter-intuitive logic to say the least.

Last, it is paramount to observe that when an enactment threatens to encroach on a person's constitutional guarantees, " 'every reasonable construction must be resorted to, in order to save [the enactment] from unconstitutionality.' " *Edward J DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council*, 485 US 568, 575; 108 S Ct 1392; 99 L Ed 2d 645 (1988), quoting *Hooper v California*, 155 US 648, 657; 15 S Ct 207; 39 L Ed 297 (1895). Interpreting the word "pending" in a way that restricts respondent's First Amendment guarantees and casts constitutional doubt on the conduct rule is contrary to this "cardinal principle" of construction. *Id*. Faced with alternative ways to construe when a case is "pending," this Court is obligated to choose the interpretation that poses the least danger of silencing speech. See part III of this opinion. This the majority fails to do.

Were the meaning of "pending" given proper import here, rather than being contorted or ignored, it would be plain that a matter that has been decided by the Court of Appeals is no longer "pending." As such, the majority's analysis is incomplete and, ultimately, incorrect. Given the proper construction, which includes accounting for the constitutional implications, it is evident that the *Badalamenti* case was not "pending" when respondent spoke publicly about it. Thus, the majority not only unjustifiably expands the meaning of the otherwise plain language of the rules at issue, it also compounds its error by misusing our authority to limit speech that pertains to a pending case because the case was not, in fact, pending.

III. RESPONDENT'S POLITICAL COMMENTS WERE PROTECTED BY THE FIRST AMENDMENT RIGHT TO FREE SPEECH

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile*, *supra* at 1034. This case, like *Gentile*, involves "classic political speech." *Id.* The incorrectness of the majority's assertion otherwise is easily exposed. Tellingly, the majority purports to acknowledge respondent's argument that he engaged in "political" speech, but it then proceeds to totally misunderstand the nature of political speech and disregard the entire body of law pertaining to it. By this paucity of reasoning, the majority completely guts the First Amendment and renders an alarming—and, no doubt, singular—holding that speech critical of public officials is prohibited unless the public official is facing reelection at the time the speech is made[10] or the speech uttered is palatable to the majority's sense of civility. Neither precept can be found in our First Amendment jurisprudence.

To provide the needed jurisprudential background the majority omits, political speech protection encompasses not only statements about current electoral candidates, but extends to all "expression of editorial opinion on matters of public importance . . . ." *FCC v League of Women Voters of California*, 468 US 364, 375; 104 S Ct 3106; 82 L Ed 278 (1984). " 'Whatever differ-

[10] Because the majority suggests that respondent's speech was not "campaign speech" because the judges about whom he spoke were not running for reelection, it might be helpful for it to explain exactly how close in time a person can speak uninhibitedly about an elected public official. Must the official be running in the year the comments are made? Must the official have already announced his candidacy? And what of appointed public officials who need not run in elections—are they always shielded from criticism because criticisms about them will *always* be made outside the context of a campaign?

ences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " *Burson v Freeman*, 504 US 191, 196; 112 S Ct 1846; 119 L Ed 2d 5 (1992), quoting *Mills v Alabama*, 384 US 214, 218; 86 S Ct 1434; 16 L Ed 2d (1966). Respondent's comments fall easily into this closely protected category of speech: he made critical statements about what he perceived as an errant decision that unjustly divested his seriously injured client of a jury verdict. The judges who overturned the jury verdict were, of course, part of our judicial system, which "play[s] a vital part in a democratic state" and in which "the public has a legitimate interest in [the] operation[]." *Gentile*, *supra* at 1035.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v Louisiana*, 379 US 64, 74-75; 85 S Ct 209; 13 L Ed 2d 125 (1964). Thus, the United States Supreme Court has "repeatedly explained [that] communication of this kind is entitled to the most exacting degree of First Amendment protection." *League of Women Voters*, *supra* at 375-376. Stated another way, political speech "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v Myers*, 461 US 138, 145; 103 S Ct 1684; 75 L Ed 2d 708 (1983), quoting *NAACP v Claiborne Hardware Co*, 458 US 886, 913; 102 S Ct 3409; 73 L Ed 2d 1215 (1982). Thus, when a government ventures into the perilous realm of restricting political speech, it must produce evidence of a state interest so significant that it fully justifies the otherwise forbidden endeavor of silencing those who desire to publicly find fault with the way in which the government conducts its affairs. See *Bridges*, *supra* at 270-271. Moreover, the government must show that the rule is so narrowly tailored that

there is *no unnecessary interference* with First Amendment freedom. *Sable Communications of California, Inc v FCC*, 492 US 115, 126; 109 S Ct 2829; 106 L Ed 2d 93 (1989). Rules inhibiting unhampered comment, thus shackling the right to freely express opinion, must be justified, "[i]f they can be justified at all, . . . in terms of some *serious substantive evil* which they are designed to avert." *Bridges*, *supra* at 270 (emphasis added); see also *id.* at 262 ("[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press."). And protecting the judiciary or other public actors from derision, however crudely or distastefully expressed, has consistently been rejected as a "serious substantive evil" that would justify restrictions on speech.

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. [*Id.* at 270-271.]

Consider also the following:

> More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. [*Zaud-*

> *erer v Office of Disciplinary Counsel of the Ohio Supreme Court*, 471 US 626, 647-648; 105 S Ct 2265; 85 L Ed 2d 652 (1985).]

Rather, restrictions on public comment in this context have normally been validated only when the voicing of opinion threatens to wreak *serious* prejudice on the orderly administration of justice. See *Bridges*, *supra* at 271. And even then the right to speak is closely guarded. The case must be pending, and comment about it cannot be suppressed unless the "*substantive* evil of unfair administration of justice" is a "*likely* consequence" or punished unless "the degree of likelihood was sufficient to justify summary punishment." *Id.* (emphasis added). And again, once an interest is validated, a substantive evil is identified, and the substantive evil is found to be a likely consequence,

> [t]he Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." [*Sable Communications*, *supra* at 126 (citations omitted).]

Significantly, the majority omits any meaningful discussion regarding whether the rules it interprets to encompass respondent's conduct were *narrowly tailored*, stating in conclusory fashion only that the rules are narrowly drawn. See *ante* at 261.

Critically, again, the determination whether a case is pending cannot be conducted without affording serious weight to the constitutional principles involved. In this sense, a rule restricting speech that is questionable in the constitutional respects of vagueness or overbreadth can be interpreted in such a manner that it upholds the

rule as a whole but nonetheless declares it inapplicable to particular conduct. See n 7 of this opinion. This, of course, is precisely what the ADB's lead opinion accomplished. It interpreted the rules narrowly in light of governing constitutional principles to avoid invalidating them completely. Allowing constitutional principles to guide and inform the analysis is yet another undertaking the majority neglects in its opinion.

In addition to what has already been stated in part II(C) of this opinion, in determining whether a case is pending in light of the constitutional right to speak freely, it is informative to examine Justice Frankfurter's words written in dissent to the majority's finding that the speech in *Bridges*, which occurred between trial and sentencing, did not prejudice the administration of justice. While the majority did not conclude that the case was not pending, but, rather, that the speech did not pose a threat serious enough to the administration of justice to be punishable, Justice Frankfurter believed that the majority did not give proper accord to the status of the case, which, by any estimation, had not concluded. In his vigorous dissent, Justice Frankfurter distinguished cases that are no longer awaiting decision from those in which a decision has not yet been rendered:

> The question concerning the narrow power we recognize always is—was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is not a technical, lawyer's problem, but is to be determined *by the substantial realities of the specific situation*.[8] Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience,

professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully *immediately* upon completion of judicial conduct. Because courts, like other agencies, may at times exercise power arbitrarily and have done so, resort to this Court is open to determine whether, under the guise of protecting impartiality in specific litigation, encroachments have been made upon the liberties of speech and press.

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[8] The present cases are very different from the situation that evoked dissent in *Craig* v. *Hecht*, 263 U.S. 255, 281[44 S Ct 103; 68 L Ed 293 (1923)]: "*It is not enough that somebody may hereafter move to have something done*. There was nothing then awaiting decision when the petitioner's letter was published." And see *Glasgow Corporation* v. *Hedderwick & Sons* (1918) Sess. Cas. 639. Compare *State ex rel. Pulitzer Pub. Co* v. *Coleman*, [347 Mo 1238] 152 S. W. 2d 640 (Mo. 1941).

[*Bridges*, *supra* at 303-304 (Frankfurter, J., dissenting) (emphasis added).][11]

As is clear from these statements, there is much more to consider than a court rule governing when a Court of

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[11] The *Coleman* court, referring to another case that recognized the power of a court to reinstate a case after a *nolle prosequi*, stated:

> But this holding does not necessarily mean that after a case has been dismissed it is still to be considered pending during the entire term at which the order of dismissal was made within the meaning of the contempt rule above set out. . . . To rule otherwise would be to narrow the limits of permissible criticism so greatly that the right to criticize would cease to have practical value. [*Coleman, supra* at 1261.]

The majority's conclusion that the *Badalamenti* matter was pending until the time for filing an application for leave to appeal to this Court had expired very much divests the right to criticize of any practical value.

Appeals case becomes "effective" before a case, in furtherance of speech restrictions, can be declared "pending." It is the *practical* nature of the proceedings to be given due accord, not the hypertechnicality of an unrelated court rule. It is whether speech has true potential to influence the manner in which justice is dispensed, not whether in some abstract sense a decided case is temporarily limited from having full effect.

Applying these precepts, as the majority fails to do, the Kansas Supreme Court determined that an attorney's comments to a reporter, made in the afternoon on November 7, 1970, and printed on November 8, 1970, about a decision issued on November 7, 1970, were not made about a pending case. *Kansas v Nelson*, 210 Kan 637; 504 P2d 211 (1972). The court reasoned: "Since our decision on November 7, 1970, terminated the case referred to by respondent in his interview, we do not believe a violation of DR 1-102(A)(5)[12] is clearly shown. . . . Since the case was terminated, respondent's statements can not serve as harassment or intimidation for the purpose of influencing a decision in the case involved." *Id*. at 641 (citation omitted). Presumably, the *Nelson* respondent could have still moved for reconsideration. But the court did not fixate on the procedural technicalities; rather, it considered the real-world purpose of the rules proscribing speech and whether the speech, in that context, would have the potential to influence a *pending* case.

When the realistic, rather than abstract, concerns are heeded, as they must be in a constitutional analysis, it is acutely clear that the case about which respondent spoke was not pending. A verdict had been rendered,

[12] The referenced rule addressed conduct prejudicial to the administration of justice.

appeal had been taken, and an appellate opinion had been written and released to the public. The case was not "immediately pending" or "actively pending." See *Bridges*, *supra* at 303 (Frankfurter, J., dissenting). There was no "real and substantial" or "close and direct" threat to the impartial decision of the Court of Appeals. See *id*. What the majority fails to account for is that its new speech prohibition does nothing to actually accomplish what rules prohibiting public, out-of-court speech about pending matters are intended to do, i.e., prevent prejudice to the administration of justice. Stated another way:

> Forbidden comment is generally such as may throw psychological weight into the scales which the judge is immediately balancing. Where the scales have already come to rest, the criticism is of that which the judge has seen fit to place on them to cause such balance, and hence has no effect upon the weighing of the elements of justice involved. [*In re Bozorth*, 38 NJ Super 184, 191; 118 A2d 430 (1955).]

The red herring the majority inserts into this case is that respondent was still entitled to move for reconsideration and to petition this Court for leave to appeal. As discussed in part II(C) of this opinion, respondent had not so moved, so there was nothing at all left to be decided. It is of no consequence that respondent *later* invoked his client's right to petition for further review. Respondent was entitled at the time he spoke to speak freely about the *Badalamenti* case. Not only was there no "serious substantive evil" at play, there simply was no risk at all of prejudicing the administration of justice. The scales of justice had come to rest. The majority's failure to address whether the case was truly pending in light of the "substantial realities" of this specific situation is a disservice to members of the bar and, critically, takes an enormous bite out of the First Amendment.

But even if one were to accept the majority's precarious conclusion that the *Badalamenti* case was pending, its end result that the comments were not protected is irreconcilable with the basic truth that even restrictions on speech regarding *pending* cases merit the most careful scrutiny. *Bridges, supra* at 268-269. Protections for speech about pending cases are no less vital because pending cases are "likely to fall not only at a crucial time but upon the most important topics of discussion," and "[n]o suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Id.* Indeed, public interest in a pending matter and the importance of disseminating information in a timely manner are at a pinnacle while the matter is ongoing. Moreover, negating constitutional restraints on limiting speech about pending matters would disregard, at the expense of free speech, that cases, especially in today's overburdened legal system, frequently remain unresolved for extended periods. See *id.* at 269. And attorneys, who stand in an unrivaled position of familiarity with the justice system's complexities, "hold unique qualifications as a source of information about pending cases." *Gentile*, *supra* at 1056. " 'Without publicity, all other checks [on the government's conduct] are insufficient: in comparison of publicity, all other checks are of small account.' " *Id.* at 1035, quoting *In re Oliver*, 333 US 257, 271; 68 S Ct 499; 92 L Ed 682 (1948), which, in turn, had quoted 1 Bentham, Rationale of Judicial Evidence, p 524 (1827).

Not only does the public's right to be informed of the workings of the judiciary transcend the judiciary's right to shield itself from even the basest of criticisms, but the judiciary, upon which is conferred unique powers, significant influence, and considerable insulation, must

not be so shielded that the public is denied its right to temper this institution. As eloquently explained by Justice Frankfurter:

> There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt. [*Bridges*, *supra* at 289 (Frankfurter, J., dissenting).]

Further, it is paramount to stress, when assessing the danger of prejudicing justice by speaking about pending matters, that "neither 'inherent tendency' nor 'reasonable tendency' [to prejudice the administration of justice] is enough to justify a restriction of free expression." *Id.* at 273 (majority opinion). Nor is it enough to merely assert a substantial likelihood of causing material prejudice; rather, the disciplinary board or reviewing court must put forth credible evidence of such a threat. See *Gentile*, *supra* at 1038. In *Bridges*, the petitioners were accused of threatening the orderly administration of justice by publishing comments before an upcoming sentencing that criticized the possible outcome of probation. See *Bridges*, *supra* at 272 n 17, 274 n 19. The strongly worded editorials were replete with frightening descriptions of the defendants that seemed to be designed to instill fear in the public and intimidate the sentencing judge into imprisoning the defendants. *Id.* In deciding that the comments merited First Amendment protection and responding to the state's argument that the comments threatened to prejudice the administration of justice, the Court duly noted that given the petitioner's stance on labor issues in the past, it would be "inconceivable that any judge in Los Angeles would expect anything but adverse criti-

cism from it in the event probation were granted." *Id.* at 273. The Court held, "To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,— which we cannot accept as a major premise." *Id*.

It is no small irony that the same could be said about this respondent and his comments. Respondent is no stranger to the disciplinary system, although not once have his comments been found punishable until today, and respondent is likely quite accustomed to accusations that he attempts to unfairly influence trial proceedings by his disposition as an advocate. See, e.g., *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 777-778; 685 NW2d 391 (2004). Indeed, respondent has many times been the target of criticism by members of this very majority. See *id.*; see also Justice WEAVER's dissent in this case. To now opine that respondent's unsurprising response to losing a jury verdict on appeal was prejudicial to the administration of justice fails to account for both his well-known "long-continued militancy" in the field of litigation for injured plaintiffs and the "firmness, wisdom, or honor" of the judges about whom he speaks. *Bridges, supra* at 273.[13]

With the majority's attempt to maintain that the *Badalamenti* case was pending discredited, and any

[13] This is certainly not to say that establishing oneself as a controversial, vocal proponent of a cause affords one license to engage in unfettered public criticism or invariably places one beyond reproach. Rather, this is simply to point out that it would be disingenuous, while being well-accustomed to respondent's renowned crusade and the manner in which he furthers it, to then attempt to divest him of his First Amendment rights by claiming that the administration of justice is gravely prejudiced by his unsurprising rejoinders. Reasonably expected criticism does not—or should not—prejudice the administration of justice. See *Bridges*, *supra* at 273.

potential assertion that respondent's conduct prejudiced justice that had already been administered, or, in the alternative, influenced either the Court of Appeals decision on the motion for reconsideration or this Court's decision on the application for leave to appeal, discarded as implausible, the only remaining justification asserted for punishing respondent is that his remarks engendered public disrespect for the judiciary. While it can hardly be argued either that this Court does not have the authority to foster rules of professional conduct or that there is not legitimacy to the proffered state interest of protecting the integrity of the judiciary, the majority's feverish invocation of these principles again overshadows the pivotal question involved in this case: Does application of the rules in question to the conduct in question infringe the guarantees of the First Amendment when the justification for punishing the conduct is the protection of the judiciary?

Several aspects of the majority's characterization of the interest at issue must be noted. For instance, in one portion of its opinion, the majority states that we have an interest in a system "in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts . . . ." *Ante* at 242. I find this statement to be presumptuous and insulting to the intellect of our citizenry. The majority must believe that our citizens, unable to think for themselves and unable to engage in critical thinking when faced with divergent viewpoints, need the state to protect them from what the *majority* perceives may mislead them.[14] The majority thus makes a frightening judgment that speech itself is inherently

[14] Notably, such a view seems surprisingly inconsistent with the position recently taken by Justice MARKMAN in *Michigan Civil Rights Initiative v Bd of State Canvassers*, 475 Mich 903, 904 (2006) (MARKMAN,

misleading, and, as such, it elevates some misguided sense of protectionism over the constitutional right of free speech.

The majority also presumes that a process in which it is assured that judges can "mete out evenhanded decisions" without being "undermined by the fear of vulgar characterizations of their actions" is a desirable goal that overrides First Amendment rights. *Ante* at 242. This view is a sad and, presumably, misguided commentary on the ability of our judges to elevate their duties over their feelings and to maintain neutrality in the face of inevitable criticism. The majority discounts that "judges must have thick skins and do not require protection from criticism unless there is malicious defamation." *In re Westfall*, 808 SW2d 829, 845 (Mo, 1991) (Blackmar, C.J., dissenting), citing *Bridges*, *supra*, *Pennekamp v Florida*, 328 US 331; 66 S Ct 1029; 90 L Ed 1295 (1946), and *Craig v Harney*, 331 US 367; 67 S Ct 1249; 91 L Ed 1546 (1947). As the ADB lead opinion in this case recognized, "It is fair to say that judges, particularly appellate judges, will not be swayed by a lawyer's brickbats."

Even the Michigan Code of Judicial Conduct, by which the judiciary is governed and which we swear to

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J., concurring), in which he charged our citizens with the duty of informing themselves in the face of potential misrepresentations. Justice MARKMAN stated:

> In carrying out the responsibilities of self-government, "we the people" of Michigan are responsible for our own actions. In particular, when the citizen acts in what is essentially a legislative capacity by facilitating the enactment of a constitutional amendment, he cannot blame others when he signs a petition without knowing what it says. It is not to excuse misrepresentations, when they occur, *to recognize nonetheless that it is the citizen's duty to inform himself about the substance of a petition before signing it, precisely in order to combat potential misrepresentations.* [Emphasis added.]

honor, alerts us that this institution is not a self-serving one designed for our protection, but exists for the people of this state. "A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary." Code of Judicial Conduct, Canon 1. And Canon 2 provides fair warning that "[a] judge must expect to be the subject of constant public scrutiny." Code of Judicial Conduct, Canon 2(A).

Although the majority purports to recognize that "lawyers have an unquestioned right to criticize the acts of courts and judges," and that "there is no prohibition on a lawyer engaging in such criticism even during the pendency of a case," it nonetheless asserts that there exist "limitations . . . on the form and manner of such criticism . . . ." *Ante* at 263. A systematic review of the majority's sources dismantles its broad claim and reveals its holding for what it truly is: an attorney cannot use choice language to criticize a judge, ever.

Of particular note are the majority's citations for this proposition. In misleading fashion, the majority states the following:

> In discussing the scope of this obligation in the 19th century, the United States Supreme Court stated that attorneys are under an implied "obligation . . . to maintain at all times the respect due to courts of justice and judicial officers. This obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." [*Ante* at 244, quoting *Bradley v Fisher*, 80 US (13 Wall) 335, 355; 20 L Ed 646 (1872).]

Even a cursory reading of *Bradley* reveals three important facts. First, the attorney in *Bradley* criticized the judge *in the courtroom in the context of litigation*. Second, the entire *Bradley* opinion was devoted to

whether the judge, who thereafter struck the attorney from the rolls, was entitled to immunity for that act. Third, the statement the majority quotes was quintessential dicta; the Court decided that the judge was entitled to absolute immunity for his act, and, thus, no commentary on the attorney's behavior was necessary or relevant to the holding. See *id.* at 357 (Davis, J., dissenting).

Tellingly, the proposition the majority extracts from *Bradley* has never been tested in the constitutional framework of an ethical rule that purports to prohibit rude speech that lacks a defamatory component made about judges after a case has concluded. To rely on such a statement for the sweepingly broad proposition that attorneys cannot utter rude remarks in that situation is misleading at best.

Of similar precariousness is the majority's citation of *In re Mains*, 121 Mich 603; 80 NW 714 (1899). Although the majority again attempts to fashion a broad rule by isolating a comment, a quick glance at *Mains* exposes the majority's loose methodology. The majority cites *Mains* for the proposition that "an attorney has no right to so conduct himself or herself as to dishonor his or her profession or to bring the courts of this state into disrepute." *Ante* at 262 n 31. This Court in *Mains* considered an attorney's accusations, made in letters to a judge, that the judge was engaging in corruption and conspiracy. Thus, this Court did not test the statement cited by the majority in the context of out-of-court, nondefamatory criticisms of the judiciary outside the context of pending litigation.

The same is true for the majority's citation of *In re Thatcher*, 80 Ohio St 492, 669; 89 NE 39 (1909). That opinion was written before the state's rules of professional conduct had been established, see *In re Harper*,

77 Ohio St 3d 211 225; 673 NE2d 1253 (1996), and, thus, is an insufficient test of whether the broad concept that an attorney should be respectful of the judiciary can be codified as a speech restriction and survive First Amendment scrutiny. But in any event, the respondent in *Thatcher* publicly asserted that a particular judge could be bought for the right price, so the speech at issue there was defamatory rather than merely rude criticism.

The majority repeats its error in citing *Attorney General v Nelson*, 263 Mich 686, 701; 249 NW 439 (1933). See *ante* at 263. The majority again attempts to draw unbelievably broad concepts from a vastly distinguishable situation. In *Nelson*, it took this Court 12 pages to catalog the conduct at issue, which consisted of, to be brief, an attorney making accusations in pleadings, petitions, and circulated letters that a judge and other attorneys were extensively abusing the legal process. So again, when this Court stated that an attorney "should be at all times imbued with the respect which he owes to the court before whom he is practicing," *Nelson*, *supra* at 701, we in no way issued a blanket statement from which a rule that an attorney must not ever speak rudely of a judge can be derived.

In the same searching method, the majority cites *Cantwell v Connecticut*, 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940), in claiming that respondent's comments, because of their graphic content, were not political speech because " '[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .' " *Ante* at 256-257, quoting *Cantwell*, *supra* at 309-310. The reader should first be informed that *Cantwell* was not a case involving political speech. Rather, the *Cantwell* plaintiffs were engaged in reli-

gious proselytizing, and one plaintiff was accused of breaching the peace by communicating propaganda that criticized the religion of others. The majority takes its chosen quote completely out of context. No more need be said than reproducing the full words of the Court on the subject:

> Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument. [*Id.* at 309-310.]

Likewise useless is the majority's reliance on *Chaplinsky v New Hampshire*, 315 US 568; 62 S Ct 766; 86 L Ed 1031 (1942). *Chaplinsky* also involved the dissemination of religious ideas that offended the listeners. Further, *Chaplinsky* concerned itself with "fighting words" and held that the statute at issue was sufficiently narrowly tailored so as to prevent only "specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." *Id.* at 573.

One can only surmise that it must be this clear misunderstanding of *Cantwell* and *Chaplinsky* that prompts the majority to make the following conclusion: "There is no reasonable construction of Mr. Fieger's remarks that could lead to the conclusion that these

were *mere comment on the professional performance* of these three judges of the Court of Appeals." *Ante* at 261 (emphasis added). Even accepting the majority's subjective assessment that respondent's remarks were not "comment" on the judges' performance,[15] the majority has failed remarkably to provide any sound citation of authority that would support its assertion that an attorney is precluded from uttering remarks that are something other than "comment" on a judge's performance, or, for that matter, rude comment about a judge not made in the context of truly pending litigation.

Notwithstanding the majority's failure to connect the rules at issue with respondent's conduct and its inability to base in any law a blanket curtailment on offensively worded criticism, the majority astoundingly opines that a conception of the First Amendment that protects offensive attorney speech "has never been a part of our actual Constitution . . . ." *Ante* at 242. In fact, its "glimpse into the likely future" footnote, *ante* at 265 n 35, is nothing more than a scare tactic designed to conceal the fact that the ADB's decision merely maintained the status quo and did not, in fact, "usher" some "Hobbesian legal culture" into our jurisprudence. See *ante* at 264. Stripped of irrelevant authority, the majority's conclusion is nothing more than an unsupportable notion that attorneys must not speak in an undefined "rude" manner in criticism of a judge's role in a concluded case.

For the reasons I have stated, I strongly disagree with the majority's erroneous conclusion that respondent's conduct is punishable for any of the reasons the majority asserts. Because, although the majority be-

[15] Unlike the majority, most would probably conclude that respondent's words were very clearly comment, however colorfully expressed, on how he believed the judges performed in deciding the *Badalamenti* appeal.

lieves otherwise, it is not enough to claim that the statements were crass, disgusting, or even discourteous and uncivil. Nor it is constitutionally sufficient to declare the rules of professional conduct violated, for "First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile*, *supra* at 1054.[16] And it cannot be dispositive merely that an attorney is an "officer of the court" without some persuasive explanation of how his public statements are irreconcilable with that role. See *id.* at 1056. " '[A] lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice.' " *Comm for Lawyer Discipline v Benton*, 980 SW2d 425, 430 (Tex, 1998) (citations omitted). See also *In re Ronwin*, 136 Ariz 566, 573; 667 P2d 1281 (1983) (commenting that the respondent attorney had an "absolute" First Amendment right "to speak and write as he wishes and to say anything which he believes to be true," but the right "must be exercised somewhere other than the courtroom").

These ideas are far from novel, and a broad survey of this nation's jurisprudence confirms that attorneys can publicly criticize the judiciary and cannot be punished for such speech, no matter how crass, when the criticisms do not affect the decorum of the tribunal or substantially prejudice the administration of justice.

[16] This idea can be culled from a variety of United States Supreme Court opinions. See *Westfall*, *supra* at 844 (Blackmar, C.J., dissenting) ("Lawyers do not surrender their First Amendment rights when they accept their licenses."), citing *Bates v State Bar of Arizona*, 433 US 350; 97 S Ct 2691; 53 L Ed 2d 810 (1977), *In re RMJ*, 455 US 191; 102 S Ct 929; 71 L Ed 2d 64 (1982), rev'g *In re RMJ*, 609 SW2d 411 (Mo, 1980), *NAACP v Button*, 371 US 415; 83 S Ct 328; 9 L Ed 2d 405 (1963), and *In re Primus*, 436 US 412; 98 S Ct 1893; 56 L Ed 2d 417 (1978).

Unless and until an unassailable connection can be made between respondent's speech and prejudice to the administration of justice, which connection has not been made here, respondent's comments, offensive as they may have been, cannot be suppressed or punished without seriously offending the First Amendment.[17]

The same can be said now as was said in *Westfall*, in which the dissent challenged the majority's overly broad holding: "Make no mistake about it. The principal opinion chills lawyers' speech about judicial decisions. . . . This language portends further disciplinary proceedings against lawyers . . . who express themselves too freely. Many will conclude that it is wise to keep quiet." *Westfall*, *supra* at 849 (Blackmar, C.J., dissenting.)

IV. CONCLUSION

It is ridiculous to conclude, as does the majority, that respondent's speech fell within the narrow bounds of the rules of professional conduct with which he was accused of violating. The majority's holding is reached only by distorting the language of the rules and ignor-

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[17] Because respondent's comments neither violated the rules in question nor were subject to restrictions as substantially prejudicial or impermissibly damaging to the integrity of the judiciary, I would not reach the question whether the rules are constitutionally void for vagueness or overbreadth. When there are other legitimate ways to resolve an issue, as there are here, declaring the rules unconstitutional is unnecessary. Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

ing the fundamental guarantees of the First Amendment. Because respondent's conduct was not governed by the rules in question, and because his right to freely criticize a decision rendered by elected members of the judiciary is safeguarded by both the United States and Michigan Constitutions, respondent merits no discipline. I would uphold the decision of the ADB and dismiss the complaint in its entirety.

WEAVER, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). I dissent from the majority's decision to remand this case for the imposition of the agreed-to professional discipline, a reprimand of Mr. Fieger, and join Justice CAVANAGH's opinion on the substantive issues in this case.

I write separately to dissent from the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case.

Statements made during their respective judicial campaigns displaying bias and prejudice against Mr. Fieger require Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to recuse themselves from this case in which Mr. Fieger is himself a party.[1] Further, Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have become so "enmeshed" in matters involving Mr. Fieger as to make it inappropriate for

[1] *Republican Party of Minnesota v White,* 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), suggests that if campaign statements display a bias for or against an individual, the statements could raise due process concerns for future litigants. See also *State ex rel La Russa v Himes,* 144 Fla 145; 197 So 762 (1940), holding that a judge's campaign statements about a specific individual disqualified the judge from presiding over a subsequent trial of that person.

them to sit in a case in which Mr. Fieger is a party.[2] Thus, the participation in this case of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN violates respondent's rights to due process under the Fifth and the Fourteenth Amendment. Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN should have recused themselves from participating in this case.

In their joint opinion, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN mischaracterize my dissent and motives. Further, their criticisms and personal attacks in the joint opinion of the majority justices are misleading, inaccurate, irrational, and irrelevant to the issues in this case.[3] The majority appears to be attacking the messenger rather than addressing the genuine issue of due process created by the displays of bias and prejudice in this case.[4]

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[2] Due process violations may arise where a judge has been so personally "enmeshed in matters" concerning one party that the judge is biased against the party. See *Johnson v Mississippi*, 403 US 212, 215; 91 S Ct 1778; 29 L Ed 2d 423 (1971) (judge had been "a defendant in one of petitioner's civil rights suits and a losing party at that").

[3] For example, the joint opinion of the majority justices is misleading when it states that this dissent is largely grounded in "statements that occurred between six and ten years ago." *Ante* at 267. Less than 6 months ago, Justice CORRIGAN's campaign committee mailed a fund-raising letter saying, "We cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack." Less than 7 months ago, Justice MARKMAN, who is currently a defendant in a federal lawsuit initiated by Mr. Fieger, filed a motion for sanctions under FR Civ P 11 against Mr. Fieger.

Further, the joint opinion of the majority justices inaccurately says that my concern over this Court's disqualification procedures began "only after Mr. Fieger ceased targeting *her* with these motions." *Ante* at 280. As I explain in part D of this opinion, since May 2003 I have consistently called for this Court to address the need for clear, fair disqualification procedures for justices, including in two cases in which Mr. Fieger had requested that I recuse myself.

[4] To paraphrase Shakespeare, it seems the majority "doth protest too much." *Hamlet,* act 3, sc 2.

This Court has long recognized that a litigant has a right to an unbiased court:

> One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint of prejudice is attached. This is so firmly established as to regularly constituted courts as to need no comment.[5]

Further, an unbiased judge is essential to the due process guarantees of the Fifth and Fourteenth Amendment.[6] In order to protect due process, when a judge is sufficiently biased, the judge must be removed from the case in which the bias arises.[7]

Disqualification for personal bias against a party may be required in order to protect the party's due process rights. When a judicial candidate has made a campaign statement displaying extreme animosity toward a spe-

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[5] *Talbert v Muskegon Constr Co*, 305 Mich 345, 348; 9 NW2d 572 (1943).

[6] *Johnson, supra* at 215-216 (judge violated due process by sitting in a case in which one of the parties was previously a successful litigant against him); *Tumey v Ohio*, 273 US 510, 532; 47 S Ct 437; 71 L Ed 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Crampton v Dep't of State,* 395 Mich 347, 351; 235 NW2d 352 (1975) ("A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process.").

[7] *Johnson, supra* at 215; *Mayberry v Pennsylvania,* 400 US 455, 466; 91 S Ct 499; 27 L Ed 2d 532 (1971). See also *Tumey v Ohio*, *supra* at 532 ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.").

The United States Supreme Court has since extended this principle to civil cases. *Aetna Life Ins Co v Lavoie*, 475 US 813, 825; 106 S Ct 1580; 89 L Ed 2d 823 (1986). See also *Ponder v Davis*, 233 NC 699, 704; 65 SE2d 356 (1951) ("A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process.").

cific individual, once on the bench, the judge should be disqualified from hearing cases in which that individual is a party. If a judge has become so embroiled in conflicts with a defendant as to demonstrate hostility toward the defendant, the judge must be disqualified.

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Here, the statements about Mr. Fieger made during their respective judicial campaigns require Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to recuse themselves from this case in which Mr. Fieger is a party. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."[8] A judge who has bias against one of the parties appearing before him could be tempted "not to hold the balance nice, clear and true."[9] To avoid this possibility, due process requires that a judge who has made campaign statements demonstrating extreme antagonism toward an individual recuse himself or herself from a case in which that individual is a party. Friedland, *Disqualification or suppression: Due process and the response to judicial campaign speech,* 104 Colum L R 563 (2004).

Numerous cases of the United States Supreme Court hold that due process requires a lack of bias for or against a party.[10] *Republican Party of Minnesota v White* suggests that if campaign statements display a bias for

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[8] *Tumey v Ohio, supra* at 532.

[9] See *id*.

[10] *Id*. at 523, 531-534; *Aetna Life Ins Co v Lavoie, supra* at 822-825; *Ward v Village of Monroeville*, 409 US 57, 58-62; 93 S Ct 80; 34 L Ed 2d

or against a particular individual, the statements could raise due process concerns for future litigants. The Court recognized that "lack of bias for or against either *party* to the proceeding" is the root meaning of "impartiality" in the judicial context.[11] The Court said that impartiality in this sense "assures equal application of the law" or "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[12] The Court confirmed that this meaning of impartiality has been used by numerous cases recognizing that an impartial judge is essential to due process.[13]

In *Republican Party of Minnesota v White*, the Court stated that it is speech for or against *parties* that raises problems of impartiality or the appearance of impartiality:

> We think it plain that the announce clause [restricting judicial campaign speech] is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.[14]

In so holding, the Court recognized that speech for or against particular parties in a case does implicate impartiality or the appearance of impartiality.

The Florida Supreme Court held that a judge who uttered campaign statements directed at a particular

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267 (1972); *Johnson*, *supra* at 215-216; *In re Murchison*, 349 US 133, 137-139; 75 S Ct 623; 99 L Ed 942 (1955).

[11] *Republican Party of Minnesota v White, supra* at 775 (emphasis in original).

[12] *Id.* at 776.

[13] *Id*.

[14] *Id.* (emphasis in original).

individual should be disqualified from presiding over a case involving that individual.[15] In *State ex rel La Russa v Himes,* a judicial candidate made the following statements during an election campaign: " '[T]he people are shot down in cold blood; the people are assaulted and their homes broken into, and what the people want is a judge who will put people like Philip La Russa and his associates away in Raiford [a state penitentiary],' " and " '[P]eople like Philip La Russa and his associates cannot come into Court and get a license for gambling by a fine or to violate the lottery laws by a fine, but [I] would put them in Raiford where they belong[].' "[16]

The Florida Supreme Court held that these campaign statements disqualified the judge from subsequently presiding over a trial of Philip La Russa for violating lottery laws. The Court stated:

> Fear that [La Russa] will not have a fair trial may in some cases be a mental attitude but if the conduct of the judge has been such as to create it, the law requires that he recuse himself. It may ultimately be as devoid of reality as the cenotaph is the remains of the hero it commemorates but if conclusively shown that the seed of fear was planted and the facts related give a reasonable man ground for belief that the judge is prejudiced, that is sufficient. It is contrary to all human experience to contend that a judge under the circumstances stated may single out one charged or that may be charged with crime and talk to the public about sending him to Raiford (State penitentiary) and then contend that the one singled out when hailed before the judge for trial had no ground for belief that the latter was prejudiced.[17]

Similarly, the campaign statements made by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and

[15] *State ex rel La Russa v Himes,* 144 Fla 145; 197 So 762 (1940).

[16] *Id.* at 146.

[17] *Id.* at 147.

MARKMAN against Mr. Fieger would "give a reasonable man ground for belief" that they are prejudiced. Because their campaign statements display prejudice against Mr. Fieger, they should be disqualified from sitting in this case.

For example, on February 20, 2006, while this case was pending before this Court, the Committee to Reelect Justice Maura Corrigan sent out a fund-raising letter from former Governor John Engler stating that "[w]e cannot lower our guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack." Former Governor John Engler may make any statements about Mr. Fieger with impunity, as long as he does not violate libel or slander laws. But Justice CORRIGAN cannot do so without potentially disqualifying herself from sitting in a case in which Mr. Fieger is a party. Justice CORRIGAN adopted former Governor Engler's statement as her own when she had her campaign committee pay for and send out the former governor's letter.[18] Justice CORRIGAN's adoption of this statement identifying Mr. Fieger as a possible threat to Justice CORRIGAN's reelection campaign as her own displays a bias against Mr. Fieger.

This display of bias is of special concern because this case, in which Mr. Fieger is a party, was pending at the time the letter was sent. On May 27, 2005, this Court granted leave to appeal in this case; on February 14, 2006, oral argument in this case was scheduled; on February 20, 2006, Justice CORRIGAN's campaign issued the fund-raising letter; and 16 days later, on March 8,

[18] The letter was one of the grounds listed in Mr. Fieger's April 20, 2006, motion for disqualification requesting that Justice CORRIGAN recuse herself from this case. That motion was denied. *Grievance Administrator v Fieger*, 475 Mich 1211 (2006).

2006, this case was argued before the Court. Now Justice CORRIGAN is deciding against Mr. Fieger, a party in this case, fewer than six months after her campaign committee sent the letter using the threat of a "sneak attack" by attorneys such as Mr. Fieger as a fund-raising tool for her 2006 election campaign.

Regarding Chief Justice TAYLOR, it was reported that, during his 2000 campaign, he made statements at a fund-raiser about the cases that Mr. Fieger had pending in the appellate courts: "Geoffrey Fieger apparently has $90 million of lawsuit awards pending in the state Court of Appeals."[19] The majority's joint opinion asserts that "it shows no 'bias or prejudice' to identify the number of cases Mr. Fieger had on appeal . . . ." *Ante* at 272. But then-Justice TAYLOR was not identifying the *number* of cases that Mr. Fieger had on appeal; he was emphasizing the amount of money that was at stake—$90 million—and implying that the awards would be overturned if then-Justice TAYLOR were retained in office.

Justice YOUNG, in a speech at the Republican Party state convention in August 26, 2000, said that "Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that."[20]

Yet another display of bias occurred in a campaign ad paid for by "Robert Young for Justice," "Stephen Markman for Justice," and "Clifford Taylor for Justice." The campaign ad included the following language:

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[19] *Justice Visits County*, The Sunday Independent, September 3, 2000, p 3. This statement was one of the grounds listed in Mr. Fieger's December 17, 2004, motion for disqualification requesting the recusal of Chief Justice TAYLOR from this case. That motion was denied. *Grievance Administrator v Fieger*, 472 Mich 1244 (2005).

[20] This statement was one of the grounds listed in Mr. Fieger's December 17, 2004, motion for disqualification requesting that Justice YOUNG recuse himself from this case. That motion was denied. *Id.*

> Opponents continue to attack Michigan's Supreme Court, but now they've gone too far. *The Detroit News* calls the opponents' ads truly vicious, saying the charges are false and silly. The *Grand Rapids Press* admonishes Detroit area trial lawyer Marietta Robinson's smear campaign, writing "Robinson's hard-edged campaign has been degrading to the court and to the public's confidence in [the] Michigan judiciary." Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson, Fitzgerald and Thomas [who ran against Chief Justice TAYLOR and Justices YOUNG and MARKMAN in the 2000 Supreme Court election].[21]

By displaying bias and prejudice against an individual, attorney Geoffrey Fieger, during their judicial campaigns, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have disqualified themselves from hearing this case in which Mr. Fieger is a party.

B

In addition, Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have become so "enmeshed" in matters involving Mr. Fieger as to make it inappropriate for them to sit in a case in which Mr. Fieger is a party. See *Johnson v Mississippi.*[22]

In *Johnson,* Robert Johnson, a civil rights worker who was at the time a defendant in a criminal proceeding, allegedly disobeyed a trial judge's instructions directing him where to walk in the courtroom. The trial judge had Johnson removed from the courtroom and instituted contempt proceedings against Johnson two years later. In the meantime, Johnson and others had

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[21] This statement was one of the grounds listed in Mr. Fieger's December 17, 2004, motion for disqualification requesting that Chief Justice TAYLOR and Justices YOUNG and MARKMAN recuse themselves from this case. That motion was denied. *Id.*

[22] 403 US 212, 215; 91 S Ct 1778; 29 L Ed 2d 423 (1971).

filed a successful suit in federal court to enjoin the state trial judge from conducting "trials of either Negroes or women . . . until such time as Negroes and women were not systematically excluded from juries."[23] The trial judge convicted Johnson of contempt and gave him a four-month sentence. The United States Supreme Court reversed the contempt conviction, holding that due process required that the contempt hearing take place before a different judge.[24] The Court stated that Johnson should have had a contempt hearing and that the trial judge should have recused himself from presiding over that hearing.[25] The Court explained that not only was there evidence that the trial judge had made "intemperate remarks . . . concerning civil rights litigants," but

> immediately prior to the adjudication of contempt [the trial judge] was a defendant in one of [Johnson's] civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving [Johnson] as to make it most appropriate for another judge to sit. Trial before "an unbiased judge" is essential to due process.[26]

Mr. Fieger has criticized Chief Justice TAYLOR's and Justice CORRIGAN's prior actions as Court of Appeals judges, and both justices have been involved in prior grievance actions relating to Mr. Fieger's criticism of their actions. Therefore, both Chief Justice TAYLOR and Justice CORRIGAN are "so enmeshed" in matters involving Mr. Fieger that due process requires that they not participate in cases in which Mr. Fieger is a party.

In 1994, complaining about two then-recent Court of Appeals cases, Mr. Fieger publicly insulted Chief Justice

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[23] *Id.* at 214.

[24] *Id.* at 215-216.

[25] *Id.* at 215.

[26] *Id.* at 215-216 (citation omitted).

(then-Court of Appeals Judge) Clifford TAYLOR, calling him "amazingly stupid" and saying:

> Cliff Taylor and [Court of Appeals Judge E. Thomas] Fitzgerald, you know, I don't think they ever practiced law, I really don't. I think they got a law degree and said it will be easy to get a — they get paid $120,000 a year, you know, and people vote on them, you know, when they come up for election and the only reason they keep getting elected [is] because they're the only elected officials in the state who get to have an incumbent designation, so when you go into the voting booth and it says "Cliff Taylor", it doesn't say failed Republican nominee for Attorney General who never had a job in his life, whose wife is Governor Engler's lawyer, who got appointed when he lost, it says "Cliff Taylor incumbent judge of the Court of Appeals," and they vote for him even though they don't know him. The guy could be Adolf Hitler and it says "incumbent judge" and he gets elected.

Mr. Fieger said more about Chief Justice (then-Court of Appeals Judge) TAYLOR:

> [T]his guy has a political agenda . . . . I knew in advance what he was going to do . . . . We know his wife is Governor Engler's Chief Counsel. We know his wife advises him on the law. We know—we knew—what he was going to do in advance, and guess what, he went right ahead and did it. Now you can know somebody's political agenda affects their judicial thinking so much that you can predict in advance exactly what he's going to do[,] . . . his political agenda translating into his judicial decisions.

Although the Grievance Administrator charged Mr. Fieger with professional misconduct, on the basis of this statement and others, Mr. Fieger was never disciplined for these public slurs on then-Judge TAYLOR.[27]

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[27] The Attorney Discipline Board dismissed the charge involving these remarks about Chief Justice TAYLOR. The Grievance Administrator appealed the matter to this Court; this Court remanded the matter to the

That Justice CORRIGAN is too enmeshed in matters involving Mr. Fieger is revealed by the fact that on March 25, 1996, then-Judge CORRIGAN filed a request for an investigation of Mr. Fieger with the Attorney Grievance Administrator. This request for investigation was filed by then-Judge CORRIGAN in response to statements alleging a conspiracy between her and the Oakland County Prosecutor's office to improperly influence the outcome of Jack Kevorkian's criminal trial. That request for investigation was dismissed by the Attorney Grievance Commission in 2002.[28] This case involves the identical issue (criticism of an elected judge by Mr. Fieger) as the 1996 situation in which then-Judge CORRIGAN was both the judge being criticized and the complainant requesting an investigation.

These events support the conclusion that Chief Justice TAYLOR and Justice CORRIGAN have become so "enmeshed" in matters involving Mr. Fieger's comments towards judges, the subject of this case before us, as to make it inappropriate and a violation of due process for them to sit in this case in which Mr. Fieger is a party.

Justice MARKMAN has also been so enmeshed in matters involving Mr. Fieger as to make it inappropriate for him to sit in a case in which Mr. Fieger is a party. In *Johnson,* immediately before the adjudication of a contempt charge, the trial judge was a defendant in one of plaintiff Johnson's civil rights suits. Here, Justice

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Attorney Discipline Board for reconsideration in light of *In re Chmura,* 461 Mich 517; 608 NW2d 31 (2000). *Grievance Administrator v Fieger,* 462 Mich 1210 (2000). Chief Justice TAYLOR did not participate in that decision.

[28] This request for investigation was one of the grounds listed in Mr. Fieger's December 17, 2004, motion for disqualification requesting the recusal of Justice CORRIGAN from this case. That motion was denied. *Grievance Administrator v Fieger*, 472 Mich 1244 (2005).

MARKMAN is currently a defendant in a federal suit by Mr. Fieger. Mr. Fieger has brought a 42 USC 1983 suit against Justice MARKMAN in the United States District Court for the Eastern District of Michigan, accusing Justice MARKMAN of being part of a conspiracy to violate Mr. Fieger's civil rights. On January 4, 2006, Justice MARKMAN filed a motion seeking Rule 11[29] sanctions against the plaintiff, Mr. Fieger. Justice MARKMAN's motion cites the "numerous motions to disqualify Defendant Markman . . . from participating in appeals in which Plaintiff Fieger is a party or counsel" as supporting grounds for the Rule 11 sanctions.

While Justice MARKMAN did not instigate that suit, he did file the motion seeking Rule 11 sanctions, using as background the fact that Mr. Fieger had previously filed numerous "frivolous" motions against him. Given that fact, Justice MARKMAN has become so "enmeshed" in controversial affairs with Mr. Fieger that due process requires that he not participate in this case, in which Mr. Fieger is a party.

C

Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN may argue that they have no actual bias or prejudice against Mr. Fieger. But regardless of what their innermost feelings may be, their displays of bias and animosity toward Mr. Fieger, as demonstrated by the aforementioned examples, require them to recuse themselves. Actions speak louder than words, and a judge may be the last person to perceive actual bias against the party accusing the judge of bias. As the United States Supreme Court said in *In re Murchison*:[30]

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[29] FR Civ P 11.

[30] 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955).

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally high between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." [Citations omitted.]

This Court has previously recognized that "there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation."[31] This is such a case.

Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have recently attempted to rewrite how the rules of conduct that govern judges, including the justices of this Court, are applied by questioning and rejecting the application of the appearance of impropriety standard in Canon 2 of the Code of Judicial Conduct.[32] The joint opinion of the majority justices relies on a statement by Chief Justice TAYLOR and Justice MARKMAN in *Adair* for the proposition that

> if a judge does that which the law and the standards of conduct permit, such action cannot ordinarily serve as the

[31] *Cain v Dep't of Corrections,* 451 Mich 470, 513 n 48; 548 NW2d 210 (1996).

[32] See *Adair v Michigan*, 474 Mich 1027 (2006).

> basis for disqualification. To hold otherwise would be to make the law into a "snare" for those who are operating well within its boundaries. [*Ante* at 273.]

The justices of the majority miss the point. The question is not whether their actions were legal. The question is whether those actions display extreme antagonism toward and bias against a party in a case, or demonstrate that judges have become so "enmeshed" in matters involving a person as to make it a violation of due process for them to sit in a case in which that person is a party. Disqualification may be required for actions that are within the law when those legal actions violate a party's rights to due process under the Fifth and the Fourteenth Amendment.

D

The broader issue concerning disqualification of justices has repeatedly presented itself in cases before this Court for more than three years. Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN inaccurately suggest in their joint opinion that my concern over this Court's disqualification practices began "only after Mr. Fieger ceased targeting *her* with these motions."[33] This speculation is untrue.

During this Court's deliberations in *In re JK,* 468 Mich 202; 661 NW2d 216 (2003), a case involving termination of parental rights, my participation in the case became an issue and led me to research the procedures governing the participation and disqualification of justices.[34] Since that time, I have repeatedly

[33] *Ante* at 280.

[34] For an explanation of this history, see my statement of nonparticipation in *In re JK, supra* at 219.

called for this Court to address the need for clear, fair disqualification procedures for justices.

In September 2003, I denied Mr. Fieger's motion for my recusal in *Gilbert v DaimlerChrysler Corp*.[35] In requesting my recusal from that appeal, Mr. Fieger asserted only that the Michigan Chamber of Commerce, who had filed a brief as amicus curiae in *Gilbert,* had contributed to my campaign for reelection to the Michigan Supreme Court and had aired advertisements advocating my reelection. I included in the order denying the motion a detailed statement explaining my reasons for denying the motion.

I noted in my statement in *Gilbert* that my reelection campaign records showed that it had received a $200 contribution from Mr. Fieger.[36] This was a clerical error. Records from the Secretary of State show that Mr. Fieger contributed $400 to my reelection campaign committee. To the best of my knowledge, this is the only "support" that Mr. Fieger gave my campaign committee in the 2002 election, despite the concurring statement's insinuations to the contrary, *ante* at 267.[37]

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[35] 469 Mich 883 (2003).

[36] My statement in *Gilbert, supra* at 884*,* noted that my reelection campaign had received contributions from both sides in that case. Besides the contribution from the plaintiff's counsel, Mr. Fieger, I listed contributions from the defendant and the defendant's attorneys: $2,000 from DaimlerChrysler's political action committee; $250 from DaimlerChrysler's assistant general counsel, Steven Hantler; $375 each from DaimlerChrysler's attorneys Elizabeth Hardy and Thomas Kienbaum; and $500 from retired Justice Patricia BOYLE, of counsel for DaimlerChrysler in that case. Those amounts were correct.

[37] As I said in that statement three years ago, Michigan's current system of selecting Supreme Court justices, which combines statewide elections and appointments by the Governor to fill vacancies, needs to be examined. I have developed and am promoting plans for an alternative selection system for Michigan Supreme Court justices, still retaining elections, but for one term only. The joint opinion's discussion of the

For more than three years, since May 2003, I have called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the procedures concerning the participation or disqualification of justices in at least 11 published statements in cases.[38] Since that time, when a motion has been filed asking for my recusal from a particular case, I have given detailed reasons for my decision whether or not to recuse myself. For example, in *Graves v Warner Bros,* 469 Mich 853, 854 (2003), when I denied Mr. Fieger's motion requesting my recusal, my statement explained that the motion did not assert any grounds for my recusal in that case:

> Plaintiff's motion for recusal is based on the same grounds alleged in the April 16, 2003 motion filed in *Gilbert v DaimlerChrysler,* Docket No. 122457 to recuse the same justices. But plaintiff recognizes that the allegations pertaining to the Michigan Chamber of Commerce participating as amicus curiae in *Gilbert v DaimlerChrysler* do not apply in this case.

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problems with the expensive, rancorous, statewide elections, *ante* at 276-277, underscores this need.

[38] See, e.g., *In re JK, supra* at 220-221, *Graves v Warner Bros*, 469 Mich 853 (2003), *Graves v Warner Bros,* 469 Mich 853, 854-855 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96; 693 NW2d 358 (2005), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381 (2005), *Grievance Administrator v Fieger*, 472 Mich 1244, 1245 (2005), *Scalise v Boy Scouts of America*, 473 Mich 853 (2005), *McDowell v Detroit,* 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

Since May 2003, there have been nine public hearings on other administrative matters in which the rules governing the disqualification of justices could have been addressed: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, January 27, 2005, May 26, 2005, September 29, 2005, January 25, 2006, and May 24, 2006.

> In requesting my recusal from the appeal in *Gilbert v DaimlerChrysler,* plaintiff asserted only that the Michigan Chamber of Commerce, which filed a brief as amicus in that case, contributed to my campaign for reelection to the Michigan Supreme Court in 2002 and aired advertisements advocating my reelection. There are no allegations in either *Gilbert v DaimlerChrysler* or this case that I made or caused to be published any statements about any of the parties, their attorneys, the amicus, or issues in the case that would raise the issue of bias or prejudice on my part.

The joint opinion's suggestion, *ante* at 280 n 6, that I merely issued a conclusory statement denying the recusal motion in *Graves* is both inaccurate and misleading. Since I responded to these two motions for my recusal with detailed statements explaining my decisions not to recuse myself from these cases, Mr. Fieger has not moved for my recusal in any subsequent cases.

Currently, justices of the Michigan Supreme Court sometimes follow unwritten traditions when deciding a motion for disqualification. At other times, justices follow portions of the current court rule on disqualification, MCR 2.003.[39] Mr. Fieger filed three motions for

[39] There has been inconsistency by some justices regarding the applicability of MCR 2.003 to Supreme Court justices. At times they have applied the rule to themselves, and at times they have not. Indeed, Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have each at times availed themselves of MCR 2.003. In *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN specifically recognized that they were required to comply with MCR 2.003, stating that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, *or if any of the other requirements of this court rule were not satisfied*." [Emphasis added.] Justice YOUNG concurred in their statement, saying that he supported their joint statement and fully concurred in the legal analysis of the ethical questions presented in it. *Id.* at 1053. Similarly, for *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188; 702 NW2d 106 (2005), Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D).

recusal of various justices in this case; the motions were decided by the individual justices, and there was no possibility of review of that justice's individual decision not to recuse himself or herself.[40]

This helter-skelter approach of following "unwritten traditions" that are secret from the public is wrong. There should be clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.

CONCLUSION

Had any one of the four justices in the majority—Chief Justice TAYLOR or Justice CORRIGAN, Justice YOUNG, or Justice MARKMAN—recused himself or herself from participating in the case, the Attorney Discipline Board's decision to dismiss the charges against Mr. Fieger would have been affirmed by equal division. MCR 7.316(C).[41]

But at other times, these four justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

[40] Although MCR 2.003(C)(3) gives a party the right to have a judge's decision not to recuse himself or herself reviewed (by the chief judge or a judge assigned by the State Court Administrator), when Mr. Fieger asked for reconsideration of then-Chief Justice CORRIGAN'S and Justices TAYLOR'S, YOUNG'S, and MARKMAN'S decisions not to recuse themselves in *Gilbert,* those four justices simply denied the motion themselves and did not refer the motion to another judge for review de novo.

[41] MCR 7.316(C) provides in pertinent part: "Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Supreme Court must be made by concurrence of a majority of the justices voting."

Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have displayed extreme antagonism toward and bias against the respondent, Mr. Fieger, by statements made in their respective judicial campaigns; Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have become so "enmeshed" in matters involving Mr. Fieger as to make it inappropriate for them to sit in a case in which Mr. Fieger is himself a party. Accordingly, the participation of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN in this case violates Mr. Fieger's rights to due process under the Fifth and the Fourteenth Amendment.

I declined to participate in the various motions requesting the disqualification of Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN when Mr. Fieger appeared as an attorney representing a party. In doing so, I stated that those motions and cases should not be decided until the Court published for public comment and public hearings and adopted clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.[42] But now that this case is being decided, and Mr. Fieger is a *party*, rather than an attorney representing a party, I can no longer withhold my opinion that Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN should not be participating in the decision of this case.

KELLY, J. (*dissenting*). We granted leave to appeal in this case to determine (1) whether the Attorney Discipline Board (ADB) can answer constitutional questions,

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[42] See, e.g., *Graves v Warner Bros*, 469 Mich 853, 854-855 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381, 382 (2005), *McDowell v Detroit,* 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

(2) whether comments made by respondent concerning three Court of Appeals judges during a radio broadcast violated certain of the Michigan Rules of Professional Conduct (MRPC), and (3) whether those rules violate the freedoms provided by the First Amendment of the United States Constitution or article 1, § 5 of our state constitution. US Const, Am I; Const 1963, art 1, § 5.

I agree with the majority of the ADB that the ADB has the authority to decide constitutional questions because, inherently, this Court has delegated that authority to it. I would hold, also, that respondent did not violate MRPC 3.5(c) or 6.5(a) because his statements were proscribed by neither rule. And, even if respondent had violated either rule, the rules are unconstitutionally vague and infringe on respondent's free speech protected by the First Amendment of the federal constitution.

THE ADB CAN DECIDE CONSTITUTIONAL QUESTIONS

The issues presented in this case are questions of law involving attorney discipline, which we review de novo. *Grievance Administrator v Lopatin,* 462 Mich 235, 247; 612 NW2d 120 (2000). Our responsibility to regulate and discipline members of the State Bar of Michigan is found in our state constitution at Const 1963, art 6, § 5,[1] and in our statutes at MCL 600.904.[2] To fulfill this responsibility, we created by court rule the Attorney

[1] Article 6, § 5 provides:

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

[2] MCL 600.904 provides:

Grievance Commission and the Attorney Disciplinary Board. MCR 9.108[3] and MCR 9.110.[4] Through these rules, we have delegated the initial phases of our

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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.

[3] MCR 9.108 provides:

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

* * *

(E) Powers and Duties. The commission has the power and duty to:

* * *

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys[]

[4] MCR 9.110 provides:

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

* * *

(E) Powers and Duties. The board has the power and duty to:

(1) appoint an attorney to serve as its general counsel and executive director;

(2) appoint hearing panels and masters;

constitutional responsibility to supervise and discipline Michigan attorneys. Just as no one contests that the Court has the power to hear constitutional questions, no one cites authority that limits the Court's power to delegate this power to the ADB.

The majority holds that the ADB cannot answer constitutional questions because of its mere quasi-judicial status. It bases that decision on *Wikman v Novi*,[5] *Lewis v Michigan*,[6] and Const 1963, art 3, § 2. But, none of these authorities answers the question. Neither *Wikman* nor *Lewis* involved a delegation of judicial power to a judicially created entity. *Wikman* dealt with a legislative delegation of power to the Michigan Tax Tribunal. *Lewis* dealt with the constitutional power of the Legislature to implement equal

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(3) assign a complaint to a hearing panel or to a master;

(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;

(5) discipline and reinstate attorneys under these rules;

(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

(7) annually write a budget for the board and submit it to the Supreme Court for approval;

(8) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and

(9) submit to the Supreme Court proposed changes in these rules.

[5] 413 Mich 617; 322 NW2d 103 (1982).

[6] 464 Mich 781; 629 NW2d 868 (2001).

protection provisions.[7] Article 3, § 2 of the state constitution is the Separation of Powers Clause.[8]

Lewis had nothing to do with the delegation of authority to decide constitutional questions. *Wikman* discussed the authority of the Legislature to delegate to one of its agencies the power to determine a constitutional question. It inferred that the Legislature cannot make this delegation because the authority to answer a constitutional question resides in the judicial branch.

By contrast, this case involves the power of the Supreme Court to delegate authority to opine on a constitutional question to one of its own agencies. It does not follow that, because a legislatively created quasi-judicial agency may not decide a constitutional question, a quasi-judicial agency of the Supreme Court cannot do so. Rather, the opposite result should obtain. If this Court makes a broad delegation of authority to its own quasi-judicial agency and does not expressly exempt from it the determination of constitutional questions, the agency has that power.

There being no restriction on the Court's power to delegate constitutional power and none on the ADB's delegated authority, I would hold that the ADB may answer constitutional questions involving attorney discipline.

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[7] The majority correctly states that the ability to answer constitutional questions is a core judicial function. However, standing alone, the statement does not explain why this Court lacks the power to delegate its authority to a body that it created. Perhaps the majority is confusing the ability with its perception of the advisability of such a delegation.

[8] "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

RESPONDENT DID NOT VIOLATE MRPC 3.5(c)

A. PENDING CASES

MRPC 3.5(c) reads: "A lawyer shall not . . . engage in undignified or discourteous conduct toward the tribunal."

In order to determine whether respondent violated MRPC 3.5(c), it is necessary first to address whether statements were made during a "pending" case. Respondent's statements were uttered after the Court of Appeals opinion in the underlying case had been issued and before any party made a motion for reconsideration or appealed.

The word "pending" is not defined by the Michigan Court Rules. Therefore, it is appropriate to consult other sources to verify the word's ordinary meaning. MCL 8.3a. Black's Law Dictionary (8th ed) defines "pending" as "[r]emaining undecided; awaiting decision <a pending case>." *Random House Webster's College Dictionary* similarly provides that "pending" means "awaiting decision or settlement." Applying these definitions, I find no support for a finding that respondent's statements were made during a pending case. Nothing remained undecided at the time the statements were made.

The majority also uses a legal dictionary. Applying it to several court rules, the majority concludes that the Court of Appeals opinion was still pending because it was not effective at the time respondent made his comments. The majority states that MCR 7.215(F)(1)(a) and MCR 7.302(C)(2)(a) and (b) show that Court of Appeals opinions do not become effective until (1) after expiration of the time for filing an application for leave to appeal to this Court or (2) until this Court decides the case, if leave is granted. However, the date when a

Court of Appeals decision becomes "effective" is not the same as the date when a matter is no longer "pending" before that Court.

When respondent made his statements, there were no issues unresolved or motions left to be decided. Although the opinion was not yet final, it had been released and nothing remained to be done by the Court of Appeals; nothing was "pending." The majority's analysis does not apply the common meaning of "pending." Instead, it creates a world where cases theoretically can be pending for an indeterminate length of time.[9]

In light of the above, I am not persuaded by the majority's analysis. Rather, I find that the underlying case was not "pending" at the time respondent made his comments.

B. IN-COURT STATEMENTS

MRPC 3.5(c) provides that a lawyer shall not engage in undignified or discourteous conduct toward the tribunal. The "Comments" on the rule, while not binding, are persuasive in determining its meaning and reflect the thoughts of this Court on the rule's true meaning. The comments on MRPC 3.5 provide, in relevant part:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge,

[9] Under MCR 2.612(C)(2), a motion for relief from judgment may be made "within a reasonable time" after judgment is entered. There is no other time limit on such a motion if it is not based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. However, I do not believe that a case could be said to be "pending" until such time as no motion could be brought under this court rule.

> but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

When subsection c is read in the context of the entire rule and the comment, its intent becomes apparent. It is aimed at prohibiting conduct that is directed "toward the tribunal" only during oral argument or trial. Everything in the comment refers to activity that transpires in a courtroom. The comment is quiet about an attorney's conduct anywhere else or after a proceeding is no longer pending.

When interpreting MRPC 3.5(c), it is instructive to look at the American Bar Association's (ABA) Model Rules of Professional Conduct 3.5. It provides that "[a] lawyer shall not . . . (d) engage in conduct intended to disrupt a tribunal." MRPC 3.5(c) was fashioned from ABA Model Rule 3.5. Also, the ABA's former DR 7-106(C)(6) and our former DR 7-106(c)(6) were identical. DR 7-106 is another source of MRPC 3.5(c). It stated, "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . engage in undignified or discourteous conduct which is degrading to a tribunal." DR 7-106(c)(6)(e).

As ADB members Theodore J. St. Antoine, William P. Hampton, and George H. Lennon noted in their opinion in this case:

> In terms of the structure of Rule 3.5 versus the comparable Code provision, we note that the former Code's DR 7-106 dealt entirely with "Trial Conduct," and subparagraph (C) contained seven prohibitions applicable when a lawyer was "appearing in his professional capacity before a tribunal." Michigan and Model Rules 3.5 involve not only rules regarding conduct during a proceeding, but also rules

> which had previously been located elsewhere in the Code, such as prohibitions against influencing judges and other officials. Thus, the introductory paragraph of Rule 3.5 reflects a different, broader, scope than that of the comparable Code provision. That is, instead of saying (as the Code did), "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . ," MRPC 3.5 says simply, "*A lawyer shall not* . . . ." The ABA focused Model Rule 3.5(c) on conduct related to pending proceedings by prohibiting "conduct *intended to disrupt* a tribunal." Michigan's Rule, as we have mentioned, is different. Although Michigan largely adopted the ABA Model Rules, the text of MRPC 3.5(c) was modified so that it proscribes "*undignified or discourteous conduct toward* the tribunal." [Emphasis in original.]

As these members of the ADB properly explained, MRPC 3.5(c) eliminated the inquiry into the lawyer's intent, choosing instead to focus on whether the conduct was (1) undignified or discourteous, and (2) "conduct toward the tribunal." Because respondent concedes, and I agree, that his statements were disrespectful and discourteous, the issue becomes whether the conduct was "toward the tribunal."

Respondent made the statements on a radio program. He did not make them in a court of law. I would limit MRPC 3.5(c) to statements and conduct that take place in a courtroom. Accordingly, I would find that respondent did not violate MRPC 3.5(c) because the conduct in question was not "toward a tribunal" as envisioned by the rule.

I am unpersuaded by the majority's conclusion that limiting the rule's application to a courtroom would make it superfluous in light of the contempt powers of courts. MCL 600.1711(1). Rather, MRPC 3.5(c) provides an alternative to the power of the court to find an attorney in contempt. There are situations where a

reprimand or other discipline not involving a contempt of court citation is appropriate. MRPC 3.5(c) expands a judge's range of options.

I also disagree with the majority that a construction of MRPC 3.5(c) that limits its application to courtrooms "fails to accord consideration to the importance the courtesy and civility rules serve as a vehicle for preserving the public's confidence in the integrity of the legal process." *Ante* at 252. Confidence in our courts is best served when an attorney is free to comment on what the attorney perceives as the deficiencies of our judges and of our legal system. Extending the rule beyond the courtroom necessarily chills comment.

I would read MRPC 3.5(c) together with its comment and hold that it applies only to statements and conduct in a courtroom. Therefore, I would find that respondent did not violate the rule.

RESPONDENT DID NOT VIOLATE MRPC 6.5(a)

MRPC 6.5(a) reads:

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

Respondent argues that MRPC 6.5(a) does not apply to the statements complained of in this case. This rule provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." The comments on the rule provide in part:

> A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met.
>
> A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion.

When read in conjunction with the comments, the rule reveals an underlying intent that lawyers display civility towards parties, witnesses, and third parties involved in the legal process. Because the rule focuses on the legal process, its application should be to pending litigation or other pending "legal matters." To read it otherwise would be to extend its application beyond any identifiable time limit. An attorney could be subject to sanctions under the rule years after a legal matter was no longer pending. I agree with the reasoning of ADB members St. Antoine, Hampton, and Lennon that "[n]othing in Rule 6.5 suggests that 'persons involved in the legal process' may not ever be criticized for their role in that process, not even after the involvement has ceased."

As explained above, respondent's comments were not made while the case was pending. The Court of Appeals had decided the matter, and no postjudgment motions

or appeals had been filed. Therefore, I would find that respondent's conduct did not violate MRPC 6.5(a) because the rule is not intended to apply to comments made about the participants in a legal action when the matter is not pending.

MRPC 3.5(c) AND 6.5(a) ARE UNCONSTITUTIONAL

Respondent argues that, if his words did violate MRPC 3.5(c) and 6.5(a), the rules are unconstitutionally vague and violate his right to free speech under both the Michigan Constitution and the First Amendment to the federal constitution.

A. VAGUENESS

Due process requires that an enactment be held void for vagueness if it is worded so that someone of ordinary intelligence cannot readily identify what does and does not violate the law. *United Food & Commercial Workers Union, Local 1099 v Southwest Ohio Regional Transit Auth*, 163 F3d 341, 358-359 (CA 6, 1998); *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). Vague laws not only trap innocent persons, they "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *United Food, supra* at 359, quoting *Grayned, supra* at 108-109. The United States Supreme Court has determined that

> [i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague

> laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [*Grayned, supra* at 108.]

Moreover, the absence of clear standards invites abuse by enabling an official to use impermissible facts to administer the policy. *United Food, supra* at 359. The danger of "abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd v Conrad*, 420 US 546, 553; 95 S Ct 1239; 43 L Ed 2d 448 (1975). The vagueness doctrine mandates that the limits that the government claims are implicit in a law "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v Plain Dealer Publishing Co*, 486 US 750, 770; 108 S Ct 2138; 100 L Ed 2d 771 (1988).

The United States Supreme Court has informed us that

> [t]he [vagueness] doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. [*Smith* v *Goguen*, 415 US 566, 572-573; 94 S Ct 1242; 39 L Ed 2d 605 (1974).]

But, an ethical rule that would normally be void for vagueness will escape invalidation if a state court has offered a clarifying interpretation explaining what conduct the rule encompasses. See *Gentile v State Bar of Nevada*, 501 US 1030, 1048; 111 S Ct 2720; 115 L Ed 2d 888 (1991).

Therefore, an enactment violates the First Amendment when it does not provide fair notice of what conduct will violate the law[10] or when it gives a public official " 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons.' " *United Food, supra* at 359, quoting *Desert Outdoor Advertising, Inc v City of Moreno Valley*, 103 F3d 814, 818 (CA 9, 1996).[11]

Normally one whose conduct clearly violates the law may not challenge the law for vagueness. However, a challenge may be brought when First Amendment rights are implicated. *United States v Mazurie*, 419 US 544, 550; 95 S Ct 710; 42 L Ed 2d 706 (1975). See also *United States v Powell*, 423 US 87, 92-93; 96 S Ct 316; 46 L Ed 2d 228 (1975); *United States v Nat'l Dairy Products Corp*, 372 US 29, 32-33, 36; 83 S Ct 594; 9 L Ed 2d 561 (1963). The rules at issue here impede the First Amendment right to free speech. Hence, respondent properly asserts his vagueness claims.

When assessing the merits of respondent's claim, it is important once again to consider the language of MRPC 3.5(c) and 6.5(a). MRPC 3.5(c) proscribes attorneys from engaging in conduct that is either undignified or discourteous. These words do not provide adequate notice to attorneys to explain in all situations what conduct will violate the rule. It is undignified to use slurred speech or to wear a filthy coat. It is also disrespectful to use foul language or to make an obscene

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[10] *Grayned, supra* at 108.

[11] The majority argues that MRPC 3.5(c) and MRPC 6.5(a) should not be found void for vagueness because arbitrary enforcement is possible with any professional rule or penal statute. It ignores the fact that, even if arbitrary enforcement were not an issue, the statute still violates vagueness principles because it does not provide fair warning.

gesture to a judge. There are numerous examples of conduct that could arguably violate the rule. A person of ordinary intelligence cannot readily identify which violate the rule and which do not. Not only are the parameters of the rule undefined, the ambiguity of the rule permits the possibility of selective or discriminatory enforcement.[12]

The majority's inclusion in the rule of statements and conduct that take place outside a courtroom significantly enhances the rule's vagueness. This is because the rule, so interpreted, sets no limits on when or where an attorney is free to speak his or her mind to another person. Arguably, under the majority's interpretation, no time, place, or medium is safe because any unprivileged, discourteous observation about a judge communicated to another person could lead to sanctions. The possibility of selective or discriminatory enforcement occurring is enhanced when an attorney represents unpopular clients or presents controversial issues. Therefore, the rule must fall to the First Amendment.

MRPC 6.5(a) suffers from a similar lack of clarity. It requires an attorney to treat all persons "involved in the legal process" with "courtesy and respect." Any number of actions or inactions could violate this rule. Ultimately, the rule's ambiguity and uncertainty condemn it.

[12] The majority argues that discriminatory enforcement is not of concern because the Attorney Grievance Commission's actions can be reviewed on a case-by-case basis. However, the United States Supreme Court knew and considered this argument before writing its vagueness jurisprudence. It realized that every discriminatory application of the law may be correctable at some point, but the idea behind the vagueness doctrine is to prevent discriminatory enforcement in the beginning. Therefore, standing alone, this argument is insufficient to save vague rules from being found unconstitutional.

The majority argues that we should not expect that the rule's parameters could be defined with " 'mathematical certainty.' " *Ante* at 255 (citation omitted). But this approach begs the questions whether there are parameters and what they are. Instead of offering answers, the majority merely states its belief that MRPC 3.5(c) and 6.5(a) do not violate the constitution. The absence of analysis for this conclusion suggests that it has no basis in the law.

I agree with the majority that there should be flexibility in our ethical rules, but I maintain that the flexibility should not stretch beyond our basic constitutional rights. Unfortunately, MRPC 3.5(c) and 6.5(a) have no conceivable parameters, and this Court has provided no guidance that would save them from constitutional invalidation. As they stand, these rules leave ordinary persons vulnerable to possible discipline and sanction without proper constitutional safeguards.

These rules do not permit persons of ordinary intelligence to readily identify the applicable standard for their conduct. They allow for the strong possibility of discriminatory enforcement. Accordingly, I would find them unconstitutionally vague.

B. FREEDOM OF SPEECH

Respondent also argues that, if the rules are not unconstitutionally vague, they are an unconstitutional abridgement of his right to free speech. His argument is based on the premise that his comments were political, rhetorical hyperbole and satire protected by the First Amendment.

The initial step in a First Amendment analysis is to determine whether the comments under consideration constitute protected speech. The Grievance Administrator argues that the respondent's statements are not

protected because they were a resort to epithets or personal abuse. Essentially his argument is that respondent's comments are not protected because they are offensive.

It is true that the United States Supreme Court has stated that " '[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' " *Chaplinsky v New Hampshire,* 315 US 568, 572; 62 S Ct 766; 86 L Ed 1031 (1942), quoting *Cantwell v Connecticut,* 310 US 296, 309-310; 60 S Ct 900; 84 L Ed 1213 (1940). *Chaplinsky* concerned a New Hampshire statute that provided:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." [*Chaplinsky, supra* at 569.]

The Court's opinion was based on the belief that Chaplinsky's statements were "fighting words." As the Court stated, "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. In fact, the Court does not mention political speech or hyperbole despite the fact that Chaplinsky's statements were directed toward his local government. *Id.* at 569. Because the case was decided on the "fighting words" doctrine, it is of little guidance to us in deciding this case.

Moreover, *Chaplinsky* and *Cantwell,* on which *Chaplinsky* was based, must be considered in light of the decision 36 years later in *FCC v Pacifica*, 438 US 726;

98 S Ct 3026; 57 L Ed 2d 1073 (1978). In *Pacifica,* the Court addressed whether the FCC could sanction a broadcaster for speech that was not obscene but was offensive. The Court cited *Chaplinsky,* but stated that some words, although lacking in literary, political, or scientific value, "are not entirely outside the protection of the First Amendment." *Id.* at 746.[13] The Court specified that First Amendment protection would be required if what made the radio monologue offensive "could be traced to its political content . . . ." *Id.*

Contrary to petitioner's assertion, several decisions have given offensive speech First Amendment protection. One that is especially pertinent is *Watts v United States,* 394 US 705; 89 S Ct 1399; 22 L Ed 2d 664 (1969). There, the defendant was convicted of violating a statute that made it a criminal offense to threaten the life of the President of the United States. At an antiwar rally, the defendant stated that " '[i]f they ever make me carry a rifle the first man I want in my sights is L.B.J. [Lyndon Baines Johnson]' " *Id.* at 706. The defendant argued that the statement was political opposition to the President. *Id.*

The Supreme Court reversed his conviction and held that the political hyperbole used by the defendant did not amount to a violation of the statute. In reaching its decision, the Court stated:

> [W]e must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly

[13] See *Cohen v California,* 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971), in which the defendant walked into a courthouse wearing a jacket reading "F*** the Draft." The Supreme Court held that the words on the jacket constituted protected political speech.

> sharp attacks on government and public officials." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 [84 S Ct 710; 11 L Ed 2d 686] (1964). The language of the political arena, like the language used in labor disputes, see *Linn v United Plant Guard Workers of America,* 383 U.S. 53, 58 [86 S Ct 657; 15 L Ed 2d 582] (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise. [*Id.* at 708.]

In the instant case, respondent is situated similarly to the defendant in *Watts*. He made offensive and crude comments about three Court of Appeals judges to show his opposition to their decision in a court case. Just as in *Watts,* when taken in context, respondent's statements were, in essence, satire, and hyperbole. In fact, respondent's statements declaring war on the judges and suggesting that they be sodomized were less troublesome than the defendant's statement in *Watts* suggesting that he would shoot the President.

This Court has expressly recognized that political hyperbole, parody, and vigorous epithets are permissible in the course of a judicial campaign. *In re Chmura* (*After Remand*)*,* 464 Mich 58; 626 NW2d 876 (2001) (*Chmura II*). The majority argues that *Chmura II* does not apply to respondent because respondent's statements were not made in a political context. The majority also notes that no campaign was under way at the time respondent made his statements. *Ante* at 256. But the decisions in cases such as *Cohen* and *Watts* illustrate that "political speech" is not as neatly defined as the majority would like to believe. The incidents in *Cohen* and *Watts* did not occur during a political campaign.

I do not agree with the majority's narrow interpretation of "political speech," nor do I believe that political hyperbole and satire should be limited to a campaign setting. Respondent's comments were about three public figures concerning their character and the manner in which they perform their public duties.[14] While it is without doubt that respondent's comments were crude, it is inescapable that they were political.

The majority also argues that the statements were made during a pending case, subjecting them to less constitutional protection. As I have explained, I disagree with the majority's conclusion that the comments were made during a "pending" case. While situations exist when a court may constitutionally limit an attorney's speech, the facts of this case do not fall into that line of cases for several reasons. Even if I were to apply the lower standard the majority adopts, I would find that MRCP 3.5(c) and 6.5(a) unconstitutionally abridge the right to freedom of speech.

In *Gentile v State Bar of Nevada,*[15] the United States Supreme Court granted certiorari to determine whether Nevada Supreme Court Rule 177, governing pretrial publicity, violated the First Amendment. The Court addressed whether attorneys may be subject to greater restrictions on their speech during a pending case. It held:

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial

[14] The majority stresses that respondent referred to the judges as "Hitler," "Goebbels," and "Eva Braun." But, offensive though it is, reference to political figures as Nazis is a common form of political satire. See <http://semiskimmed.net/bushhitler.html> (accessed May 18, 2006).

[15] 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991).

> court beyond the point necessary to preserve a claim for appeal. *Sacher* v. *United States*, 343 U.S. 1, 8 [72 S Ct 451; 96 L Ed 717] (1952) (criminal trial); *Fisher* v. *Pace*, 336 U.S. 155 [69 S Ct 425; 93 L Ed 569] (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U.S. 622 [79 S Ct 1376; 3 L Ed 2d 1473] (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. [*Gentile, supra* at 1071.]

Using these standards, the Court adopted a balancing test. Under the test, a court must weigh the state's interests underlying the ethical rule at issue and the attorney's First Amendment rights. The Court also held that the rule must be narrowly tailored to meet the state's interest.[16] *Id.* at 1076.

To fully understand the applicability of *Gentile* and *Sawyer* to this case, it is essential to look at their facts. As stated above, *Gentile* concerned pretrial publicity. *Sawyer* concerned comments made during a pending trial. It is noteworthy that neither case is directly on point. *Sawyer* concerned comments made by an attorney about a judge, but the attorney's actions took place while a trial was pending. In fact, in *Gentile* the Court upheld the rule because "it merely postpone[d] the attorneys' comments until after *the trial*." *Id.* (emphasis added). Neither case is applicable here, because respondent's statements were made after his client's case had been decided in the Court of Appeals and no trial or other legal proceeding was pending.

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[16] The majority makes conclusory statements only. It offers a complete lack of legal analysis regarding whether the rules at issue are narrowly tailored. Merely stating that the rules are narrowly tailored does not make it so.

By deciding that respondent's statements are subject to less First Amendment protection because they were made during a pending matter, the majority stretches the holdings in *Gentile* and *Sawyer*. I cannot join in that distortion.

Attorneys must be free to speak about a case after it has been decided. Stifling speech while memories of the case are freshest is a disservice to the parties as well as to the public. Because of the majority's extension of *Gentile,* it could be years before an attorney could finally express his or her opinion about the judges that sat in a case. Even though the majority states that attorneys still may offer disagreement with a court decision, the ruling in this case will have a chilling effect on attorneys' free speech.

Even if I were to apply the lower standard expressed in *Gentile,* I would find that MRPC 3.5(c) and MRPC 6.5(a) are unconstitutional because they are not narrowly tailored. I agree with the majority that the state's interest in maintaining a well-respected judiciary is an important one. But whether that interest outweighs an attorney's right to criticize a judge is not the paramount question. The rules in question cannot satisfy the third prong of *Gentile* because there are no reasonable and definite standards that an official can follow in applying them. *Niemotko v Maryland*, 340 US 268, 271; 71 S Ct 325; 95 L Ed 267 (1951).

The pretrial publicity rule in *Gentile* was written to apply only to speech that is substantially likely to have a materially prejudicial effect. *Gentile*, *supra* at 1076. The rules at issue here lack that narrow tailoring. They are so vague that a person of reasonable intelligence could not decipher their boundaries. Nothing limits their application. Because they are not narrowly tai-

lored, even under *Gentile*, MRPC 3.5(c) and 6.5(a) must fall to the First Amendment.[17]

The majority asserts that the holdings of *Cohen* and *Watts* are inapplicable here because they involve the rights of everyday citizens, as contrasted with those of attorneys. I disagree. *Cohen* and *Watts* sought to define protected political speech. Neither limited its holding to everyday citizens or nonlawyers. Rather, both stand for general principles that outline the landscape of protected political speech. The majority's statement that *Gentile* overrode *Cohen* and *Watts* on the matter of defining political speech by attorneys is inaccurate. *Gentile* did not define political speech for lawyers or anyone else. Rather *Gentile* set parameters for determining whether an ethical rule may properly abridge rights protected by the constitution.

In response to the legal analysis I have provided, the majority advances yet another parade of horribles.[18]

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[17] The majority's discussion of the First Amendment rights of judges is obiter dictum. The issues in this case involve attorney speech. Whatever challenges to the Michigan Code of Judicial Conduct that may arise in the future have nothing to do with whether the comments made by respondent and complained of here are protected speech.

It should be noted, in passing, that the majority, in its joint opinion, overstates the holding in *Republican Party of Minnesota v White*, 536 US 765, 781-782; 122 S Ct 2528; 153 L Ed 2d 694 (2002). *White* does not allow judges or judicial candidates to attack a third party by name, even if the third party supports the candidate's opponent. The holding in *White* is that judicial candidates may speak on disputed legal and political issues. *Id.* at 776-777. In fact, *White* implies that speech that implicates a particular person may show bias and is properly sanctioned. *Id*.

The majority's treatment of *White* is yet another instance of the mischaracterization of case law made throughout the majority's opinions. For a full discussion of this pattern see Justice CAVANAGH's dissent, *ante* at 320-325.

[18] This is a tired tactic. The majority has turned to such arguments in other cases in which the decision was not grounded soundly in the law.

Certainly the First Amendment and the rights it embodies are too precious to jettison on the basis of hypothetical situations. I have too much faith in the quality and integrity of our judiciary and our bar to believe them unable to handle capably the great responsibilities that come with free speech. I would rather risk living in the society envisioned by the majority than in one where the mere utterance of dissatisfaction could subject an attorney to harmful sanctions.

Recently, this Court held that courts should not ascribe meaning to statutes unintended by the Legislature because they fear what will develop if they interpret the language as written. *Wexford Med Group v City of Cadillac,* 474 Mich 192, 220 n 10; 713 NW2d 734 (2006). I believe that the majority should apply the principle stated in *Wexford* here when interpreting the constitution in this case.

As I have before, I find solace now in the words of Benjamin Franklin: "Any society that would give up a little liberty to gain a little security will deserve neither and lose both."[19] Here the majority is ready to give up liberty in the hope that some hypothetical future horror will not occur. We must not permit the rights protected by the First Amendment to be whittled away in this manner.

CONCLUSION

I would hold that the Attorney Discipline Board has the authority to declare unconstitutional a rule of professional conduct by virtue of this Court's delegation

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See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 649-650; 684 NW2d 800 (2004), and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

[19] <http://www.brainyquote.com/quotes/authors/b/benjamin_franklin.html> (accessed July 12, 2006).

of authority to it. I would hold, also, that respondent did not violate MRPC 3.5(c) or 6.5(a) because the comments in question were not made in court or while the case was pending. Finally, I would hold that, even if respondent violated them, the rules in question are unconstitutionally vague and infringe on speech protected by the First Amendment. Therefore, I would not sanction respondent.

MALDONADO v FORD MOTOR COMPANY

Docket No. 126274. Decided July 31, 2006. On application by defendant Ford Motor Company for leave to appeal, the Supreme Court ordered oral argument on whether to grant the application or take other peremptory action. Following oral argument and in lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and reinstated the trial court's order dismissing the plaintiff's action.

Justine Maldonado brought an action in the Wayne Circuit Court against Ford Motor Company and Daniel P. Bennett, alleging that Bennett, a supervisor at Ford, sexually harassed the plaintiff in violation of the Civil Rights Act, MCL 37.2101 *et seq*. Kathleen Macdonald, J., the original judge assigned to the case, entered an order excluding evidence of Bennett's prior indecent exposure conviction. The Court of Appeals denied leave to appeal from that order in an unpublished order, entered July 2, 2001 (Docket No. 233449). The Supreme Court denied leave to appeal. 465 Mich 971 (2002). Bennett's indecent exposure conviction was expunged in district court proceedings before the Supreme Court denied leave to appeal. The circuit court action was reassigned to William J. Giovan, J., who thereafter denied the plaintiff's motion to dissolve the previous order excluding evidence of the expunged conviction. Ford subsequently moved to dismiss the action on the basis that the plaintiff and her counsel had engaged in improper pretrial publicity aimed at tainting the potential jury pool, including making repeated references to the expunged conviction in media interviews. The court entered an opinion and order dismissing the action with prejudice, concluding that the plaintiff and her counsel had engaged in premeditated misconduct designed to tamper with the administration of justice and that no lesser sanction would deter the plaintiff or her counsel. The Court of Appeals, BORRELLO, P.J., and SMOLENSKI, J. (WHITE, J., concurring in part and dissenting in part), affirmed in part, reversed in part, and remanded for an evidentiary hearing to determine whether the comments of the plaintiff and her counsel actually prejudiced the jury pool. Unpublished opinion per curiam, issued April 22, 2004 (Docket No. 243763). Ford sought leave to appeal. The Supreme Court ordered

oral argument on whether to grant the application or take other peremptory action. 471 Mich 940 (2004).

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

The trial court did not abuse its discretion in dismissing the action, and the trial court's explicit warning prohibiting any references to Bennett's expunged conviction did not violate the First Amendment.

1. Trial courts possess the inherent authority to sanction litigants and their counsel, including the authority to dismiss an action. Courts also have express authority to direct and control the proceedings before them. A court's exercise of its inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. An abuse of discretion standard of review must be one that is more deferential than review de novo. The standard acknowledges that there will be circumstances in which there will be no single correct outcome. Rather, there will be more than one reasonable and principled outcome. When a trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. The trial court in this case did not abuse its discretion in dismissing the plaintiff's case because the plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence in order to taint the potential jury pool, deny the defendants a fair trial, and frustrate the due administration of justice. The trial court did not abuse its discretion because it possessed the inherent authority to dismiss the action and warned the plaintiff and her counsel that dismissal would result if they continued to publicize evidence ruled inadmissible by the court.

2. The trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice and preserving the right to a fair trial by impartial jurors, and did not offend the First Amendment. The Court of Appeals erred in holding that dismissal is improper unless the jury pool was actually tainted. The substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials. The trial court found a substantial likelihood of prejudice. The Court of Appeals erred in remanding the matter for a determination of actual prejudice. The judgment of the Court of Appeals must be reversed and the order of the trial court dismissing the action must be reinstated.

Court of Appeals judgment reversed and circuit court order of dismissal reinstated.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, stated that the trial court abused its discretion in dismissing the plaintiff's action with prejudice. The opinion of the Court of Appeals should be affirmed. The majority, in its desire to preserve an organized polity, finds that the comments of the plaintiff and her attorneys justify the trial court's decision to dismiss the action with prejudice. However, the comments of the plaintiff and her attorneys fall well within the parameters of the protection of the First Amendment. The conduct of the plaintiff and her attorneys was not substantially likely to materially prejudice the trial. There was no explicit warning from the trial court that the case would be dismissed if remarks about the expunged conviction were made. Comments by the plaintiff did not indicate that she believed that she was under court order not to comment on the expunged conviction. The majority's position effectively silences negative critiques of the justice system and its parties in cases commanding the most public interest, removing the cases from the arena of public discourse. The trial court had numerous other options that would have been less extreme than the drastic measure of dismissal with prejudice. The conduct of the plaintiff and her attorneys also did not violate Michigan Rules of Professional Conduct 3.5 and 8.4. Justice CAVANAGH also concurred with Justice WEAVER's dissent.

Justice WEAVER, joined by Justice KELLY, dissenting, stated that she concurred fully in Justice CAVANAGH's dissent and wrote separately to explain that the premise of the circuit court's dismissal of the plaintiff's case had no legal validity. Because MRPC 3.6 applies only to the conduct of lawyers, the circuit court abused its discretion by dismissing the plaintiff's case on the basis of that rule and the court's attribution of the plaintiff's activities to her lawyers. The majority errs further by concluding that dismissal was nonetheless warranted under MCR 2.504(B)(1) when no violation of an applicable court rule or court order justified the dismissal.

1. COURTS — TRIALS — MISCONDUCT BY LITIGANTS AND COUNSEL — SANCTIONS.

Trial courts possess the inherent authority to sanction litigants and their counsel, including the authority to dismiss an action; courts have express authority to direct and control the proceedings before them (MCL 600.611; MCR 2.504[B][1]).

2. COURTS — TRIALS — EVIDENCE — CONSTITUTIONAL LAW — FREEDOM OF SPEECH — RESTRICTIONS.

A trial court may direct a litigant and its counsel to refrain from publicizing information about another litigant that has been ruled inadmissible as impermissible other-acts evidence and as being more prejudicial than probative; such a restriction is narrowly tailored and necessary to protect potential jurors from the substantial likelihood of prejudice and to preserve the right to a fair trial by impartial jurors, and it does not violate the First Amendment.

Scheff & Washington, P.C. (by *George B. Washington* and *Miranda K.S. Massie*), for the plaintiff.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Elizabeth Hardy* and *Julia Turner Baumhart*) (*Patricia J. Boyle,* of counsel), and *Robert W. Powell*, for Ford Motor Company.

Amicus Curiae:

Michael J. Steinberg, Kary L. Moss, and *Christine Chabot*, for American Civil Liberties Union Fund of Michigan.

CORRIGAN, J. In this case we consider the essential authority of trial courts to control the proceedings before them. The issue in this case pertains to the extent of a trial court's authority to govern the conduct of counsel and their clients in court proceedings. Where the Michigan Constitution authorizes us to make rules to govern court proceedings, the authority to enforce those rules inescapably follows. At the heart of preserving an organized polity, we must attend to relevant issues, including concerns over belligerent, antagonistic, or incompetent lawyering. To this end, we affirm the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice.

We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); *Persichini v Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999); *Prince v MacDonald*, 237 Mich App 186, 189; 602 NW2d 834 (1999). This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v NASCO, Inc*, 501 US 32, 43; 111 S Ct 2123; 115 L Ed 2d 27 (1991).

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

In the instant case, we consider whether the trial court abused its discretion in dismissing plaintiff's case because plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice. We conclude that because the trial court possessed the inherent authority to dismiss the action, and because the trial court warned plaintiff and her counsel that dismissal would result if they continued to publicize evidence ruled inadmissible by court order, the trial court did not abuse its discretion in dismissing plaintiff's case.

We also consider whether the trial court's dismissal of plaintiff's case because plaintiff intentionally disobeyed its explicit warning to refrain from publicizing information regarding defendant Daniel P. Bennett's excluded conviction violated the First Amendment. The trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice. See *Gentile v State Bar of Nevada*, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991). The trial court's narrow restriction on speech did not offend the First Amendment. The Court of Appeals novel requirement that dismissal is improper unless the jury pool was actually tainted conflicts with the substantial likelihood of prejudice test of *Gentile*. Moreover, "actual taint" is an impossible and unworkable standard, especially where nearly three years have passed since the incidents occurred. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's complaint.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff Justine Maldonado, an employee of defendant Ford Motor Company, filed suit against Ford, alleging that a Ford supervisor, Daniel Bennett, sexually harassed her in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*.[1] Ford (hereafter defendant) moved in limine to exclude evidence of Bennett's 1995 indecent exposure conviction. Judge Kathleen Macdonald, the original judge assigned to the case, granted defendant's motion and entered an order

[1] We have previously considered other actions in which Daniel Bennett was accused of sexual harassment, *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005), and *McClements v Ford Motor Co*, 473 Mich 373; 702 NW2d 166 (2005), mod 474 Mich 1201 (2005).

on February 16, 2001, excluding evidence of Bennett's prior conviction in this case and in another action brought against Bennett, *Elezovic v Ford Motor Co,* 472 Mich 408; 697 NW2d 851 (2005).[2] Plaintiff thereafter sought leave to appeal to the Court of Appeals and this Court regarding Judge Macdonald's decision to exclude Bennett's prior conviction. Both the Court of Appeals and this Court denied plaintiff's application.[3]

On September 11, 2001, less than a month before a settlement conference scheduled for October 3, 2001, and shortly after a three-week trial resulting in a directed verdict for defendants in the *Elezovic* case, plaintiff's counsel issued a press release on firm letterhead that referred to Bennett's indecent exposure conviction, Judge Macdonald's exclusion of that conviction as evidence, and the impending trial in this case.[4] A

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[2] In the *Elezovic* case, Judge Macdonald also issued an order directing that witnesses be instructed that reference to Bennett's excluded conviction or any other excluded evidence would be considered a contempt of court, and would result in sanctions, including compensation to the court in the case of a mistrial. All the witnesses in that case, including plaintiff Justine Maldonado, signed statements indicating that they had been advised of the court's ruling regarding inadmissible evidence, that they were not to mention any excluded evidence, and that they understood that sanctions would result from mentioning any excluded evidence.

As Justice CAVANAGH notes, Judge Macdonald stated, upon entering the order of exclusion, that she might reconsider her decision to exclude the evidence during the course of the trial if need be. Justice CAVANAGH, however, erroneously relies on this statement to conclude that plaintiff and her counsel were not precluded from "ever mentioning the indecent exposure conviction in public again . . . ." *Post* at 408 (emphasis omitted). Judge Macdonald's order remained in effect throughout this case. As such, plaintiff and her counsel were bound by the order.

[3] 465 Mich 971 (2002).

[4] Justice WEAVER claims that plaintiff only, and not her counsel, made public statements about the excluded conviction after Judge Macdonald entered the order of exclusion. The September 11 press release, however,

series of news broadcasts and print media publications followed, replete with references to Bennett's prior conviction.[5]

On November 9, 2001, Bennett's indecent exposure conviction was expunged in district court proceedings.

By order dated January 11, 2002, Judge Macdonald established a trial date of July 8, 2002.

In February 2002, Judge Macdonald was assigned to the family division of the circuit court. Consequently, this case was reassigned by lot to Judge William Giovan. On May 17, 2002, Judge Giovan held a hearing regarding the admissibility of propensity evidence not currently at issue. Plaintiff's counsel invited the media to this hearing. Despite Judge Giovan's order closing the hearing to the media, plaintiff's counsel directed the

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which referred to the excluded conviction, was issued by plaintiff's counsel after the order of exclusion was entered.

[5] The following is a list of the publications stemming from plaintiff's counsel's September 11, 2001, press release, many of which refer to Bennett's excluded conviction: (1) The Associated Press wire story, September 12, 2001, referencing the excluded conviction; (2) an article in the *Detroit Free Press*, September 13, 2001, referencing the excluded conviction; (3) an article by the United Press International, October 10, 2001, referencing the excluded conviction; (4) The Associated Press wire story, October 10, 2001, referencing the excluded conviction; (5) a Fox 2 news broadcast held at the law office of Scheff and Washington, October 10, 2001, referencing the excluded conviction and providing a closeup of the conviction papers; (6) a WDIV news broadcast, October 10, 2001, referencing the excluded propensity evidence; and (7) an article in the *Oakland Press*, October 11, 2001, referencing the excluded conviction.

Justice WEAVER contends that we assert that plaintiff's counsel referred to the excluded conviction in these publications. We assert no such thing. Rather, we merely state that these publications stem from plaintiff's counsel's September 11, 2001, press release. In other words, it was plaintiff's counsel's press release that prompted the mass of publications. Plaintiff's counsel's press release was designed to draw media attention to the excluded conviction and, as shown above, indeed accomplished its goal.

media to wait outside until the hearing concluded to discuss details regarding the hearing.

Immediately following the hearing, Judge Giovan met with all counsel to discuss plaintiff's counsel's continued public references to Bennett's prior conviction despite Judge Macdonald's previous court order and the expungement of the conviction. Bennett's counsel pointed out that plaintiff's counsel's behavior apparently violated MCL 780.623(5),[6] which criminalizes the divulgence, use, or publication of information regarding an expunged conviction. Plaintiff's counsel responded by stating that "it was worth the risk" to continue to publicize Bennett's expunged conviction.[7]

Judge Giovan declined to order plaintiff's counsel to obey MCL 780.623(5) because he considered it redundant to order an attorney to follow the law.[8] Despite

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[6] The expungement statute states:

> Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both. [MCL 780.623(5).]

[7] Plaintiff's counsel's comments at this meeting also demonstrate that plaintiff's counsel continued to make public references to the excluded evidence despite the court order, contrary to Justice WEAVER's contention.

[8] Justice CAVANAGH mischaracterizes Judge Giovan's refusal to unnecessarily order an attorney to follow the law as a refusal to require the parties to refrain from referencing the excluded evidence. Justice CAVANAGH's mischaracterization that "the trial court never thought it issued an order" in this case is preposterous. *Post* at 420. While Judge Giovan did not specifically enter a gag order, he did, on numerous occasions, direct the parties to abide by Judge Macdonald's order of exclusion, he subsequently denied plaintiff's motion to dissolve the order, and he orally warned the parties that dismissal would result for failure to abide by the order. Moreover, Justice CAVANAGH's mischar-

Judge Giovan's expression of confidence that counsel would follow the law, plaintiff's counsel left the courtroom and met with the waiting media. This meeting resulted in extensive television news and press coverage, some of which again referred to Bennett's expunged conviction and the possible exclusion of the propensity evidence.[9] Shortly thereafter, plaintiff's counsel again discussed this case at a May 28 public meeting and a June 1, 2002, rally in Ann Arbor sponsored by BAMN (Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by any Means Necessary).[10]

Plaintiff subsequently moved to dissolve Judge Macdonald's order excluding Bennett's prior conviction from evidence. On June 13 and 21, 2002, Judge Giovan heard the motion. During that hearing, plaintiff's counsel mentioned that an article had been published in the June 12-18, 2002, issue of the *Metro-Times*, a free weekly publication readily available in the courthouse where jury selection was imminent. The article appeared on the front page of the newspaper and refer-

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acterization of the lower court transcript is rebutted by plaintiff's own comment, "If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice."

[9] The following is a list of the publications stemming from plaintiff's counsel's May 17, 2002, meeting with the media, some of which also referred to evidence that had been excluded before trial: (1) a WDIV news broadcast, May 17, 2002, referencing the excluded propensity evidence; (2) a WXYZ news broadcast, May 17, 2002, also referencing the excluded propensity evidence; and (3) The Associated Press local wire story, May 17, 2002, referencing the expunged conviction.

Again, contrary to Justice WEAVER's contention, we do not assert that plaintiff's counsel actually made references to the excluded evidence in these publications. Rather, we assert that these publications stem from plaintiff's counsel's meeting with the media.

[10] Plaintiff's counsel, George Washington, Miranda Massie, and Jodi Masley, are all members of the BAMN organization.

enced Bennett's expunged conviction. This article prompted the following colloquy:

> *The Court*: But, you know, since you mentioned the article, where's this coming from? I thought that there is a prohibition against counsel speaking to—making public statements designed to affect trial.
>
> *Ms. Hardy* [*defense counsel*]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.
>
> *The Court*: Is counsel being quoted in this?
>
> *Mr. Washington* [*plaintiff's counsel*]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie and I were both quoted, all quoted.
>
> *The Court*: *I'm* not sure—well—
>
> *Ms. Hardy*: It was initiated, without a doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but *the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling*—[11]

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[11] Although the article contained quotations from both plaintiff's counsel and defense counsel, defendant claimed that plaintiff's attorney provided the reporter with the extensive information in the article regarding Bennett's excluded conviction. Plaintiff did not deny this allegation.

Justice CAVANAGH contends that because Bennett's counsel, on two occasions, referred publicly to Bennett's excluded conviction, plaintiff should not be punished for behaving as defense counsel did. We acknowledge that Bennett's counsel publicly referred to Bennett's excluded conviction. We disagree, however, that defense counsel's behavior mirrored that of plaintiff and her counsel. Bennett's counsel's limited references to the excluded evidence were prompted by plaintiff and her counsel. Defense counsel's statements were made in an attempt to minimize the damage caused by plaintiff's and her counsel's numerous

> *The Court*: I'm not making any decisions about this, but I'm going to tell you one thing. *If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice*, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client. [Emphasis added.]

The court denied the motion to dissolve Judge Macdonald's previous order of exclusion.

Three days later, on June 24, 2002, plaintiff was deposed, at which time she admitted that she had disclosed facts regarding Bennett's expunged conviction despite the trial court's order disallowing such evidence. The following colloquy took place:

> [*Defense counsel*]: If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?
>
> [*Plaintiff's counsel*]: You mean at people, period, one person at a time?
>
> [*Defense counsel*]: Any individual, whether it's groups, how many times has she gone out and publicized it, divulged it.
>
> [*Plaintiff*]: I have no idea. It's been a lot.
>
> *Q*. Over 100?
>
> *A*. I don't know.
>
> *Q*. Over ten?
>
> *A*. Oh, definitely over ten, possibly over 100.
>
> *Q*. Okay.
>
> *A*. If I could get it out on the Internet, I would put it out on the Internet.

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public references to the excluded evidence. Unlike plaintiff's and her counsel's public comments regarding the excluded evidence, defense counsel's comments were not intended to taint the potential jury pool and cause prejudice to plaintiff.

Moreover, plaintiff admitted during her deposition on June 24, 2002, that she would continue to disclose facts regarding Bennett's expunged conviction. She stated:

> *A*. I'm aware that you're whining and crying because I'm talking about it all over town, yes, I am aware of that. I won't shut up about it. It's the truth. You can expunge it, but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and he must be stopped, and you know it and you know it [sic]. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett.
>
> *Q*. So you've been talking about it—
>
> *A*. To anyone.
>
> *Q*. —any chance you get, to anyone—
>
> *A*. That's Right.
>
> *Q*. —even though-even since you became aware that it was expunged?
>
> *A*. Yes. Absolutely.

On June 26, 2002, two days after the deposition, plaintiff and certain of her counsel participated in a "Justice for Justine Committee" demonstration outside Ford headquarters. During the demonstration, participants distributed leaflets to the public containing information regarding Bennett's expunged conviction and evidence regarding Bennett's alleged behavior toward other female Ford employees that the trial court had ruled inadmissible. The leaflet also stated that Judge Giovan "is in Ford's pocket" and "is trying to keep the truth out of the courtroom." Also on this day, a television interview was broadcast on WDIV Channel 4, in which plaintiff stated:

> If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment.

A demonstration similar to that held on June 26, 2002, was held the following day at the Ford Wixom plant, at which a similar leaflet was distributed.[12]

On June 28, 2002, defendants moved to dismiss plaintiff's suit on the basis that plaintiff and her counsel engaged in improper pretrial publicity aimed at tainting the potential jury pool. On July 1, 2002, plaintiff responded by moving to disqualify Judge Giovan. On July 3, 2002, Judge Giovan heard and denied this motion. The same day, plaintiff's counsel, Miranda Massie, appeared in a television interview broadcast on WDIV, Channel 4. She stated:

> Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases.[13]

On July 8, 2002, the date on which jury selection was to begin, Judge Timothy Kenny heard plaintiff's appeal of Judge Giovan's denial of the motion for his disqualification and affirmed the denial. Also on July 8, 2002, Judge Giovan heard defendant's motion to dismiss.[14] Throughout the hearing, plaintiff and her counsel were

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[12] The following publications stemmed from the June 26 and 27 demonstrations: (1) a WDIV news broadcast, June 26, 2002, showing picketers holding signs stating, "Ford, stop buying judges"; (2) a Click on Detroit, Channel 4 website article, June 26, 2002, referencing the exclusion of the propensity evidence; and (3) an article in the *Detroit News*, June 27, 2002.

[13] As a result of this news broadcast, the following publications were released: (1) a Click on Detroit, Channel 4 website article, July 3, 2002, referencing plaintiff's and her counsel's belief that Judge Giovan was biased; and (2) a Channel 50 news broadcast, July 3, 2002, in which plaintiff stated that money cannot buy justice.

[14] Also on this day, an article was published on the Click on Detroit, Channel 4 website concerning Judge Giovan's alleged bias.

discourteous to and uncooperative with the court. Specifically, in response to the court's question, "Are you a member of the 'Justice for Justine' committee?" plaintiff's counsel, Jodi Masley, responded by stating:

> Nobody's ever asked me that in my life. I—you know what. I fully support the "Justice for Justine", you know, committee. They have every right to do everything they [want]. And did I participate in a demonstration that was called by the "Justice for Justine" committee, I did.

Judge Giovan attempted to respond to Ms. Masley's comment, but she interrupted him, stating, "I mean, have I or have I ever been a member of the Communist Party, is that what this is?" Moreover, in response to Judge Giovan's inquiry regarding whether members of the "Justice for Justine" committee were present in the court, Ms. Masley stated:

> Have you guys even ever heard of the phrase "Freedom of association . . . ?"
>
> * * *
>
> I have no idea. Do they need to know—identify their political affiliations . . . ?
>
> * * *
>
> (Interposing) Who did you guys vote for in the last judicial election?

The hearing continued into the following day. At the conclusion of the two-day hearing, plaintiff requested permission to file a supplemental brief, which Judge Giovan granted.

On August 21, 2002, Judge Giovan issued an opinion and order dismissing plaintiff's case with prejudice, concluding that plaintiff and her counsel had engaged in premeditated misconduct designed to tamper with

the administration of justice and that no lesser sanction would deter plaintiff or her counsel.[15]

The Court of Appeals, affirmed in part, reversed in part, and acknowledged the trial court's authority to dismiss plaintiff's complaint, but remanded the case to the trial court to hold an evidentiary hearing to determine whether plaintiff's and her counsel's comments actually prejudiced the jury pool.[16]

Defendant sought leave to appeal to this Court. We directed the clerk to schedule oral argument on whether to grant the application or to take other peremptory action.[17]

II. STANDARD OF REVIEW

This case requires us to determine whether the Court

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[15] Justice WEAVER contends that Judge Giovan improperly attributed responsibility for plaintiff's improper references to plaintiff's counsel. As these facts clearly demonstrate, however, Judge Giovan properly determined that both plaintiff and her counsel engaged in behavior designed to taint the potential jury pool.

Justice WEAVER further contends that plaintiff was not restricted by any order or court rule from making repeated public references to Bennett's prior conviction. While we disagree with the contention that no order or court rule barred plaintiff from making pubic references to the excluded evidence, we reiterate that, whether a court order existed or whether a court rule applied, plaintiff was not free to repeatedly publicize excluded evidence, especially with the trial impending. The only conclusion that can logically be drawn from plaintiff's repeated references to the excluded conviction is that plaintiff was improperly attempting to admit the excluded evidence by means of the mass media. Consequentially, Judge Giovan chose a principled option within his authority in dismissing plaintiff's case in order to protect the administration of justice. *Banta, supra* at 368; *Cummings v Wayne Co*, 210 Mich App 249, 252; 533 NW2d 13 (1995), citing *Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co,* 544 F Supp 242, 244-245 (D SC, 1981).

[16] Unpublished opinion per curiam of the Court of Appeals, issued April 22, 2004 (Docket No. 243763).

[17] 471 Mich 940 (2004).

of Appeals erred in reversing the trial court's dismissal of this case. Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action. *Banta, supra* at 368. "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). A trial court's dismissal of a case for failure to comply with the court's orders is also reviewed for an abuse of discretion. *Thorne v Carter*, 149 Mich App 90, 93; 385 NW2d 738 (1986); MCR 2.504(B)(1).

In *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), this Court noted that an abuse of discretion standard must be one that is more deferential than review de novo, but less deferential than the standard set forth in *Spalding v Spalding,* 355 Mich 382; 94 NW2d 810 (1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Babcock, supra* at 269. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.

Additionally, in cases raising First Amendment issues, an appellate court is obligated to independently review the entire record to ensure that the lower court's judgment " ' "does not constitute a forbidden intrusion

of the field of free expression." ' " *Gentile, supra* at 1038, quoting *Bose Corp v Consumers Union of United States, Inc,* 466 US 485, 499; 109 S Ct 1949; 80 L Ed 2d 502 (1984), quoting *New York Times Co v Sullivan*, 376 US 254, 258; 84 S Ct 710; 11 L Ed 2d 686 (1964).

III. ANALYSIS

A. TRIAL COURT'S AUTHORITY TO SANCTION LITIGANTS FOR UNETHICAL BEHAVIOR

As stated above, trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta, supra* at 368. "The authority to dismiss a lawsuit for litigant misconduct is a creature of the 'clean hands doctrine' and, despite its origins, is applicable to both equitable and legal damages claims." *Cummings v Wayne Co*, 210 Mich App 249, 252; 533 NW2d 13 (1995), citing *Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co,* 544 F Supp 242, 244-245 (D SC, 1981). "The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process." *Cummings, supra* at 252. "The 'clean hands doctrine' applies not only for the protection of the parties but also for the protection of the court." *Id.*, citing *Buchanan Home, supra* at 244.

Moreover, the Michigan Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government. "Const 1963, art 3, § 2 divides the powers of government among three branches and commits to each branch exclusive exercise of the functions properly belonging to it, except as otherwise expressly provided in the Constitution."[18] *In re 1976 PA 267*, 400 Mich 660,

[18] Const 1963, art 3, § 2 provides:

662; 255 NW2d 635 (1977). "Art 6, § 1 vests the judicial power of the state exclusively in one court of justice."[19] *Id*. "Section 4 of that article[20] vests general superintending control over all courts in the state in the Supreme Court and § 5 confers upon this Court the power to make rules to govern the practice and procedure within the courts."[21] *Id.* "It is also well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *Id.* at 662-663. "The judicial powers derived from the Constitution include rulemaking, supervisory

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> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the constitution.

[19] Const 1963, art 6, § 1 provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

[20] Const 1964, art 6, § 4 provides:

> 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.

[21] Const 1964, art 6, § 5 provides:

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

and other administrative powers as well as traditional adjudicative ones." *Id.* at 663. "They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." *Id.*, citing *Attorney General ex rel Cook v O'Neill*, 280 Mich 649; 275 NW 445 (1937).

Moreover, express authority to dismiss a complaint is conferred by statute and court rule in Michigan. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

Several of the Michigan Rules of Professional Conduct address sanctionable attorney conduct. MRPC 3.6 concerns trial publicity. It provides:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding*. [Emphasis added.]

MRPC 3.5 addresses impartiality and decorum of the tribunal. It states:

> A lawyer shall not:
>
> (a) *seek to influence a* judge, juror, *prospective juror* or other official *by means prohibited by law*;
>
> (b) communicate ex parte with such a person concerning a pending matter except as permitted by law; or
>
> (c) engage in undignified or discourteous conduct toward the tribunal. [Emphasis added.]

Finally, MRPC 8.4 deals with attorney misconduct. It provides, in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice.

B. THE TRIAL COURT'S AUTHORITY TO DISMISS THIS CASE

In this case, Judge Macdonald initially concluded that evidence of Bennett's prior conviction was inadmissible before the jury because of its unduly prejudicial nature. Rather than abiding by the trial court's order, even after both the Court of Appeals and this Court denied plaintiff leave to appeal regarding the order, plaintiff and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means. They continued to do so even after the trial court explicitly warned them that such misconduct would result in the dismissal of plaintiff's lawsuit.

The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants.

Moreover, MCL 600.611 and MCR 2.504(B)(1) provide the trial court with the authority to impose sanc-

tions such as dismissal. Here, Judge Macdonald issued an order excluding evidence regarding Bennett's expunged conviction. Judge Giovan later reaffirmed Judge Macdonald's initial order of exclusion, and explicitly warned the parties that he would dismiss the case if the inappropriate remarks regarding the excluded conviction continued.[22]

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[22] Both Justice CAVANAGH and Justice WEAVER claim that Judge Giovan's warning to refrain from engaging in pretrial publicity was not an order of the court. In doing so, they rely on Judge Giovan's statement that he "never issued a gag order" in this case. The dissenting justices, however, take this statement out of context. Judge Giovan clearly explained that a gag order was not necessary because rules were already in place governing pretrial publicity:

> So, what I say, I'm not going to issue a gag order because the rules of professional conduct already have a standard that bind you. So, why should Judge Giovan, who is only one of thousands of judges, select his own criteria for what people should say when we have standing rules that govern what attorneys are permitted to say?
>
> And one of the things that attorneys are not permitted to do is to make public statements that are intended to influence the outcome of a case. And when your opponents after several times coming to court accusing you and your colleagues and maybe the parties themselves of doing precisely that, I took no action.
>
> But after—on the day that this did occur, I had seen a long article about this case, I had heard counsel say on many occasions, as you have said here today, that you have invited public examination of this case, all I said was that if I should find that the rules were violated, I would take corrective action, which could include dismissing the case.
>
> Now, I was not referring to some mysterious, illusory, ambiguous rule fixed in my mind and known to nobody else. It's obvious I was not saying that, that I was going to take action or not based on a rule that I invented and disclosed to no one.
>
> What was obvious to anyone that what I was saying is that if I found that the rule of professional conduct was violated, that is to

Plaintiff's understanding of Judge Macdonald's order and Judge Giovan's warning to adhere to the order was clearly demonstrated in her deposition and in the June 26, 2002, television interview that was broadcast on WDIV Channel 4 in which she acknowledged Judge Giovan's warning that dismissal would result if she continued her behavior, but further stated that "it doesn't bother me, because I'm not going to quit fighting against sexual harassment."

Plaintiff's counsel also clearly understood Judge Macdonald's order and Judge Giovan's explicit warning to adhere to the order. The trial court twice explicitly discussed the improper conduct with plaintiff's counsel and warned everyone about the consequences of continuing misconduct. Despite the warning, and despite the approaching trial, plaintiff and her counsel continued the misconduct.[23] In fact, as Judge Giovan noted,

say that counsel or parties were making public statements intended to affect the outcome of this case, I would take action.

[23] Justice CAVANAGH suggests that Judge Giovan's warning not to discuss the excluded conviction with the press was somehow insufficient to convey to the parties that they were not to discuss the excluded conviction with the media. *Post* at 410-412. We strongly disagree. The transcript of this exchange, which we have set forth on pages 382-383 of this opinion, makes it quite clear that the parties were advised in no uncertain terms that references to the excluded conviction were to cease. Contrary to Justice CAVANAGH's assertion, Judge Giovan explicitly warned the parties and the attorneys that further references to the excluded conviction would result in dismissal. Although Judge Giovan did not embody this warning in a written order, the warning did not consist of "general comments . . . made in passing to both parties." *Post* at 414. Rather, the warning was explicit and made on the record in open court. All involved were clearly aware of what was prohibited. To require a formal written order—as it appears Justice CAVANAGH would—would be to permit any litigant or attorney to disregard an explicitly conveyed and clearly understood obligation on the ground that it was not communicated in a written order. Such a rule would lead only to gamesmanship and we decline to adopt it.

plaintiff's lead counsel, George Washington and Miranda Massie, appeared in television news broadcasts that specifically referred to Bennett's expunged conviction. Moreover, plaintiff's counsel acknowledged that counsel could possibly be violating the expungement statute by publicly disseminating information regarding Bennett's expunged conviction, but stated that it was "worth the risk." Also of note is Ms. Masley's statement at the July 8, 2002, hearing that "Ms. Maldonado has a right to speak about Mr. Bennett's conviction for sure." She further stated that plaintiff and her counsel, depending on how close it was to trial, had the right to publicize evidence that had been excluded by the court.

Judge Giovan properly noted that, notwithstanding the rulings of two judges and the apparent illegality of disclosing Bennett's excluded conviction, nothing would deter plaintiff from continuing to publicize information regarding Bennett's excluded conviction. Plaintiff so admitted in her deposition. Even without an explicit order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, Judge Giovan chose a principled option in dismissing plaintiff's case in order to protect the administration of justice. The imposition of any lesser sanction would have been unjust in light of plaintiff's and her counsel's flagrant misbehavior.[24]

Plaintiff was well aware of Judge Giovan's explicit warning to refrain from making public references to the excluded conviction and of the consequences of failing to abide by the warning. Moreover, as demonstrated throughout this opinion, plaintiff failed to abide by the warning on numerous occasions.

[24] Justice CAVANAGH suggests that the trial court had "numerous other options" available to it as sanctions apart from dismissal. *Post* at 419. Even if we agreed with this assertion, it is irrelevant in determining whether the sanction actually chosen—dismissal in this case—was within

Not only did plaintiff and her counsel disregard Judge Macdonald's order and Judge Giovan's explicit warning to respect the order, counsel violated numerous rules of professional conduct. Plaintiff's counsel's public references to Bennett's excluded conviction violated MRPC 3.6, which was the basis for Judge Giovan's dismissal. Plaintiff's counsel reasonably knew or should have known that their comments would have a substantial likelihood of materially prejudicing the proceedings by improperly influencing prospective jurors regarding Bennett's propensities to commit sexual harassment, especially since trial was approximately two weeks away.

Plaintiff argues that Judge Giovan improperly relied on MRPC 3.6 in dismissing plaintiff's case. She contends that Judge Giovan's dismissal was solely based on plaintiff's comments, and that MRPC 3.6 does not apply to nonlawyers. Plaintiff correctly argues that the Michigan Rules of Professional Conduct do not apply to nonlawyers, but mistakenly contends that Judge Giovan relied only on her behavior in ordering a dismissal. Plaintiff also erroneously contends that she is free to engage in improper pretrial publicity designed to taint the potential jury pool. The Michigan Court Rules do apply to plaintiff. They authorize the trial court to impose sanctions such as dismissal for party misconduct. MCR 2.504(B)(1). Judge Giovan expressly warned plaintiff that if she continued to disseminate informa-

the range of "reasonable and principled outcome[s]." *Babcock, supra* at 269. In light of the repeated violation of the court's instruction not to publicize the excluded conviction, we cannot say that Judge Giovan's conclusion that nothing short of dismissal would deter plaintiff's and her counsel's repeated misconduct was incorrect. As such, even if we were to assume that there were other sanctions available—which we do not necessarily believe to be the case—the sanction of dismissal was clearly within the range of reasonableness under the circumstances.

tion regarding Bennett's excluded conviction in violation of Judge Macdonald's order, he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case.[25] In any event, even if plaintiff is not bound by MRPC 3.6, plaintiff's counsel's repeated public references to Bennett's excluded conviction, coupled with Ms. Massie's statement five days before trial that "Metro Detroit" judges were biased in favor of the Ford Motor Company, were substantially likely to materially prejudice the proceedings and improperly influence prospective jurors.

Judge Giovan did not reach a conclusion regarding a possible violation of MRPC 3.5, finding it was unnecessary because he dismissed the case under MRPC 3.6. Because Judge Giovan did not rely on this rule in dismissing the case, we need not reach a conclusion regarding a possible violation of the rule. We nevertheless enumerate plaintiff's counsel's acts of disrespect against the trial court to highlight plaintiff's counsel's undignified and discourteous conduct toward the trial court.

Plaintiff's counsel, on numerous occasions, despite court orders and an explicit warning by the trial court, publicly divulged information regarding Bennett's excluded conviction. Plaintiff's counsel also deliberately disregarded the trial court's oral directive to refrain from

[25] Justice CAVANAGH contends that we attempt to portray Judge Macdonald's order excluding Bennett's prior conviction as having the same effect as an order precluding any mention of this evidence in public. We, however, do not misconstrue the order of exclusion as an order precluding any mention of the evidence in public. Rather, we rely on the order of exclusion in concluding that plaintiff's and her counsel's numerous references to the excluded evidence just weeks before trial was to begin constituted premeditated misconduct designed to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice.

disseminating information regarding Bennett's excluded conviction. Ms. Masley sarcastically responded to the trial court's questioning at the dismissal hearing, and at one point, while on the stand, turned to members of the "Justice for Justine" committee present in the courtroom and asked them who they voted for in the last judicial election. Additionally, Ms. Massie commented during a July 3, 2002, television interview that "Metro Detroit" judges are biased toward the Ford Motor Company. While this conduct may not amount to a violation of MRPC 3.5, it further justifies Judge Giovan's dismissal for plaintiff's and her counsel's participation in pretrial publicity designed to taint the jury pool.

We also note MRPC 8.4, although Judge Giovan did not rely on this rule in ordering dismissal. MRPC 8.4 prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. MRPC 8.4(a) prohibits lawyers from engaging in misconduct through the acts of others. Here, plaintiff's counsel not only failed to restrain plaintiff from repeatedly and intentionally publicizing Bennett's inadmissible expunged conviction in order to taint the potential jury pool and deny defendants a fair trial, they participated with plaintiff in the misconduct on numerous occasions. This inappropriate and unprofessional conduct directly violated Judge Macdonald's order, Judge Giovan's reaffirmance of the order, and Judge Giovan's explicit warning. Moreover, this conduct was directly aimed at frustrating the due administration of justice. It also supports the dismissal of plaintiff's complaint.

C. THE FIRST AMENDMENT AND A TRIAL COURT'S ABILITY TO RESTRICT SPEECH

The First Amendment guarantees that the freedom of speech shall not be abridged. It 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. [US Const, Am I.]

In *Gentile*, the United States Supreme Court addressed the standard governing the state's ability to discipline an attorney under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which an attorney is involved. The Court rejected the petitioner attorney's claim that he should be held to the "clear and present danger" standard applicable to the press, and concluded that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Gentile, supra* at 1074. The Court, in an opinion by Chief Justice Rehnquist, explained:

> We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.
>
> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state's judicial system and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) *comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found*. [*Id.* at 1075 (emphasis added).]

The Court noted that "[l]awyers representing clients in pending cases are key participants in the criminal

justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074. The Court further observed that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 1075.

Judge Giovan, after reviewing *Gentile,* found a substantial likelihood of prejudice:

> More important, however, is that the plaintiff should not be heard to make her argument, which goes like this: "We deny that our behavior was intended to have a substantial likelihood of prejudice. But even if you establish that it was, you cannot dismiss the plaintiff's case until you establish that it has achieved its intended effect."
>
> We believe otherwise. That is not an acceptable standard for preserving the integrity of a court system. The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect.

The Court of Appeals acknowledged that the applicable test under *Gentile* is whether the conduct generated a "substantial likelihood" of prejudice, yet remanded for an evidentiary hearing to determine whether "actual" prejudice occurred.

We hereby affirm the trial court's understanding of *Gentile*. Plaintiff's and her counsel's numerous public references to Bennett's inadmissible, expunged indecent exposure conviction, despite a court order excluding such evidence, were obviously intended to prejudice potential jurors. The trial court thus warned the parties and counsel that all public references to the expunged conviction in violation of the ethical rules would result

in dismissal. This limitation on plaintiff's and her counsel's speech only applied to speech that was substantially likely to have a materially prejudicial effect and that, therefore, violated the rules of ethics. It did not prohibit plaintiff and her counsel from speaking about sexual harassment or the general nature of plaintiff's case. Judge Giovan, at the dismissal hearing, acknowledged the importance of upholding the First Amendment and drew a distinction between protected speech and speech merely designed to thwart the judicial process. He stated to defense counsel:

> Well, now, before we move further, I think you understand that we need to draw a distinction between a party's willingness and right to disseminate to the public their ideas of how they've been unjustly treated and the like, and even criticism of the Court as opposed to what's really at stake here, and that is efforts to thwart the judicial system, and that is to disseminate, for example, excluded evidence and evidence forbidden to be disseminated by statute, which you have referred to. But nevertheless, you do need to differentiate between those two things.

The rules of evidence are designed to ensure fairness in the administration of justice, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence. MRE 102. Judge Macdonald's exclusion of Bennett's expunged conviction was based on the rules of evidence. She specifically relied on MRE 404(b) in excluding the evidence, determining that the evidence would not be offered for any purpose other than to show Bennett's propensity to conduct himself in this manner. Judge Macdonald further relied on MRE 403 to determine that, even if the evidence were relevant, its undue prejudice substantially outweighed its probative value in light of the availability of alternative means of proof. Judge Macdonald's ruling, and Judge Giovan's subsequent limita-

tion on plaintiff's and her counsel's speech, was in accord with the purpose of the evidentiary rules. Moreover, the rulings were necessary to protect defendants' fundamental right to a fair trial and were directly aimed at protecting potential jurors from prejudice.

As the United States Supreme Court noted in the *Gentile* case, few, if any, interests are more fundamental than the right to a fair trial by an impartial jury. Plaintiff stated that nothing would deter her from continuing to publicize Bennett's expunged conviction, and that she would post it on the Internet if she could. Additionally, plaintiff's counsel, despite court orders, publicly divulged information regarding the excluded expunged conviction. Judge Giovan merely exercised his " 'affirmative constitutional duty' to minimize the potential for prejudicial pretrial publicity," *United States v Houbriti*, 307 F Supp 2d 891, 897 (ED Mich, 2004), quoting *Gannett Co, Inc v DePasquale*, 443 US 368, 378; 99 S Ct 2898; 61 L Ed 2d 608 (1979), in dismissing plaintiff's case, and did not violate the First Amendment in doing so.

The Court of Appeals requirement that actual prejudice be shown conflicts not only with the "substantial likelihood" test set forth in *Gentile,* but also with the plain language of MRPC 3.6. Moreover, the Court of Appeals standard has no practical workability. It would be impossible to determine "actual prejudice" to a potential jury pool three years after the incident in question. We decline to order an evidentiary hearing that is no more than a fool's errand. The trial court narrowly tailored a restriction on plaintiff's and her counsel's speech consonant with the Michigan Rules of Professional Conduct. The trial court's limitation on plaintiff's and her counsel's speech was narrowly tai-

lored and necessary to prevent prejudice to the potential jury pool and did not violate the First Amendment.

IV. RESPONSE TO JUSTICE CAVANAGH'S DISSENT

Justice CAVANAGH asserts that the majority opinion violates the First Amendment by restricting speech that does not have a substantial likelihood of materially prejudicing the proceedings. We reiterate that the narrow and necessary limitation on plaintiff's and her counsel's speech only applied to Bennett's expunged prior conviction that had been excluded as evidence. Plaintiff and her counsel remained free to discuss the general nature of her case and sexual harassment. We agree with Justice CAVANAGH that the First Amendment does protect even offensive expressions, see, e.g., *R A V v City of St Paul*, 505 US 377; 112 S Ct 2538; 120 L Ed 2d 305 (1992). The First Amendment, however, does not protect all speech in whatever circumstances. See, e.g., *Adderley v Florida*, 385 US 39; 87 S Ct 242; 17 L Ed 2d 149 (1966). The United States Supreme Court has recognized the need to balance the rights of attorneys and litigants in pending cases and the state's interest in fair trials. In recognizing this tension, the Court has held that the First Amendment does not protect speech that has a substantial likelihood of materially prejudicing the proceedings. Contrary to Justice CAVANAGH's implication that plaintiff is being punished for being discourteous and offensive toward the court, we affirm the dismissal of plaintiff's case solely because plaintiff and plaintiff's counsel made numerous references to excluded evidence, despite the trial court's oral warning that dismissal would result if such references continued, for the sole purpose of tainting the potential jury pool and denying defendants a fair trial.

Justice CAVANAGH opines that plaintiff's and her counsel's references to the excluded evidence did not have a substantial likelihood of materially prejudicing the proceedings. We, however, fail to see how plaintiff's and her counsel's numerous public references to Bennett's prior indecent exposure conviction, after the court ordered the exclusion of that evidence, did not have a substantial likelihood of materially prejudicing this sexual harassment proceeding. The excluded indecent exposure conviction, which was subsequently expunged, involved sexual behavior that is very similar to the alleged sexual behavior in this case. It could be offered for no other purpose than to show Bennett's propensity to conduct himself in this manner. This is the exact type of evidence that MRE 404(b) precludes. If the narrow limitation on speech in this case cannot pass muster under the substantial likelihood test of *Gentile,* we fail to see what limitation could survive.[26]

V. CONCLUSION

We conclude that the trial court did not abuse its discretion in dismissing plaintiff's suit. We further hold

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[26] To reiterate, as stated in *Grievance Administrator v Fieger*, 476 Mich 231, 264-265 n 34; 719 NW2d 123 (2006):

> Given the position advanced by the dissenting justices . . . , one wonders whether the dissenting justices would simply surrender the legal process to the least restrained and worst behaved members of the bar. With increasingly little need to adhere to the rules necessary to ensure public confidence in the integrity of the legal process, the dissenters would create a world in which legal questions come increasingly to be decided, not by a fair and rational search for truth, but by bullying and uncivil behavior, personal abuse, one-upmanship, and public exhibitionism on the part of those who are custodians of this system, the bar. Justice under the law cannot flourish within such a system.

that the trial court's explicit warning prohibiting any references to Bennett's excluded conviction did not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's case. Because we hold that a dismissal is appropriate, we need not decide the remaining issue. Additionally, we do not reach the issues in plaintiff's cross-application because they are moot in light of our reinstatement of the trial court's order of dismissal.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

CAVANAGH, J. (*dissenting*). I agree with the majority that a trial court has the authority to control courtroom proceedings; however, this control must comport with the First Amendment. The desire for "preserving an organized polity," *ante* at 375, cannot be exercised at the expense of an individual's First Amendment right to free speech. Because I believe that the trial court abused its discretion when it dismissed plaintiff's case with prejudice and because I vehemently disagree with the majority's belief that its opinion today does not violate the Constitution, I must respectfully dissent. Further, because I agree with Justice WEAVER that the majority's decision undermines the basic tenets of our judicial system, I also concur with her dissent.

I. THE STANDARDS FOR REVIEWING THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS

Plaintiff Justine Maldonado's cause of action for sexual harassment against Daniel Bennett and defendant Ford Motor Company was dismissed with prejudice on August 21, 2002, because the trial court believed that plaintiff and her attorneys engaged in prejudicial

pretrial publicity. The Michigan Rules of Professional Conduct (MRPC) have an established court rule that specifically governs trial publicity. MRPC 3.6 states:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer *knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding*. [Emphasis added.]

The United States Supreme Court examined the "substantial likelihood of material prejudice" standard in *Gentile v State Bar of Nevada*, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991), in light of the First Amendment.[1] The Supreme Court observed that this standard "imposes only narrow and necessary limitations on lawyers' speech." *Id*. at 1075. As the Supreme Court has also noted, "the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges v California*, 314 US 252, 262; 62 S Ct 190; 86 L Ed 192 (1941). The evil must be substantial and "extremely serious and the degree of imminence extremely high before utterances can be punished." *Id*. at 263.

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[1] 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. [US Const, Am I.]

The Michigan Constitution provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press. [Const 1963, art 1, § 5.]

II. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS WAS NOT SUBSTANTIALLY LIKELY TO MATERIALLY PREJUDICE THE TRIAL

The conduct of plaintiff and her attorneys was not substantially likely to materially prejudice the trial. When plaintiff filed her sexual harassment cause of action, the *Detroit Free Press* published an article about the filing on June 9, 2000. Plaintiff also held a press conference about the filing of her complaint. From that time forward, Bennett's indecent exposure conviction was a matter of public record, available to any member of the public, including any journalist.

Long before Bennett's indecent exposure conviction was ultimately expunged on November 9, 2001, and the trial court made a general statement to the parties about pretrial publicity on June 21, 2002, the indecent exposure conviction and the facts surrounding it were well-publicized. Accordingly, it is improper to blame plaintiff and her attorneys for every subsequent mention of Bennett's indecent exposure conviction, as the majority has, because information about his conviction was available from numerous sources. Journalists had access to this information from the time the complaint was filed, and journalists attended public courtroom proceedings, as they are allowed to do. Police reports were readily available to anyone who properly requested them. This information was contained in pleadings in the circuit court, the Court of Appeals, and this Court, and no objection was made. Further, the indecent exposure conviction was repeatedly discussed in open court. So regardless of whether plaintiff was the original provider of the information, any novice journalist willing to do a nominal amount of research would have ultimately discovered the conviction. See, e.g., *Gentile*, *supra* at 1046 (Kennedy, J.) (Although the petitioner shared the information with journalists, it

was also "available to any journalist willing to do a little bit of investigative work.").

Over seven months after information about Bennett's indecent exposure conviction was first made known in relation to this case, on January 19, 2001, Judge Kathleen Macdonald granted a motion to exclude evidence of Bennett's indecent exposure conviction from plaintiff's trial.[2] Later, on February 16, 2001, the trial court granted a motion to exclude any evidence related to Bennett's indecent exposure conviction. However, *these decisions did not preclude plaintiff and her attorneys from ever mentioning the indecent exposure conviction in public again*, and it is erroneous to attempt to portray them as such. While the majority refers to an order by Judge Macdonald that witnesses who mentioned Bennett's indecent exposure conviction would be considered in contempt of court, this order applied to *Lula Elezovic's case*, not plaintiff's case, and the order applied only to testimony given in court. This order did not restrict *plaintiff's* right to discuss Bennett's indecent exposure conviction in public settings as it relates to her case.

Notably, in between the two decisions excluding evidence of Bennett's indecent exposure conviction, on

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[2] Notably, Judge Macdonald recognized that this decision may not be final. She stated the following:

> My ruling *right now* is that it [evidence of Bennett's indecent exposure conviction] will not be allowed even as to notice to Ford Motor. *That's my position now*. However, whenever I make a ruling in a vacuum outside the context of a trial, I'm always concerned that when I get in the middle of the trial and I find out I may have made a mistake, I will change my ruling. If I find the probative value of this evidence against only Ford Motor and somehow I can make a limited instruction so that somehow the jury won't take it as propensity evidence, *I would reconsider it. As of right now this evidence is excluded*. [Emphasis added.]

January 28, 2001, the *New York Times* published a lengthy article about the multiple claims of sexual harassment at defendant's plant. The article also mentioned Bennett's indecent exposure conviction, including a reference to the indecent exposure conviction made by the former plant manager for defendant's Wixom plant. Another article was published on June 12, 2002, in the *Metro-Times*. In the article, plaintiff is quoted as saying, "They are investigating everything in my life, but not the man who did it to me, not the man who had the criminal record, was in a company car and exposed himself to high-school girls and was convicted of it." However, the article also stated that "[a]ccording to Ford and Bennett's attorney," plaintiff began weaving her tale after she learned of Bennett's indecent exposure conviction.[3] Bennett's attorney also talked about Bennett's indecent exposure conviction in the article, as well as how Bennett was falsely accused by the girls and how the conviction was expunged. Bennett's conviction was also mentioned by the attorney for Lula Elezovic, a woman who also alleged that Bennett sexually harassed her; Pamela Perez, another woman who alleged that Bennett sexually harassed her; and a former plant manager for defendant. While the majority

[3] The majority characterizes these remarks as necessary responses to comments made by plaintiff and her attorneys. *Ante* at 382-383 n 11. The majority believes that saying that plaintiff is a lying opportunist who crafted her story after learning of the indecent exposure conviction is "not intended to taint the potential jury pool and cause prejudice to plaintiff." *Ante* at 383 n 11. I, however, believe that an objective reader of the facts of this case will recognize an analytical disparity in the majority's reasoning. Simply, if mentioning Bennett's indecent exposure conviction is—as the majority asserts—an attempt to influence the jury pool, then publicly arguing that plaintiff fabricated claims of sexual harassment in a desperate attempt to receive a large cash award from defendant is *exactly the same type of conduct that the majority finds so egregious*.

contends that it was proper for the trial court to dismiss plaintiff's case with prejudice for mentioning Bennett's indecent exposure conviction, it conveniently ignores the fact that *defendant's attorney and Bennett's attorney also did the same* to advance their theory of the case to the public.

On May 17, 2002, another evidentiary hearing was held in front of Judge William Giovan.[4] At a conference in chambers, defendant's attorney requested a gag order directing plaintiff's attorneys not to publicize Bennett's expunged indecent exposure conviction. The court *declined to issue a gag order*.

In the course of another evidentiary hearing on June 21, 2002, the trial court briefly stated that it would dismiss the case if it found that a party was "causing some difficulty in our getting a fair jury . . . ." Yet this "explicit warning," as the majority repeatedly calls it, was so vague and fleeting that it cannot possibly take the place of a formal court order. It provided no guidance to the parties about what conduct was prohibited and clearly made no specific mention of Bennett's expunged conviction. Moreover, because the conviction had been previously referenced in the media and the trial court had *refused to issue a gag order to prohibit this conduct*, there can be no fair inference drawn from the trial court's offhand comment that it was now prohibiting any mention of the conviction.

It is important to note that the entire exchange about the possibility of dismissal occurred in an offhand manner as follows:

> *Mr. Morgan* [*Bennett's counsel*]: But first, they tried Mr. Bennett's deposition, and they unilaterally scheduled it for

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[4] Judge Giovan was assigned to the case after Judge Kathleen Macdonald was assigned to another division of the circuit court.

the 12th, knowing that they had fed the Metro Times with all the information for that horribly one-sided, inflammatory article that came out—[5]

The Court: You think it was one-sided?

Mr. Morgan: I haven't heard anyone comment to me to the contrary in the past week and a half.

The Court: I will just tell you that I don't know who it was, but somebody thought that it made a fair presentation. That's neither here nor there, if that makes you feel any better.

Mr. Morgan: Well, the night before, and my client was ready to appear for the deposition in the *Perez* case. We had filed a motion for a protective order that we had scheduled for the previous Friday, and that motion for a protective order was, number one, to have the judge limit—

The Court: But, you know, since you mentioned that article, where's this coming from? I thought that there is a prohibition against counsel speaking to—making public statements designed to affect litigation.

Ms. Hardy [*defendant's counsel*]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.

The Court: Is counsel being quoted in this?

Mr. Washington [*plaintiff's counsel*]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie [plaintiff's attorney] and I were both quoted, all quoted.

The Court: I'm not sure—well—

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[5] Part of this "one-sided" article states as follows:

> Perhaps the plaintiffs are colluding to pick Ford's pockets. And perhaps Maldonado is the woman Ford portrays her to be—a greedy, sexually wanton, emotionally troubled ringleader of a conspiracy to gouge the company.
>
> Or perhaps she and the other women are telling the truth.

> *Ms. Hardy*: It was initiated, without doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling—
>
> *The Court*: I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client. [Emphasis added.]

Contrary to the majority's assertions, the trial court did not advise the parties "in no uncertain terms that references to the excluded conviction were to cease." *Ante* at 394 n 23. And the trial court did not "explicitly warn[] the parties and the attorneys that further references to the excluded conviction would result in dismissal." *Id*. In fact, there was no "explicit warning" that the case would be dismissed if remarks about the conviction were made, and there was no warning about what conduct would result in dismissal. A review of the quoted transcript of the exchange reveals that *not once* does the trial court even utter a word about the expunged indecent exposure conviction or excluded evidence.

Remarkably, I need only quote the trial court's own words to show the falsity of the majority's position that the trial court "explicitly warned the parties that [it] would dismiss the case if the inappropriate remarks regarding the excluded conviction continued." *Ante* at 393. The trial court itself stated, "I told everybody then [at the May 17 hearing], certainly in chambers and

maybe again after that on the record, I don't know that I repeated it on the record, that *I had no intention of telling anyone what they can say*." (Emphasis added.) At another hearing, the trial court stated, "I think I don't have the right to decide for myself what a lawyer can say to the public. I do not have that right." And finally and most importantly, "I have never issued such an order in my life." Therefore, I fail to see how the majority can characterize the trial court's words as being an "explicit warning" when the trial court itself does not believe it issued such a warning.

The trial court's own statements that it did not issue an order or warning that explicitly restricted what could be said should persuade a reasonable reader that no such order was entered or warning issued that prohibited the mention of the indecent exposure conviction. Yet the majority chooses to ignore this reality in favor of a factual scenario that it created and that it *wishes* had occurred. The majority attempts to portray an order excluding evidence from trial as having the same effect as an order precluding any mention of this evidence in public, and this erroneous portrayal is the crux of the majority's analysis. Remarkably, the majority's entire analysis relies on the faulty premise that two orders—one of which was never even entered—dealing with different topics and restricting different conduct can actually be the same. But an order excluding evidence is not magically transformed into an order precluding the mention of the evidence in public no matter how much the majority wishes it were so. Unfortunately, I believe that the majority has steadfastly refused to acknowledge the difference because it would show that its analysis is insupportable.

While the majority labels as "preposterous" the dissent's position that an order excluding evidence from a

trial is not the same as an order precluding the mention of this evidence in public, the majority never goes beyond name-calling to explain its position that an order excluding evidence now means that this evidence can never be mentioned in any forum again. Unfortunately, the majority's insistence on resorting to such tactics and its refusal to explain its position is becoming standard operating procedure whenever the majority cannot legally support its position. In this case, the majority so desires a specific outcome that it ignores the fact that an order excluding evidence cannot be labeled an order precluding mention of this evidence in public, and this blind adherence to its favored outcome leads it to espouse a position that is completely indefensible.

Moreover, the trial court's brief remarks at the evidentiary hearing about ethical obligations were made with no hearing or information about what plaintiff and her attorneys had or had not been doing. There is no indication that the trial court believed that plaintiff and her attorneys had been engaging in misconduct and that they must now cease any of their activities. The trial court's general comments were made in passing to both parties. *There was no formal or informal hearing on this matter*; there was only an extremely brief exchange. Also, contrary to the majority's contention, a comment made by plaintiff at a rally protesting sexual harassment is not adequate evidence that plaintiff understood the trial court's June 21, 2002, "order." In response to a reporter's question at the rally, plaintiff stated that she was not going to quit fighting sexual harassment, even if that meant that her case would be dismissed. However, the news report does not show the question posed by the reporter that prompted plaintiff's statement. Notably, there was *no* mention of Bennett's expunged conviction during this news broadcast. What was mentioned during the broadcast was a statement

by a spokeswoman for defendant, in which she said that she would not comment on the case, but she did note that the judge had asked those involved to refrain from drawing attention to the case. While the majority draws the conclusion from the broadcast that plaintiff somehow understood a limitation on referencing Bennett's expunged conviction when no such limitation was ever ordered or discussed by the trial court, I draw no such conclusion. It is highly probable that plaintiff was referring to the same directive that defendant's spokeswoman was referencing—that the trial judge asked the parties to refrain from drawing *unnecessary* attention to the case. But there is no indication that such a vague "request" was somehow transformed into an "order" regarding referring to Bennett's expunged conviction merely by plaintiff's comment.[6]

As it relates to the conduct of plaintiff's attorneys, the majority states that it was misconduct for plaintiff's attorneys to have "appeared in television news broadcasts that specifically referred to Bennett's expunged conviction." *Ante* at 395. Yet, in over ten televised news reports, plaintiff and her attorneys do not once mention Bennett's indecent exposure conviction or the events that led to the conviction. Notably, the only person to comment off-camera on the conviction in one of the news reports is a spokesperson for *defendant*. Further, while the 1995 conviction is referenced in various televised news reports, an attorney for Bennett or defendant appears in each one of these reports. If it was

[6] Plaintiff's counsel later even sought more specificity and argued that the trial court's request was too vague to provide any guidance because "there's no way that any member of [plaintiff's] legal team could know when you had drawn a conclusion, as you said, that we were running afoul of the ethical rules . . . ."

misconduct for plaintiff's attorneys to appear in these reports, I fail to see why defendant is not being held to a similar standard.

I further note that, in a September 12, 2001, article by The Associated Press, it is *Bennett's* attorney who mentions the indecent exposure conviction, not plaintiff's attorneys. In an October 10, 2001, article in the *Detroit Free Press*, it is again Bennett's attorney who mentions the indecent exposure conviction as he characterizes plaintiff and the other women who allege sexual harassment by Bennett as women who are lying, looking for easier jobs, "out to make a quick buck," and attempting to capitalize on Bennett's indecent exposure conviction.

Notably, "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Gentile*, *supra* at 1058 (Kennedy, J.). "[A]n attorney may take reasonable steps to defend a client's reputation . . . ." *Id*. at 1043. In this case, defendant made numerous comments to the media regarding plaintiff and her claims of sexual harassment. Bennett's and defendant's strategy was clear. Plaintiff was a liar. Bennett's attorney made repeated, explicit statements to the media—plaintiff and the other women who alleged sexual harassment were lying. Defendant's attorney stated that plaintiff had "credibility issues." In the June 12, 2002, *Metro-Times* article, Bennett's attorney said that plaintiff and the other women suing defendant and Bennett were lying about the harassment and were motivated in large part by greed. Defendant's defense was summarized as being that "Maldonado is an overweight opportunist who is colluding with co-workers to make a fortune by falsely accusing Bennett of sexual harassment and falsely accusing the company of doing nothing about it." Pre-

trial allegations against Maldonado included an assertion that she had had sex in a car in defendant's parking lot and frequently took her underwear off at work and hung it for all to see. And defendant's attorney repeatedly attempted to trivialize testimony and evidence that other women had been sexually harassed by Bennett by referring to this as "me too" evidence.

In light of the forceful and contentious tactics engaged in by both parties, I do not believe that the mere mention of an *expunged* conviction of indecent exposure that *some jurors might hear* had a substantial likelihood of materially prejudicing the trial. See, e.g., *Gentile*, *supra* at 1058 (Statements made by an attorney alleging that the police department and the prosecutor's office were corrupt were not substantially likely to materially prejudice the proceedings.). It is not surprising that *defendant* would make this argument because it would like as little attention as possible paid to this case because it finds itself defending yet another sexual harassment claim involving Bennett. What is surprising, however, is that the majority agrees with defendant and takes the position that dismissal with prejudice is a reasonable response for the courts in a matter in which plaintiff and her attorneys have behaved in a manner *entirely consistent* with the actions of defendant's attorneys.

Simply, if plaintiff and her attorneys are criticized for seeking to influence the public perception of events by talking about Bennett's indecent exposure conviction, then I fail to see how defendant's attorneys were not attempting to do the same. Both parties sought to negatively portray their adversary's position in the media. While plaintiff is criticized by the trial court for sending out a press release, defendant also sent out

press releases involving this case, yet it is only plaintiff who is being penalized with the extreme sanction of dismissal with prejudice.[7]

The attention paid to this case unmistakably shows that public interest is going to be more acute when the matter at issue is controversial. See *Bridges*, *supra* at 268. Sexual harassment, and, in this case, its alleged pervasiveness at defendant's facilities, is a matter of public interest that will engender public discussion.[8] As the *Detroit Free Press* reported in an October 10, 2001, article, various women complained of sexual harassment at defendant's Wixom plant, including women who were high-level supervisors. In the article, a manager for the Michigan Department of Civil Rights stated, " 'It's an extraordinary situation when you've got that many [sexual harassment complaints]. . . . Filing a lawsuit is not something women take lightly.' "

Making this case an even bigger issue of public interest is the manner in which the judicial proceedings are conducted, and the allegation, supportable or not, that participants are not receiving fair treatment in our courts. The public undoubtedly has an interest in ensuring that proceedings are conducted fairly. But punishing comments made while the case is pending will "produce their restrictive results at the precise time

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[7] I also note that after investigating this matter, the state of Michigan's Attorney Grievance Commission did not find any evidence of misconduct that warranted further action, and it dismissed complaints filed by Bennett's attorney against plaintiff's attorneys.

[8] Other women have also alleged sexual harassment involving Daniel Bennett. Notably, this Court has issued two other opinions involving similar allegations against Bennett. See *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005); *McClements v Ford Motor Co*, 473 Mich 373; 702 NW2d 166 (2005). Further, a majority of this Court addressed by order another case dealing with alleged sexual harassment by Bennett. *Perez v Ford Motor Co No 2*, 474 Mich 1057 (2006).

when public interest in the matters discussed would naturally be at its height." *Bridges*, *supra* at 268. It is axiomatic that under the majority's rationale, cases that command the most public interest will be removed from the arena of public discourse. See *id*. It may take years to resolve a case, and the majority's position effectively silences negative critiques of the justice system and its parties during that time. *Id*. With this, I cannot agree.

III. OTHER ADEQUATE AVENUES WERE AVAILABLE TO THE TRIAL COURT

The trial court had numerous other options to use before employing the drastic measure of dismissing plaintiff's case with prejudice. The possibility that other less extreme measures could have been used by the trial court is a weighty factor that must be considered. See, e.g., *Landmark Communications, Inc v Virginia*, 435 US 829, 843; 98 S Ct 1535; 56 L Ed 2d 1 (1978). The trial court could have required a continuance; moved the location of the trial; continued forward with sequestered, individualized voir dire; or continued forward with voir dire and a larger pool of jurors. See, e.g., *Gentile*, *supra* at 1044 (Kennedy, J.). At the very least, the trial court could have issued an *order* forbidding any future disclosure by the parties of Bennett's indecent exposure conviction. There is no record that any of these options were seriously considered by the trial court.

The majority appears to argue that plaintiff would not comply with such an order. But plaintiff's sarcastic and posturing comments to defense counsel that she had told people about the conviction and would continue to do so cannot seriously be deemed evidence from which it can be extrapolated that plaintiff would refuse

to comply with an order *from the court*. Notably, it is clear that the trial court never thought it issued an order to any of the parties. The trial court stated:

> I don't believe in gag orders. I've never issued a gag order. . . . I have heard from time to time judges issuing orders personal to the attorneys saying you can't talk about this case, you can't do this, you can't do that. I have never issued such an order in my life. . . . I haven't done it in thirty years and I didn't do it in this case. [Emphasis added.]

Moreover, defendant's attorney knew that an order was not entered. During a motion hearing, defendant's attorney reiterated the court's comment during a prior hearing that "you were not issuing an order . . . ." During the same hearing, Bennett's attorney also said that he had asked the court to issue an order, but the court had declined. And in any event, whether plaintiff theoretically would comply with such an order is unfounded speculation. The critical fact is that plaintiff is suffering the ultimate punishment for violating an alleged "order" that was never even issued.

To fully understand this case and any comments made by plaintiff, it is important to note that during her deposition, plaintiff endured days of questioning. At one point, her attorneys even filed a motion for a protective order barring further deposition questioning of plaintiff. Plaintiff was questioned about her weight and her Internet habits. Evidence was sought and plaintiff was also questioned about her sexual fantasies, prior sexual assaults, sexual habits, and religious beliefs, as well as her brother's drug addiction and her father's criminal past. This case was highly contentious with defense counsel repeatedly claiming that plaintiff was lying so that she could receive a damages award. Plaintiff's statement of defiance to opposing counsel cannot rea-

sonably be deemed dispositive evidence that she would continue to discuss excluded evidence if ordered not to do so by the court. While I do not condone disrespectful behavior during depositions or during any aspect of a proceeding, plaintiff's response was a human, albeit inadvisable, response in light of the contentious proceedings. But the statement did not rise to such a level that her case should be dismissed with prejudice because she made it, and I vehemently disagree with the majority that doing so was within the range of reasonable and principled outcomes at the trial court's discretion.

Remarkably, the trial court expressed no real concern about the ability of jurors to impartially decide this case. During a hearing to decide defendant's motion to dismiss, the trial court stated it was not listening to arguments to determine if the conduct of plaintiff and her attorneys impaired defendant's right to a fair trial. The trial court stated, "I think it is often possible in high publicity cases to—you know, with appropriate safeguards, to try a case without—it may be difficult sometimes—without the publicity infecting the trial." Defendant's attorney agreed that the gravamen of the proceeding was about the "alleged misbehavior" of plaintiff and her attorneys in publicizing material and it was not whether defendant could receive a fair trial.

The majority now wants to portray this case as being about a defendant's right to a fair trial. See *ante* at 376. It claims that the "trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice." *Ante* at 377. But I fail to see how *necessary* it was when the trial court itself did not even consider this as a reason for dismissing the case with prejudice. While the majority now wants to portray this case as

being about a defendant's right to a fair trial because this portrayal better supports the majority's outcome, I find this depiction to be disingenuous at best because neither the trial court nor defendant itself viewed the case in this way.

IV. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS DID NOT VIOLATE MRPC 3.5 AND MRPC 8.4

The majority states that the trial court did not rely on MRPC 3.5 and MRPC 8.4 in reaching its conclusion to dismiss plaintiff's case. However, the majority nonetheless examines the conduct of plaintiff and her attorneys in light of these rules to provide further evidence that the conduct warranted dismissal of plaintiff's sexual harassment cause of action. MRPC 3.5 states the following:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or
>
> (c) engage in undignified or discourteous conduct toward the tribunal.

Regarding MRPC 3.5, the majority refers to a "sarcastic" comment made by one of plaintiff's attorneys to the trial court. Further, the attorney also made a comment during a television interview that it was hard for a plaintiff to get a fair trial when the defendant is a large company like Ford Motor Company. This comment stemmed from plaintiff's filing of an emergency motion for disqualification of the trial judge because, in part, a member of the firm representing defendant who had entered appearances in the matter for defendant was the reception chairperson for a "gala campaign

reception" fundraising event for the judge at the Opus One Restaurant in Detroit. After failing to get plaintiff's attorney to disclose who shared the invitation with her and when, the trial judge refused to disqualify himself and then issued an order denying plaintiff's motion to dissolve the order excluding evidence related to Bennett's 1995 conviction. And later, on August 21, 2002, the trial court dismissed plaintiff's case with prejudice because it claimed that plaintiff and her attorneys had engaged in prejudicial pretrial publicity.

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile*, *supra* at 1034 (Kennedy, J.). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v Alabama*, 384 US 214, 218; 86 S Ct 1434; 16 L Ed 2d 484 (1966). This includes "the manner in which government is operated or should be operated, and all such matters relating to political processes." *Id*. at 218-219. In *Gentile*, *supra* at 1033-1034, the defendant was an attorney who held a press conference that criticized the state for indicting his client and not indicting members of the police department, who he referred to as "crooked cops." This speech was protected by the First Amendment. *Id*. at 1058.

People may disagree about whether the comment by plaintiff's attorney about the bias of "Metro Detroit" judges was rude or forthright, crude or candid. The statement could even be deemed unjustifiable. However, it was within the attorney's constitutional rights to make the statement. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of

American public opinion." *Bridges*, *supra* at 270. The essence of the right to free speech is that it gives the speaker the opportunity to express the speaker's viewpoints, valid or not. The citizens of Michigan are intelligent and do not need speech to be sanitized. It does not advance the ideals of the justice system to shelter the public from comments, even those that may be deemed unwarranted by some.

Moreover, there is nothing inherently undignified or discourteous in criticizing a court's decisions. In fact, a judge should expect these critiques as a "judge must expect to be the subject of constant public scrutiny." See Code of Judicial Conduct, Canon 2(A). But even if an attorney behaves in a manner that is deemed undignified or discourteous, then sanctions can be imposed against the *attorney*. Indeed, if every attorney who complained about a court's ruling had his client's case dismissed, the dockets of our state's courts would be cleared almost immediately.

At the outset of its opinion, the majority expresses a concern about "preserving an organized polity . . . ." *Ante* at 375. And I must note that I do not dispute that it would certainly be easier for a trial court to handle proceedings if there were no fear of criticism for its rulings. However, the ease of a trial court in managing its day-to-day affairs is not sufficient to infringe on plaintiff's First Amendment rights in this case. Our citizens' constitutional right to free speech does not exist merely when it falls within the majority's narrowly defined "orderly" parameters. The First Amendment exists to protect speech—discourteous, disorderly, and sometimes downright offensive. "Freedom" is the first and foremost concern protected by the First Amendment, not order. The majority has offered nothing more than conjecture that the actions of plaintiff

would impinge on the parties' right to a fair trial, but the lack of any real concern about a fair trial is particularly obvious when one considers that the *trial court itself did not have such a concern*. The majority further ignores that before speech can be punished, it must be determined to have a *substantial* likelihood of *materially* prejudicing the proceedings. See MRPC 3.6. Trial court proceedings are not protected by restricting an individual's right to criticize those very same proceedings.

Regarding MRPC 8.4, the rule states the following:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice;
>
> (d) state or imply an ability to influence improperly a government agency or official; or
>
> (e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

The majority states that plaintiff's counsel did not restrain plaintiff from publicizing Bennett's indecent exposure conviction and that plaintiff's attorneys participated with plaintiff in this "misconduct" on numerous occasions. The majority refers to MRPC 8.4(a), but I fail to see how plaintiff's attorneys engaged in misconduct through the acts of plaintiff. There is no evidence that plaintiff's attorneys counseled her to speak about Bennett's indecent exposure conviction. And I disagree that participating in a rally—a time-

honored tradition in this country—and speaking to the media constitute "misconduct" that warrants dismissal of plaintiff's case with prejudice.

Finally, the majority states that remanding for an evidentiary hearing about the specifics of the conduct of plaintiff and her attorneys is "no more than a fool's errand" that it refuses to engage in. *Ante* at 402. While I disagree that the conduct of plaintiff and her attorneys had a substantial likelihood of materially prejudicing the trial, I fail to see what is foolish about remanding to specifically determine what happened, when, and why. When a person's First Amendment rights are at stake and the extreme sanction of dismissing a cause of action with prejudice has been ordered, the majority's steadfast refusal to examine the facts in light of the timetable of events is troubling to say the least.

V. CONCLUSION

The First Amendment does not exist merely to protect courteous and genteel speech. The First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges*, *supra* at 263. Today, I believe that the majority has ignored the mandates of the Constitution in an ill-advised and unnecessary attempt at maintaining "order" in our courts. I believe that the comments of plaintiff and her attorneys fall well within the parameters of the First Amendment. Accordingly, I respectfully dissent and would affirm the decision of the Court of Appeals.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). The majority's assertion that its decision today is "[a]t the heart of preserving an

organized polity" is false. *Ante* at 375. I concur fully in Justice CAVANAGH's dissent because I agree that the circuit court's dismissal of plaintiff's case violated her First Amendment right to free speech.

In addition to the First Amendment violation, I write to explain that the premise of the circuit court's dismissal of plaintiff's case had no legal validity and, therefore, the majority's acrobatic effort to justify its decision to affirm the circuit court's order does not preserve an organized polity, it undermines it.

An organized polity is governed by the law and is preserved by courts that apply the law and objectively state the facts. In this case, the circuit court did not establish a legal foundation for its dismissal of plaintiff's case, it acted on a whim. The circuit court's decision was, therefore, an abuse of discretion. Now, the majority legitimizes the circuit court's order by misstating the facts of the case and misapplying the law. The majority's decision abuses this Court's appellate review power and, therefore, is inconsistent with the preservation of an ordered polity.

The circuit court in this case dismissed with prejudice plaintiff Justine Maldonado's sexual harassment action against defendant Ford Motor Company and Ford's employee, defendant Daniel P. Bennett. The circuit court premised its dismissal on pretrial publicity that it attributed to plaintiff and plaintiff's lawyers and that referred to defendant Bennett's prior conviction for indecent exposure in an unrelated case. The circuit court found that the publicity violated the Michigan Rules of Professional Conduct, MRPC 3.6. The Rules of Professional Conduct govern the conduct of lawyers. MRPC 3.6 prohibits lawyers from making extrajudicial statements about a case that might materially prejudice judicial proceedings. Despite the fact that MRPC 3.6

only applies to the conduct of lawyers and the fact that there is no evidence that her lawyers violated the rule, the circuit court opined that Ms. Maldonado's activities could be imputed to her lawyers and dismissed the case.

The question presented is whether the circuit court's dismissal with prejudice of Ms. Maldonado's case was an abuse of discretion. I would hold that it was an abuse of the circuit court's discretion to dismiss plaintiff's case for the reasons set forth below, and for those stated well by Justice CAVANAGH in his dissent.

I

Because the majority mischaracterizes facts pertinent to understanding this case, the following time line lists the important dates and events in this case's history:

• June 9, 2000: Ms. Maldonado files her sexual harassment cause of action.

• June 9, 2000: The *Detroit Free Press* publishes an article referring to defendant Bennett's unrelated indecent exposure conviction. The pending case, including statements about the case by both sides, is regularly in the media thereafter.

• January 19, 2001: Judge Kathleen Macdonald grants the motion to exclude from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.

• February 16, 2001: Judge Macdonald enters an order excluding from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.

• September 11, 2001: Plaintiff's lawyers issue a press release referring to defendant Bennett's prior and unrelated conviction for indecent exposure.

• November 2001: Defendant Bennett's prior and unrelated conviction for indecent exposure is expunged.

• June 21, 2002: During a hearing regarding the motion to dissolve Judge Macdonald's order to exclude evidence of the expunged and unrelated indecent exposure conviction, Judge William Giovan warns the parties about pretrial publicity and states that if a party violates some ethical obligation, the case could be dismissed.[1]

• July 3, 2002: During a hearing on plaintiff's motion for Judge Giovan's disqualification, Judge Giovan states on the record that his prior warning was *not a court order*.

• August 21, 2002: During a hearing on defendant's motion to dismiss the case, defendant's attorney states that the case was in the news again. Judge Giovan dismisses the case with prejudice.

II

The circuit court did not establish a legal foundation to support its dismissal of Ms. Maldonado's case. The

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[1] Specifically, Judge Giovan said:

> I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment.

The majority incorrectly characterizes this warning by suggesting that "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald orders, he would dismiss her case." *Ante* at 396-397. Contrary to the majority's characterization, the warning issued by Judge Giovan simply warned the parties to not violate any ethical obligation. Judge Macdonald's order only excluded the evidence from trial, not the public forum.

court based its dismissal of Ms. Maldonado's case on her and her attorneys' alleged violation of the Michigan Rules of Professional Conduct, MRPC 3.6. The violation identified by the circuit court involved pretrial publicity by Ms. Maldonado and her attorneys regarding defendant Bennett's prior conviction for indecent exposure, which Judge Giovan suggested violated Judge Macdonald's order to exclude that evidence from trial.

The circuit court's attempt to hold Ms. Maldonado responsible for a violation of MRPC 3.6 is unsupportable. MRPC 3.6 only applies to lawyers. The rule states:

> A *lawyer* shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer* knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. [Emphasis added.]

Judge Giovan's opinion reveals that he was aware that MRPC 3.6 does not apply to nonlawyers. Nevertheless, he concluded that a nonlawyer client "is not immune for knowingly doing what [her lawyers] cannot." MRPC 3.6 does not apply to nonlawyers; therefore, it was an abuse of discretion to base the dismissal of Ms. Maldonado's case on her violation of a rule that does not apply to her.

Further, Judge Giovan failed to identify any violation of MRPC 3.6 by Ms. Maldonado's attorneys that warrants dismissal of the case. Judge Giovan noted that her lawyers "appeared in television news broadcasts that made specific references to Mr. Bennett's criminal conviction." However, Judge Giovan did not identify a specific instance when the lawyers themselves mentioned the conviction in these broadcasts or publications. My review of the record reveals that the lawyers did not themselves refer to the conviction.

It is true that one year before Judge Giovan heard the defendant's motion to dismiss and two months before defendant's prior conviction was expunged, the law firm representing Ms. Maldonado issued a press release that referred to defendant Bennett's prior conviction. Judge Giovan found that the press release violated MRPC 3.6, suggesting that the lawyers knew trial was imminent when the press release was issued. But the information about defendant's prior conviction referred to in the press release was already well-publicized. Thus, it cannot be concluded that, when the press release was issued, a reasonable person would have expected that the content of the release would likely prejudice an adjudicative proceeding materially. Furthermore, contrary to the majority's assertion otherwise, because Bennett's prior conviction was well-publicized before plaintiff's lawyer's 2001 press release, the press release cannot be considered the source for all subsequent news publications that referred to the prior conviction.

Judge Giovan also suggested that the press release somehow violated Judge Macdonald's February 16, 2001, order, which excluded evidence of defendant's prior conviction from trial. However, while Judge Macdonald's order excluded the evidence of defendant's prior conviction from trial, it did not prohibit any and all public reference to the prior conviction by either plaintiff or plaintiff's lawyers.[2] For these reasons, it was

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[2] After Judge Giovan took the case over from Judge Macdonald, defendant Ford and defendant Bennett filed a joint motion for entry of an order directing that the witnesses be instructed regarding excluded evidence and impermissible testimony on July 21, 2002. In their brief supporting their request, defendants stated that every witness in the *separate* trial of *Elezovic v Ford Motor Co* had to

> sign off on a statement indicating that they had been advised of the ruling by the Court regarding inadmissible evidence, and

not reasonable for Judge Giovan to premise his dismissal of plaintiff's case on the actions of her lawyers.

The majority admits that MRPC 3.6 does not apply to Ms. Maldonado because she is not a lawyer. *Ante* at 396. Further, like Judge Giovan, the majority fails to identify any specific instances in which Ms. Maldonado's lawyers violated MRPC 3.6. But, rather than acknowledging the circuit court's abuse of discretion in relying on MRPC 3.6 to dismiss Ms. Maldonado's case, the majority grasps for and creates its own alternative justifications for the circuit court's order.

The majority's primary justification for its decision to affirm the order of dismissal is the need for *order in the court*. In this case, the majority concludes that the dismissal of Ms. Maldonado's case was authorized under MCR 2.504(B)(1), which provides:

> If the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for summary dismissal of an action or a claim against that defendant.

However, the mere fact that the court rule permits the circuit court to dismiss a case does not mean that

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> that they were not to mention anything about any excluded evidence, and that they understood the consequence for mentioning any of the excluded evidence would be sanctions including contempt and imposition of all the costs of a mistrial. Defendants request the same process in this case.

The defendants apparently hoped that Judge Giovan would issue an order in this case like that which Judge Macdonald had issued in the *Elezovic* case to prevent witnesses from mentioning defendant Bennett's prior conviction during their testimony on the witness stand. But Judge Giovan did not issue any such order.

In any event, the *Elezovic* order appears to have only limited the witnesses' speech inside the courtroom; it was directed at preventing impermissible testimony during the *Elezovic* trial regarding defendant Bennett's prior conviction that Judge Macdonald had ordered to be excluded from the evidence.

dismissal is justified on a whim. By the plain terms of MCR 2.504(B)(1), there must be a violation of an applicable court rule or order to justify a summary dismissal of a case.

To make it seem like MCR 2.504(B)(1) justifies the dismissal of plaintiff's case, the majority intentionally misstates the facts to make it appear that plaintiff and plaintiff's lawyers violated a court order. The majority states: "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald's order, he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case." *Ante* at 396-397. This is untrue. The facts are: (1) Judge Giovan's warning was not an order of the court,[3] (2) there *never* was a court order limiting pretrial publicity or references to defendant Bennett's prior conviction, (3) Judge Macdonald's order excluding evidence of defendant Bennett's conviction for indecent exposure from plaintiff's sexual harassment trial imposed no limitation on pretrial publicity, and (4) Judge Giovan did not premise his dismissal on plaintiff's violation of his warnings; instead, he incorrectly attributed plaintiff's activities to her lawyers to support his conclusion that they had violated MRPC 3.6.

The majority also relies heavily on the assertion throughout its opinion that plaintiff's lawyers were themselves quoted publicly referring to Bennett's prior conviction. Contrary to the majority's assertion, none of

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[3] Referring to the warning at the July 3, 2002, hearing on plaintiff's motion for his disqualification, Judge Giovan said: "I want to say a thing about gag orders. You've called what I said in court a gag order. Not so. As a matter of fact, I don't believe in gag orders. I've never issued a gag order."

the broadcasts or articles cited by the majority quoted or discussed any statements by Ms. Maldonado's lawyers regarding Bennett's prior conviction for indecent exposure. In those broadcasts and articles, Ms. Maldonado's lawyers made statements about the case and about their perception that the circuit court was biased, but not about the expunged conviction. Immediately after Judge Macdonald ruled that the conviction would be excluded, which was months before Judge Giovan was assigned the case, the lawyers were quoted as saying that they would appeal that order. Thereafter, all quoted statements about Bennett's prior conviction were made by Ms. Maldonado, and Ms. Maldonado was not restricted by any order or court rule from making repeated public reference to Bennett's prior conviction.

It was an abuse of discretion for Judge Giovan to attribute to plaintiff's lawyers responsibility for statements made by plaintiff and the press about the well-known fact that Bennett had a prior conviction for indecent exposure. It does not serve an organized polity for the majority to affirm a ruling that was based on a whim rather than the law.

III

A cornerstone for an organized polity is that courts of law will act in an orderly way, as opposed to acting on a whim. In an organized society, disputes are taken to a court of law for adjudication because a court is impartial and will handle cases with fairness and pursuant to the law. Dismissing Ms. Maldonado's case without a legal foundation is the same as dismissing the case on the basis of a whim. The majority's decision to affirm the circuit court's order damages

the integrity of the judicial system and, contrary to the majority's rhetoric, undermines the basic tenets of an organized society.

KELLY, J., concurred with WEAVER, J.

PEOPLE v ANSTEY

Docket No. 128368. Argued March 7, 2006 (Calendar No. 3). Decided July 31, 2006.

Mark J. Anstey was arrested for operating a motor vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level, MCL 257.625(1)(a) or (b), and agreed to take a chemical breath test of his bodily alcohol level. After taking the police-administered test, the defendant, as permitted by MCL 257.625a(6)(d), requested an opportunity to have a person of his own choosing administer an independent chemical test. It is not disputed that his reasonable request was denied. The district court ordered the suppression of the results of the police-administered test but denied the defendant's motion to dismiss the charge. The Berrien County Trial Court, Alfred M. Butzbaugh, J., granted the defendant's application for an interlocutory appeal and reversed the order of the district court denying the defendant's motion to dismiss the charge on the basis that *People v Koval,* 371 Mich 453 (1963), required dismissal of the charge. The court remanded the matter to the district court for the entry of an order consistent with its opinion. The prosecution appealed from the trial court's opinion and order and the Court of Appeals, ZAHRA, P.J., and NEFF and COOPER, JJ., affirmed the opinion and order of the trial court in an unpublished opinion per curiam, issued February 8, 2005 (Docket No. 255416). The Supreme Court granted the prosecution's application for leave to appeal. 474 Mich 886 (2005).

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

1. Dismissal or suppression of the test results of the police-administered chemical test is not warranted because MCL 257.625a(6)(d) does not specify a remedy. *People v Koval,* 371 Mich 453 (1963), and its progeny that held to the contrary, including *People v Green,* 260 Mich App 392 (2004), *People v Prelesnik*, 219 Mich App 173 (1996), *People v Hurn,* 205 Mich App 618 (1994), *People v Dicks,* 190 Mich App 694 (1991), *People v Willis,* 180 Mich App 31 (1989), *People v Underwood,* 153 Mich App 598 (1986), and *People v Burton,* 13 Mich App 203 (1968), must be overruled. However, when a trial court determines that the defendant was

deprived the statutory right to a reasonable opportunity for an independent chemical test under § 625a(6)(d), the court may instruct the jury that the defendant's statutory right was violated and that the jury may decide what significance to attach to this fact. The court's authority to give such an instruction derives from the inherent authority of the court to instruct the jury on the law applicable to the case and the discretionary power to comment on the evidence. Such an instruction will also advance the judiciary's duty to assist the jury in ascertaining the truth. The instruction will further the pursuit of the truth and give real effect to the right in MCL 257.625a(6)(d).

2. The defendant's due process right to present a defense, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20, was not violated, because the police have no duty under the state or federal constitutions to assist a defendant in developing potentially exculpatory evidence. Just as the police have no constitutional duty to perform any chemical tests, they have no constitutional duty to assist the defendant in obtaining an independent chemical test. The police have no constitutional duty to take affirmative action to transport the defendant from the place of his incarceration to a hospital of his choice for the requested test. The defendant did not have a constitutional right to police assistance in obtaining an independent chemical test at the hospital of his choice. The officer's actions did not violate the defendant's due process rights.

3. The judgment of the Court of Appeals, which affirmed the judgment of the trial court, must be reversed and the matter must be remanded to the trial court for reinstatement of the charges. At trial, the results of the police-administered chemical test shall be admissible, but the trial court may instruct the jury that the defendant's statutory right was violated and that the jury may decide what significance to attach to this fact.

Justice WEAVER, concurring in part and dissenting in part, concurred with the result of the majority's opinion overruling *People v Koval*, 371 Mich 453 (1963), and its progeny, reversing the judgment of the Court of Appeals, and remanding the matter to the trial court for the reinstatement of the charges against the defendant. Justice WEAVER dissented and declined to join the portion of the majority's opinion stating that a permissive jury instruction may be appropriate when the defendant has been unreasonably denied the opportunity for an independent chemical test. Rather, it should be left to the Legislature whether to revise MCL 257.625a(6)(d) to provide a remedy for a violation of that subsection. It is appropriate to overrule *Koval* because *Koval* was wrongly decided, because *Koval* defies practical workability, be-

cause reliance interests will not suffer undue hardship if *Koval* is overruled, and because changes in the law or facts no longer justify the *Koval* decision.

Reversed and remanded.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that to hold that there is no remedy for the violation of the mandatory right to an independent chemical test contravenes the unambiguous rule of statutory construction that no word in a statute can be rendered nugatory. The word "shall" in MCL 257.625a(6)(d) indicates the Legislature's clear intent to create a mandatory requirement. The statute clearly requires the police to assist in some way when a person attempts to exercise the right to obtain an independent chemical test. A mandatory right without a remedy for the violation of that right is no right at all. The Legislature, in amending the statute 12 times since *People v Koval*, 371 Mich 453 (1963), was decided, has deliberately chosen to leave the holding in *Koval* in place. It can be presumed that the Legislature is satisfied with the remedy of dismissal found prudent in *Koval*. A defendant's Sixth Amendment right to present a full defense is implicated when the defendant is deprived of the statutory right to an independent chemical test. Neither ignoring the constitutional violation nor allowing for suppression of the results of the state-administered chemical test will rectify the violation or put the defendant on equal footing with that of the prosecution. Nothing less than dismissal cures the violation. The judgment of the Court of Appeals should be affirmed.

1. CRIMINAL LAW — OPERATING MOTOR VEHICLE WHILE INTOXICATED — EVIDENCE — INDEPENDENT CHEMICAL TESTS.

Dismissal of the charges against a defendant or suppression of the results of a police-administered chemical test of the defendant's body alcohol level is not proper when the defendant has been denied the statutory right to an independent chemical test as provided under MCL 257.625a(6)(d); a trial court that determines that the defendant was deprived of a reasonable opportunity for an independent chemical test under § 625a(6)(d) may instruct the jury that the defendant's statutory right was violated and that the jury may decide what significance to attach to this fact.

2. CONSTITUTIONAL LAW — CRIMINAL LAW — EVIDENCE.

Although the police have a duty to honor the defendant's right to present a defense, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13,

17, 20, they have no duty under the state or federal constitutions to assist a defendant in developing potentially exculpatory evidence.

3. CONSTITUTIONAL LAW — CRIMINAL LAW — OPERATING A MOTOR VEHICLE WHILE INTOXICATED — INDEPENDENT CHEMICAL TESTS.

The police have no duty under the state or federal constitutions, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20, to perform any chemical tests or to assist a defendant in obtaining an independent chemical test for intoxication; the police have no constitutional duty to take affirmative action to transport the defendant from the place of his or her incarceration to a hospital of the defendant's choice for an independent test requested by the defendant.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *James Cherry,* Prosecuting Attorney, and *Aaron J. Mead,* Assistant Prosecuting Attorney for the people.

State Appellate Defender (by *Gail Rodwan*) for the defendant.

CORRIGAN, J. Defendant was arrested for operating a motor vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level (OUIL/UBAL), a violation of MCL 257.625(1)(a) or (b). Following defendant's arrest, defendant agreed to take a police officer-administered chemical breath test of defendant's bodily alcohol level. Under MCL 257.625a(6)(d), after having agreed to take the police-administered test, defendant was entitled to "a reasonable opportunity to have a person of his or her own choosing administer" an independent chemical test. The prosecution does not dispute the district court's ruling that the statute was violated.

We granted leave to appeal in this case and directed the parties to include among the issues briefed: (1) whether dismissal is the proper remedy for the denial of

an independent chemical test in violation of MCL 257.625a(6)(d); and (2) whether *People v Koval,* 371 Mich 453; 124 NW2d 274 (1963), was correctly decided. 474 Mich 886 (2005).

We conclude that because the statute does not specify a remedy, dismissal is not warranted for a statutory violation. In so holding, we specifically overrule *Koval, supra*, and its progeny. We hold, however, that when the trial court determines that the defendant was deprived of his or her right to a reasonable opportunity for an independent chemical test under MCL 257.625a(6)(d), the court may instruct the jury that the defendant's statutory right was violated and that the jury may decide what significance to attach to this fact. We also hold that defendant's due process right to present a defense was not violated.

I. FACTS

Defendant was stopped by the police and arrested for OUIL/UBAL. The police transported defendant to jail and requested that he take a chemical breath test. Defendant agreed to take the test. It reflected that his body alcohol level was 0.21 grams per 210 liters of breath, plainly above the legal limit.[1] Defendant then asked the arresting officer to transport him to a medical facility in Indiana for an independent chemical test, but the officer refused to do so. Defendant next asked the officer to transport him to Watervliet Community Hospital, about a 15- to 20-minute drive from the jail. The officer again refused, but offered to take defendant to

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[1] At the time defendant was arrested, MCL 257.625(1) set the statutory intoxication threshold at a body alcohol content of 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. Pursuant to 2003 PA 61, however, the statutory intoxication threshold has been reduced from 0.10 to 0.08.

Lakeland Hospital/St. Joseph Medical Center, a nearby location where the police routinely took suspects for chemical tests. Defendant refused this offer, apparently because he did not believe that he could obtain a truly independent test there. Consequently, defendant never received an independent test of his body alcohol level.

Defendant was charged with OUIL, second offense, and/or UBAL, second offense, MCL 257.625(1)(a) or (b); MCL 257.625(8)(b).[2] Defendant moved to dismiss the charges because the arresting officer unreasonably denied his request for an independent chemical test under MCL 257.625a(6)(d). The district court found defendant's request to go to the Indiana hospital unreasonable because the officer would have had to travel outside his jurisdiction. But the district court found that defendant's request to go to Watervliet Hospital for an independent chemical test was reasonable, and that the officer violated MCL 257.625a(6)(d) by failing to honor defendant's request. The court determined that dismissal of the charges would be an "inappropriate and somewhat draconian" remedy because defendant was not completely denied his right to an independent chemical test, because he was given the opportunity to obtain such a test at Lakeland Hospital. Instead, the court held that suppression of the results of the police-administered chemical test was the proper remedy.

The Berrien County Trial Court reversed, ruling that *Koval* and its progeny interpreting MCL 257.625a had consistently held that dismissal was the appropriate remedy for the unreasonable denial of an independent chemical test. The court held that the Legislature would have specifically provided for a different remedy or amended the statute to provide for a different

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[2] MCL 257.625(8)(b) has since been redesignated as MCL 257.625(9)(b).

remedy if it had not intended for the remedy to be dismissal. Instead, the Legislature had silently acquiesced to the remedy of dismissal by not amending the statute in light of *Koval* and subsequent Court of Appeals decisions holding that dismissal is the appropriate remedy. The trial court then remanded to the district court for entry of an order dismissing the charges.

The Court of Appeals affirmed. *People v Anstey*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2005 (Docket No. 255416). We granted the prosecution's application for leave to appeal. 474 Mich 886 (2005).

II. STANDARD OF REVIEW

The prosecutor challenges whether dismissal of the charges against defendant was appropriate under MCL 257.625a(6)(d). Questions of statutory interpretation are questions of law that this Court reviews de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

III. ANALYSIS

A. MCL 257.625a(6)(d)

The question before this Court is whether the Legislature intended that a violation of MCL 257.625a(6)(d) should result in dismissal of the case because the officer unreasonably denied defendant's request for an independent chemical test administered by a person of his own choosing.[3] "The primary goal in construing a statute is 'to give effect to the intent of the Legislature.'

[3] We offer no opinion regarding whether the district court correctly ruled that the police violated MCL 257.625a(6)(d). But because the prosecution does not challenge the district court's ruling, we assume for purposes of this section of the opinion that the statute was violated.

We begin by examining the plain language of the statute." *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2002) (citations omitted).

The right to a reasonable opportunity to have an independent chemical test is created by statute, MCL 257.625a(6)(d):

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). *A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention*. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample. [Emphasis added.]

Notably, the Legislature did not specify what remedy to apply if a police officer failed to advise, or denied, a defendant of his or her right to a reasonable opportunity to obtain an independent chemical test.

By contrast, the Legislature has clearly specified that if a prosecutor fails to comply with subsection 8 of MCL 257.625a, the remedy available to a defendant for violation of subsection 8 of the statute is suppression of the results of the state-administered chemical test.[4]

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[4] MCL 257.625a(8) provides:

> If a chemical test described in subsection (6) is administered, the test results shall be made available to the person charged or the person's attorney upon written request to the prosecution, with a copy of the request filed with the court. The prosecution shall furnish the results at least 2 days before the day of the trial.

Had the Legislature intended a comparable remedy for a violation of subsection 6(d)—or even the more drastic remedy of dismissal—it could have so specified. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006) (citation omitted) (" 'Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . . .' ").

MCL 257.625a(7) is also noteworthy. At the time defendant was arrested, MCL 257.625a(7) provided, in pertinent part, as follows:[5]

> The provisions of subsection (6) relating to chemical testing do not limit the introduction of any other admissible evidence bearing upon the question of whether a person was impaired by, or under the influence of, intoxicating liquor . . . .[6]

Subsection 7 indicates that, notwithstanding the provisions regarding chemical testing evidence set forth in subsection 6, the Legislature intended to allow the prosecution to go forward on other evidence establishing impaired operation of a motor vehicle. Given this statutory language, a prosecutor could adduce evidence relating to a defendant's erratic driving, inability to perform field sobriety tests, or slurred speech, as well as other evidence tending to establish the defendant's

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> The prosecution shall offer the test results as evidence in that trial. *Failure to fully comply with the request bars the admission of the results into evidence by the prosecution*. [Emphasis added.]

[5] *Koval* and its progeny did not address this subsection (or its then-existing equivalent) in determining that dismissal of charges was the appropriate remedy for an unreasonable denial of the right to an independent chemical test.

[6] Subsection 7 was amended in 2003 to provide, in pertinent part: "The provisions of subsection (6) relating to chemical testing do not limit the introduction of any other admissible evidence bearing upon any of the following questions . . . ." 2003 PA 61. Our analysis applies equally to the amended statute.

impairment. Reading this subsection together with subsection 6, it would seem that the Legislature's intent, whether or not MCL 257.625a(6)(d) was violated, was to permit a prosecutor to go forward under MCL 257.625(1)(a) (OUIL) using other evidence, beyond chemical testing, to establish guilt. Dismissal, therefore, was not an anticipated remedy.[7]

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[7] Justice CAVANAGH argues (and the trial court held) that the Legislature's decision not to add a remedy to MCL 257.625a(6)(d) in post-*Koval* amendments to the statute indicates the Legislature's agreement with the *Koval* Court's interpretation of the statute. Justice CAVANAGH, however, ignores our holding in *Neal v Wilkes*, 470 Mich 661, 668 n 11; 685 NW2d 648 (2004):

> [A]s we recently explained in *People v Hawkins*, 468 Mich 488, 507-510; 668 NW2d 602 (2003), neither "legislative acquiescence" nor the "reenactment doctrine" may "be utilized to subordinate the plain language of a statute." "Legislative acquiescence" has been repeatedly rejected by this Court because "Michigan courts [must] determine the Legislature's intent from its *words*, not from its silence." *Donajkowski v Alpena Power Co,* 460 Mich 243, 261; 596 NW2d 574 (1999). Although, where statutory language is ambiguous, the reenactment doctrine may be a more useful tool of construction, "in the absence of a clear indication that the Legislature intended to either adopt or repudiate this Court's prior construction, there is no reason to subordinate our primary principle of construction—to ascertain the Legislature's intent by first examining the statute's language—to the reenactment rule." *Id*. at 508-509. [Emphasis in original.]

Because MCL 257.625a(6)(d) omits a remedy for a violation of the right to a reasonable opportunity for an independent chemical test, the reenactment doctrine is inapplicable. Contrary to Justice CAVANAGH's argument, we do not hold that the Legislature left ambiguous the remedy for a violation of the statute. Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create. Our holding that the judiciary has the inherent authority to instruct the jury regarding a violation of the statute does not create such a remedy.

Further, the amendments to MCL 257.625a(6)(d) do not clearly demonstrate through words the Legislature's intention to adopt or repudiate *Koval*'s interpretation of the statute. Justice CAVANAGH errone-

Notwithstanding the absence of statutory language mandating dismissal for a violation of MCL 257.625a(6)(d), the trial court and the Court of Appeals held that dismissal of the charges against defendant was required because of this Court's ruling in *Koval, supra*. This Court interpreted a previous version of MCL 257.625a(6)(d) in *Koval, supra*. In that case, the defendant was stopped for driving while intoxicated. *Koval, supra* at 456-457. The police officers failed to advise the defendant of his right to have an independent chemical test, contrary to the defendant's statutory right.[8] The previous version of the statute, like the

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ously focuses on the Legislature's *silence* rather than its *words*. We interpret the statute by examining its plain language and by employing *applicable* rules of statutory construction. In arguing that dismissal is the appropriate remedy for a violation of MCL 257.625a(6)(d), Justice CAVANAGH disregards the text of the statute and the rule of statutory construction that courts cannot assume that the Legislature inadvertently omitted language from one portion of the statute that it placed in another portion of the statute. *Monaco, supra* at 58. It is Justice CAVANAGH, not the majority, that "chooses to disregard rules of statutory construction . . . ." *Post* at 473.

Further, we reject Justice CAVANAGH's contention that our holding fails to give meaning to the word "shall" in the statute. While Justice CAVANAGH correctly argues that the word "shall" indicates that the right to a reasonable opportunity for an independent chemical test is mandatory, this is not the issue before us. Rather, the issue is what *consequences* the Legislature intended when this mandatory right is violated.

[8] At the time, the pertinent language of the statute provided as follows:

> "(3) A person charged with driving a vehicle while under the influence of intoxicating liquor shall be permitted to have a licensed physician or registered nurse, under the supervision of a physician of his own choosing, administer a chemical test as provided in this section within a reasonable time after his detention, and the results of such test shall be admissible if offered by the defendant and shall be considered with other competent evidence in determining the innocence or guilt of the defendant. Any person charged with driving a vehicle while under the influence of intoxicating liquor shall have the right to demand that

present version, did not provide a remedy. This Court held that noncompliance with the mandatory statutory requirement required dismissal of the charges against the defendant. *Id.* at 459. In reaching this conclusion, this Court cited the mandatory form of the statute and noted that the statute "was enacted for the protection and benefit of a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor." *Id.* at 458.[9]

As discussed, the text of the statute makes clear that the Legislature did not intend the remedy of dismissal to follow from a violation of the right to a reasonable opportunity for an independent chemical test. Additionally, our case law supports the conclusion that neither dismissal nor suppression of the evidence is an appropriate remedy for a violation of MCL 257.625a(6)(d). In *People v Hawkins*, 468 Mich 488, 512-513; 668 NW2d 602 (2003), this Court held that the exclusionary rule is "a harsh remedy designed to sanction and deter police

the test provided for in this section must be given him, provided facilities are reasonably available to administer such test, and the results of such test shall be admissible if offered by the defendant and shall be considered with other competent evidence in determining the innocence or guilt of the defendant. The defendant shall be advised of his right to the test provided for in this subsection." [*Koval, supra* at 455-456.]

[9] Several Court of Appeals opinions decided after *Koval* have held or recognized that dismissal is the appropriate remedy for a violation of the right to a reasonable opportunity for an independent chemical test. See, e.g., *People v Green*, 260 Mich App 392, 407; 677 NW2d 363 (2004), *People v Prelesnik*, 219 Mich App 173, 181; 555 NW2d 505 (1996), overruled on other grounds in *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999), *People v Hurn*, 205 Mich App 618, 620; 518 NW2d 502 (1994), *People v Dicks*, 190 Mich App 694, 701; 476 NW2d 500 (1991), *People v Willis*, 180 Mich App 31, 37; 446 NW2d 562 (1989), *People v Underwood*, 153 Mich App 598, 600; 396 NW2d 443 (1986), and *People v Burton*, 13 Mich App 203, 207; 163 NW2d 823 (1968). We overrule these cases, along with *Koval*.

misconduct where it has resulted in a violation of *constitutional* rights . . . ." (Emphasis partially deleted.) This appeal also involves violation of a statutory right, not a constitutional right.[10] This Court "reaffirm[ed] that where there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *Id.* at 507. Where there is nothing in the statutory language indicating that the exclusionary rule applies to a violation of a statute, this Court should decline to infer such legislative intent, because "[t]o do otherwise would be an exercise of *will* rather than *judgment*." *People v Stevens (After Remand)*, 460 Mich 626, 645; 597 NW2d 53 (1999) (emphasis in original). This Court has repeatedly applied these principles in holding that suppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated. See, e.g., *Hawkins, supra*; *People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002), overruled in part on other grounds in *Bright v Ailshie*, 465 Mich 770, 775 n 5; 641 NW2d 587 (2002); *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001);[11] and *Stevens, supra*. Applying similar reasoning, we hold that dismissal, which is an even more drastic remedy, is not an appropriate remedy for a

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[10] See our discussion of the due process issue later in this opinion.

[11] We are puzzled by Justice CAVANAGH's decision to single out our "analysis" of *Sobczak-Obetts, supra*, and distinguish it on its facts. We list *Sobczak-Obetts, supra*, only as an example of a case in which this Court held that suppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated. We do not hold that the statutes in *Sobczak-Obetts, supra*, are similar to MCL 257.625a(6)(d).

statutory violation unless the statute clearly provides otherwise. The language of MCL 257.625a does not reveal that the Legislature intended to impose the drastic remedy of dismissal or suppression of the evidence when an officer fails to give a defendant a reasonable opportunity for an independent chemical test. Accordingly, neither of these remedies is appropriate for a violation of MCL 257.625a(6).[12] We overrule *Koval*'s holding to the contrary.[13]

But while the text of MCL 257.625a shows that the Legislature did not intend that dismissal or suppression of the evidence follow from a violation of subsection 6(d), the language of the statute does not render this Court powerless to act in the face of a police agency's violation of a defendant's statutory right to obtain potentially exculpatory evidence under MCL

[12] Further, neither dismissal nor suppression of the results of the police-administered chemical test is appropriate because these remedies would put the prosecution in a worse position than if the police officer's improper conduct had not occurred. *Stevens, supra* at 640-641. Moreover, the exclusionary rule is inappropriate because the rule "forbids the use of direct and indirect evidence *acquired from governmental misconduct*," and there is no causal relationship between the officer's failure to provide defendant with a reasonable opportunity for an independent chemical test and the police-administered chemical test. *Sobczak-Obetts, supra* at 710 (emphasis in original and citations omitted); see also *Hudson v Michigan*, ___ US ___, ___ ; 126 S Ct 2159, 2163-2165; 165 L Ed 2d 56, 64-65 (2006). Finally, suppression is not an appropriate remedy for a violation of the statute, because the loss of evidence should not be remedied by preventing the jury from considering more relevant evidence. Rather than promoting the truth-seeking function at trial, suppression of the evidence exacts a " ' "costly toll" upon truth-seeking and law enforcement objectives . . . .' " *Id.* ___ US ___; 126 S Ct 2163; 165 L Ed 2d 64, quoting *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364; 118 S Ct 2014; 141 L Ed 2d 344 (1998).

[13] We do not, as Justice CAVANAGH contends, "simply close the books and end the inquiry" at this point. *Post* at 470-471. Rather, the remainder of our opinion is dedicated to determining what course of action a trial court may take when a statutory violation occurs.

257.625a(6)(d). Through MCL 257.625a(6)(d), the Legislature conferred on defendants a statutory right to develop potentially exculpatory evidence to refute the results of a police-administered chemical test. Thus, when a police officer denies a defendant his or her statutory right to a reasonable opportunity for an independent chemical test administered by a person of his or her own choosing, the officer prevents the defendant from exercising a statutory right to discover potentially favorable evidence in his or her defense.

The jury should be permitted to weigh the police officer's wrongful conduct as well as the statutory right that the officer denied. When the defendant argues before trial that he or she was deprived of a reasonable opportunity for an independent chemical test, the trial court must determine, after an evidentiary hearing if necessary, whether the defendant was in fact deprived of this statutory right. If the court determines that a statutory violation occurred, then it is free, upon request of defense counsel, to inform the jury of this violation and instruct the jury that it may determine what weight to give to this fact. Such a jury instruction is an appropriate consequence for the violation of a mandatory statutory right to a reasonable opportunity for an independent chemical test because it will accord meaning to the right created in subsection 6(d) without creating a remedy that the Legislature did not intend. A jury instruction will also presumably deter police officers from violating that right in the future. We offer the following possible instruction for violations of MCL 257.625a(6)(d):

> Our law provides that a person who takes a chemical test administered at a peace officer's request must be given a reasonable opportunity to have a person of his or her own choosing administer an independent chemical test. The defendant was denied such a reasonable opportunity for an independent chemical test. You may determine what sig-

> nificance to attach to this fact in deciding the case. For example, you might consider the denial of the defendant's right to a reasonable opportunity for an independent chemical test in deciding whether, in light of the nonchemical test evidence, such an independent chemical test might have produced results different from the police-administered chemical test.[14]

The court's authority to give such an instruction derives from the inherent powers of the judiciary. Const 1963, art 6, § 5, entrusts this Court with the authority and duty to prescribe general rules governing the practice and procedure in all courts in the state.[15] See *People v Glass (After Remand)*, 464 Mich 266, 281; 627 NW2d 261 (2001). " 'It is also well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 390; 719 NW2d 809 (2006), quoting *In re 1976 PA 267*, 400 Mich 660, 662-663; 255 NW2d 635 (1977). The judicial powers derived from the constitution may not be diminished, exercised, or interfered with by other branches of the government. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 162; 665 NW2d 452 (2003). Exercising this authority, our Court has enacted court rules that require the trial court to instruct the jury on the applicable law and give the court the discretion to comment on the evidence:

> Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable

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[14] This proposed instruction incorporates language from MCL 257.625a(6)(d).

[15] "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5.

> law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case. The court, at its discretion, may also comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require. [MCR 2.516(B)(3).][16]

Additionally, the Legislature has directed the judiciary to instruct the jury on the law and permitted a court to comment on the evidence:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. [MCL 768.29.]

Thus, the judiciary has the authority and obligation under both court rule and statute to instruct the jury on the applicable law and the discretionary power to comment on the evidence as justice requires. The Legislature has not stripped the judiciary of these powers in this context.[17]

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[16] The rules of criminal procedure also require the trial court to instruct the jury on the applicable law:

> After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate. [MCR 6.414(H).]

[17] In some situations, the Legislature has forbidden a trial court from instructing a jury with regard to certain matters. For example, a trial court may not instruct on the limits on noneconomic damages in products liability and medical malpractice actions. MCL 600.2946a(2) and MCL

It is also well-established in our case law that the trial court must instruct the jury on the law applicable to the facts of the case:

> "[I]t is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts. Especially is this his duty in a criminal case." [*People v Henry*, 395 Mich 367, 373-374; 236 NW2d 489 (1975), quoting *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888).]

The trial court must instruct the jury not only on all the elements of the charged offense, but also, upon request, on material issues, defenses, and theories that are supported by the evidence. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000); *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975).

The trial court's authority to comment on the evidence encompasses the power to summarize the evidence relating to the issues, call the jury's attention to particular facts, *People v Lintz*, 244 Mich 603, 617; 222 NW 201 (1928), and "point out the important testimony so as to lead the jury to an understanding of its bearings," *Richards v Fuller*, 38 Mich 653, 657 (1878). The trial court's comments must be fair and impartial, *Burpee v Lane*, 274 Mich 625, 627; 265 NW 484 (1936), and the court should not make known to the jury its own views regarding disputed factual issues, *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961), the credibility of witnesses, *People v Clark*, 340 Mich 411,

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600.6304(5). The Legislature has not restricted the trial court's authority to give jury instructions in the context of a violation of MCL 257.625a(6)(d).

420-421; 65 NW2d 717 (1954), or the ultimate question to be submitted to the jury, *Lintz, supra* at 617-618.[18]

The instruction we offer falls within the court's inherent authority to instruct the jury on the law applicable to the case and the discretionary power to comment on the evidence.[19] A defendant who is denied the statutory right to a reasonable opportunity for an independent chemical test administered by a person of his or her own choosing may advance the defense that the police-administered test was inaccurate,[20] and that

[18] In *People v Ward*, 381 Mich 624, 628-629; 166 NW2d 451 (1969), this Court explained that the court's authority to instruct the jury and comment on the evidence must be discharged separately:

> The trial judge's twofold authority to instruct the jury on the law and to make such comment upon the evidence, the testimony, and the witnesses as, in his opinion, the interest of justice may require is severable and must be discharged separately. When a trial judge instructs upon the law he must do so affirmatively. So far as the jury is concerned, the law is what the judge says it is. They have the duty to follow his instructions on the law.
>
> As to the court's comment upon the evidence, such comments are not binding upon the jury. They do not delineate the jury's duty and they must be prefaced by words which leave the jury free to disregard them in good conscience.

[19] We do not, as Justice WEAVER states, "rewrite the statute from the bench." *Post* at 467. Our holding that the court has the authority to instruct the jury that the statute was violated does not usurp the Legislature's authority by supplying a remedy that does not exist in the statute. Rather, our holding is based on the inherent power of the judiciary to instruct on the law and comment on the evidence.

[20] Justice CAVANAGH is incorrect that "the defendant is left with *absolutely no meaningful way to refute the prosecutor's chemical evidence against him in a criminal trial*." *Post* at 476 (emphasis in original). An independent chemical test is not the only way a defendant may challenge the accuracy of the police-administered test. See *California v Trombetta*, 467 US 479, 490; 104 S Ct 2528; 81 L Ed 2d 413 (1984) (listing alternative ways in which the defendant could challenge the results of the Intoxilyzer test). For example, a defendant may introduce evidence that the machine

the police deprived him or her of the opportunity to raise a reasonable doubt of guilt through an independent test. The trial court may instruct and inform the jury on the requirements of MCL 257.625a(6)(d) and properly comment on the evidence by bringing to the jury's attention that the defendant's statutory right has been violated. Such an impartial instruction will communicate no opinion and compel no outcome, but will only inform the jury of the law and the facts and allow the jury to draw its own conclusions. Thus, it will not encroach upon the exclusive province of the jury to weigh the testimony and draw inferences therefrom.

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used to administer the chemical test (in this case a breathalyzer) was improperly calibrated or maintained. A defendant may also adduce nonchemical evidence, such as the testimony of a toxicology expert, who can give an expert opinion on the defendant's body alcohol level based on the number of drinks the defendant consumed over a course of time. Despite the concerns raised in the article cited by the dissent, the Hawaii Supreme Court has more recently opined that the "Widmark formula," which estimates an individual's body alcohol level based on weight and gender, the type and amount of alcohol, the absorption rate and the elimination rate, is "widely viewed as reliable." *State v Vliet*, 95 Hawaii 94, 112; 19 P3d 42 (2001). Further, the extrapolation of a "range" within which a defendant's body alcohol level falls could be very helpful, if believed by the jury, by raising a reasonable doubt that the defendant was operating a motor vehicle with an unlawful blood alcohol level. See, e.g., *State v Preece,* 971 P2d 1, 7-8 (Utah App, 1998) (holding that the trial court committed error requiring reversal by not permitting the defendant to introduce evidence that, under the "Widmark formula," his body alcohol level could have been below the legal limit at the time he was stopped by the police).

Moreover, a defendant can challenge the accuracy of the police-administered chemical test itself, as well as the method by which it was operated when the police obtained his or her breath sample. Thus, contrary to the dissent's assertion, the results of a police-administered chemical test are not "indisputable." See, e.g., *Trombetta, supra* at 490 (noting that the results of an Intoxilyzer test can be challenged in a variety of ways, including "faulty calibration, extraneous interference with machine measurements, and operator error").

People v Larco, 331 Mich 420, 430; 49 NW2d 358 (1951); *People v Dupree*, 175 Mich 632, 639; 141 NW 672 (1913).

Such an instruction will also advance the judiciary's duty to assist the jury in ascertaining the truth. The late Joseph D. Grano once stated that "the goal of discovering the truth should play a dominant role in designing the rules that govern criminal procedure." Grano, *Confessions, Truth, and the Law* (Ann Arbor, The University of Michigan Press, 1993), p 6; see also Grano, *Implementing the objectives of procedural reform: The proposed Michigan Rules of Criminal Procedure—Part I*, 32 Wayne L R 1007, 1011, 1018 (1986); and Grano, *Special issue: Introduction—The changed and changing world of constitutional criminal procedure: The contribution of the Department of Justice's Office of Legal Policy*, 22 U Mich J L Reform 395, 402-404 (1989). In analyzing the underlying purposes and objectives of procedural reform, Grano stated:

> [T]he primary objective of criminal procedure is to facilitate the ascertainment of truth. To some extent, therefore, fairness must encompass this concern. Accordingly, rules are unfair when they do not provide either party an adequate opportunity to develop and present his case. The special concern with fairness for the defendant, however, stems from the special abhorrence of erroneous conviction. Thus, basic agreement exists that a rule is unfair if it denies the defendant an adequate opportunity to defend against the charges. [Grano, *Implementing the objectives of procedural reform: The proposed Michigan Rules of Criminal Procedure—Part I*, 32 Wayne L R 1007, 1018 (1986).]

Promoting the truth-seeking process is one of the judiciary's primary goals in determining the appropriate action to take when one party prevents the other from obtaining evidence. Justice MARKMAN has explained that "[t]he discovery of the truth is essential to

the successful operation of the system's mechanisms for controlling crime and mitigating its consequences." Markman, *Special issue: Foreword: The "truth in criminal justice" series*, 22 U Mich J L Reform 425, 428 (1989).[21]

By placing all the facts before the fact-finder, the instant instruction will further the pursuit of the truth and give real effect to the right in MCL 257.625a(6)(d). This instruction will promote a basic premise of our justice system, that providing more, rather than less, information will generally assist the jury in discovering the truth. It will communicate an accurate account of what transpired and allow the jurors to apply the law to the facts as they decide. Where evidence or a witness is unavailable or compromised because of the conduct of prosecutors and police officers, the court should not keep *more* evidence away from the jurors, but should rather give the jurors *all* the pertinent information, including what has been denied to them, and allow them to assess the consequences.[22]

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[21] We reject Justice CAVANAGH's argument that dismissal of the charges better serves the truth-seeking process than allowing the jury to consider the violation of the defendant's statutory right to a reasonable opportunity for an independent chemical test. Dismissal does not merely prevent the jury from considering relevant evidence (as suppression of the evidence would), but it prevents the jury from considering the charges altogether. Such a remedy ensures that the truth will *never be discovered*. Conversely, a jury instruction that the statute was violated gives the jury all of the available relevant information. The instruction gives the defendant an adequate opportunity to defend himself by arguing that the police-administered test was inaccurate and that an independent test would have produced a different result.

[22] Additionally, MCL 257.625a(6)(d) places a procedural obligation on the police to enable a defendant to obtain relevant evidence. Police agencies will be deterred from breaching this obligation if they understand that jurors may consider the statutory violation at trial. An instruction will not only give concrete effect to a defendant's statutory right to secure an independent chemical test, but it will deter future arbitrary use of police power by limiting the extent to which the state

Prohibiting the trial court from instructing the jury regarding a violation of MCL 257.625a(6)(d) would keep relevant information from the jury by concealing the denial of the defendant's statutory right to develop potentially exculpatory evidence. Not only would this impede the jury's search for the truth, but it would permit police officers to ignore a defendant's mandatory statutory right to a reasonable opportunity for an independent chemical test administered by a person of his own choosing without consequence. Thus, in light of our general power to instruct and comment on the evidence in criminal cases, and the trial's goal of promoting the search for truth, we conclude that in these narrow circumstances, the courts may give a jury instruction informing the jury that MCL 257.625a(6)(d) was violated.

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benefits from its own wrongdoing. But unlike the harsh remedies of suppression or dismissal, a jury instruction will not seek to "punish" police agencies, but will rather give the jury relevant information that they may consider when rendering their verdict.

We reject Justice CAVANAGH's statements that the instruction "encourages" the police to violate MCL 257.625a(6)(d) and "reward[s]" the police for violating the statute. *Post* at 480 & n 6. Contrary to Justice CAVANAGH's argument, an instruction is a meaningful consequence, because it makes the jury aware that the police acted inappropriately by violating the statute. Making the jury aware that the police violated the law in no way "encourages" or "rewards" the police.

Further, Justice CAVANAGH argues that a violation of the statutory right to an independent chemical test puts the police "in a *superior* position because they will hold the trump card of indisputable chemical evidence." *Post* at 480 n 6 (emphasis in original). That argument contains two flaws. First, Justice CAVANAGH wrongly assumes that the results of the independent chemical test would have been favorable to the defendant. Even if the results of the independent chemical test would have been favorable to the prosecution, the instruction allows the jury to make what they will of the statutory violation, including finding that the independent chemical test would have been favorable to the defendant. Second, the police-administered chemical test is not "undisputable" chemical evidence. The defendant has many effective ways to challenge this evidence. See n 20 of this opinion.

While we hold that the trial court may give a jury instruction where there is a violation of MCL 257.625a(6)(d), an instruction is not necessarily appropriate for a violation of every statutory right where the statute does not provide a remedy. It is appropriate in this case because it gives meaning to the statutory right to a reasonable opportunity for an independent chemical test administered by a person of his or her own choosing and is consistent with the judicial power to instruct on the law and comment on the evidence in the interests of justice. We limit application of the instruction to the statute at issue.

B. DUE PROCESS

Defendant argues that the violation of MCL 257.625a(6)(d) also violated his due process right to present a defense. Because the parties dispute whether a constitutional violation occurred and Justice CAVANAGH argues that defendant's due process rights were violated, we address the constitutional issue despite the lower courts' decisions not to base their rulings on any constitutional violation.[23] But we address only the constitutional issue and offer no opinion on the correctness of the district court's ruling that the officer violated the statute, because that is not at issue in this case.

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[23] The district court held that defendant's request to go to Watervliet Hospital was reasonable, so the officer violated the statute in denying defendant's request. The trial court, while stating that "a due process constitutional issue is implicated . . . since it relates to perishable evidence," ultimately held that "[a] constitutional analysis is not required, since the statutory remedy [dismissal] is clear." Unpublished opinion of the Berrien County Trial Court, issued April 20, 2004 (Docket No. 2003-411091-SD), slip op at 8, 9. The Court of Appeals also did not address any constitutional issues, holding instead that dismissal was warranted because of the officer's violation of the statute.

A criminal defendant has a right to present a defense under our state and federal constitutions. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). "[T]he right to present a defense is a fundamental element of due process . . . ." *Id.* at 279. In *Pennsylvania v Ritchie*, 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987), the United States Supreme Court stated, "Our cases establish, at a minimum, that criminal defendants have the right to . . . put before a jury evidence that might influence the determination of guilt."

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867[102 S Ct 3440; 73 L Ed 2d 1193] (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. [*California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984).]

Defendant argues that his due process right to obtain potentially exculpatory evidence was violated under *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), because the officer acted in bad faith in denying defendant's request to be taken to Watervliet Hospital for an independent chemical test. We disagree. In *Youngblood, supra* at 57-58, the United States Supreme Court held that the government's failure to preserve potentially exculpatory evidence violates a criminal defendant's due process rights if the

defendant can show bad faith on the part of the government. *Youngblood* is distinguishable because it involves the government's failure to disclose *existing* evidence in its possession, where the instant case involves defendant's right to *develop* potentially exculpatory evidence not in the government's possession.[24] For due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975). Defendant has cited no cases holding that *Youngblood* and its progeny apply when the government fails to turn over evidence that has yet to be developed. Because the instant case involves the failure to develop evidence, as opposed to the failure to disclose existing evidence, the bad-faith test in *Youngblood* is inapplicable.

Defendant's right to present a defense was not violated because the police have no constitutional duty to assist a defendant in developing potentially exculpatory evidence. Just as the police have no constitutional duty[25] to perform any chemical tests, *Youngblood, supra*

[24] Justice CAVANAGH argues that the defendant does not develop evidence when he or she takes an independent chemical test, apparently because the defendant's blood and the alcohol in the defendant's blood already exist. The evidence defendant sought, however, was not his own blood, but the *results of a test* measuring the alcohol content in his blood at the time he was arrested. Justice CAVANAGH fails to see that these results simply do not exist, because the test was never administered.

[25] Justice CAVANAGH quibbles with our use of the phrase "constitutional duty." Though we did not think any explanation of this wording would be needed, we clarify for Justice CAVANAGH that by "constitutional duty," we mean that the police have a duty to honor the defendant's constitutional rights. We see nothing misleading about the phrase "constitutional duty," which the United States Supreme Court has used in this context. See, e.g., *Youngblood, supra* at 59 ("the police do not have a constitutional duty to perform any particular tests"); *Hoffa v United States*, 385 US 293,

at 59,[26] they have no constitutional duty to assist the defendant in obtaining an independent chemical test.[27] See, e.g., *In re Martin*, 58 Cal 2d 509, 512; 374 P2d 801; 24 Cal Rptr 833 (1962) (in holding that the police are not required to assist a defendant in obtaining a chemical test, the California Supreme Court explained that "police officers are not required to take the initiative or even to assist in procuring evidence on behalf of a defendant which is deemed necessary to his defense"); and *People v Finnegan*, 85 NY2d 53, 58; 647 NE2d 758, 623 NYS2d 546 (1995) ("law enforcement personnel are not required to arrange for an independent test or to transport defendant to a place or person where the test may be performed" because "police have no affirmative duty to gather or help gather evidence for an accused"). Thus, the police have no constitutional duty to take affirmative action to transport the defendant from the place of his or her incarceration to a hospital of his or her choice for the requested test. *State v Choate*, 667 SW2d 111, 113 (Tenn Crim App, 1983) (where the

310; 87 S Ct 408; 17 L Ed 2d 374 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation . . . .").

[26] In *Youngblood, supra* at 59, the United States Supreme Court stated that "the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests."

[27] In attempting to distinguish the *Finnegan* case, Justice CAVANAGH states that the plain language of MCL 257.625a(6)(d) creates an affirmative statutory duty on behalf of the police to assist a defendant in obtaining an independent chemical test. Justice CAVANAGH relies on the language in the statute indicating that a defendant "*shall be given a reasonable opportunity*" to have a person of the defendant's choosing administer the independent chemical test. The issue here, however, is whether the constitution requires that a defendant have a reasonable opportunity to obtain an independent chemical test. Because the parties have conceded that the statute had been violated, we need not address whether the statute creates an affirmative duty on behalf of the police to assist a defendant in obtaining such a test.

defendant argued that he had a constitutional right to police assistance in obtaining an independent chemical test whether or not he complied with the statute requiring him to take a police-administered test, the court held that the police have no "affirmative [constitutional] duty to make a blood test available to the defendant by transporting him from the place of his incarceration to a hospital for the requested test"). Thus, the officer's actions in the instant case did not violate defendant's due process rights because the officer had no constitutional duty to assist defendant in obtaining an independent chemical test by transporting defendant to Watervliet Hospital.[28]

IV. CONCLUSION

The statutory text does not reflect that the Legislature intended either dismissal or suppression of the evidence to be the remedy for a violation of MCL 257.625a(6)(d). Accordingly, we overrule *Koval* and its progeny. Instead, we hold that a permissive jury instruction may be appropriate when the trial court has determined that there was a violation of MCL 257.625a(6)(d). When the Legislature established the right of a defendant to seek an independent chemical test, it intended to allow that defendant to use the test to rebut evidence produced by the prosecutor at trial. A jury instruction will give meaning to that right by placing all relevant information, including the requirements of the statute, before the fact-finder. Such an instruction in this circumstance is an appropriate func-

[28] Further, although not necessary for our analysis, the officer not only gave defendant an opportunity for a second chemical test at Lakeland Hospital, he offered to transport defendant to the hospital. Defendant chose not to avail himself of the opportunity for transportation to Lakeland Hospital for a second chemical test independent of the police-administered test.

tion of the judicial power that will ensure the integrity of the criminal trial and further the pursuit of the truth. We also hold that defendant's due process right to present a defense was not violated.

We reverse the judgment of the Court of Appeals and remand the matter to the trial court for reinstatement of the charges against defendant. At trial, the results of the police-administered chemical test shall be admissible, but the trial court may instruct the jury that the police violated defendant's statutory right to a reasonable opportunity for an independent chemical test.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*concurring in part and dissenting in part*). Defendant herein was arrested for operating a vehicle while intoxicated, a violation of MCL 257.625. At the arresting officer's request, defendant agreed to take a chemical breath test. The prosecutor has conceded that defendant was denied a reasonable opportunity to have a second, independent chemical test by a person of his choosing.

Pursuant to this Court's decision in *People v Koval*,[1] the Court of Appeals affirmed the trial court's dismissal of charges against defendant on the basis that he had been denied his reasonable request for an independent test.

I concur with the result of the majority's opinion overruling *Koval* and its progeny, reversing the Court of Appeals judgment, and remanding to the trial court to reinstate charges against defendant.

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[1] 371 Mich 453; 124 NW2d 274 (1963).

However, I dissent and decline to join that portion of the majority's opinion creating a remedy that when a defendant is unreasonably denied the opportunity for an independent test, the trial court may instruct the jury to that effect. Rather, now that *Koval*—with its judicially created extreme remedy of dismissal of drunk driving cases—has been overruled, I would leave it to the Legislature to consider whether it wishes to revise MCL 257.625a(6)(d) to supply a remedy for violation of that subsection. In doing so, the Legislature should consider whether any constitutional issues exist as it balances the interest of an accused defendant, who has been provided no remedy for the violation of the statutory right to an independent chemical test, with the public safety interest in keeping impaired drivers off the roads. This is a matter of public policy that the Legislature should decide because it has the ability, unlike this Court in deciding this case, to hold public hearings and to provide an opportunity for all those holding differing views and possessing information on the wisest course to share their views and information with the Legislature.

MCL 257.625a(6)(d) provides that a defendant who takes a police-administered chemical test "shall be given a reasonable opportunity" to have an independent test by a person selected by the defendant. However, the Legislature did not specify that any remedy was available when a defendant is unreasonably denied an opportunity for an independent test. Because this Court erred in *Koval* in supplying the extreme remedy of dismissal for a violation of subsection 6(d), this Court is correct in deciding to affirmatively overrule *Koval*.

It is appropriate under *Robinson v Detroit*,[2] to overrule *Koval* because *Koval* was wrongly decided, and

[2] 462 Mich 439, 464-465; 613 NW2d 307 (2000).

defies practical workability, and because reliance interests will not suffer undue hardship if *Koval* is overruled, and changes in the law or facts no longer justify the earlier decision. The 1963 version of the statute did not provide a remedy, but it had a mandatory requirement that the defendant be advised of his or her right to take an independent test. Because of these two factors, and because the defendant had already been convicted, the *Koval* Court apparently deemed that it had to supply a remedy and that the only available remedy was dismissal.

I note that while the *Koval* decision was rendered in the early 1960s during an era when society was not as vigilant about curtailing drinking and driving, our present-day perspective has changed remarkably. Recognizing that our Legislature has an interest in ensuring public safety by keeping impaired drivers off the roads, we must look to the language of the statute in order to discern, if possible, the legislative intent.

In determining such intent in this case, it is apparent that the Legislature was aware that it had the option of supplying some kind of remedy for a violation of subsection 6(d) because the Legislature supplied a remedy in another subsection of MCL 257.625a. Specifically, if a prosecutor fails to comply with subsection 8 of MCL 257.625a, the remedy available to a defendant for violation of that subsection is *suppression* of the results of the state-administered chemical test.[3] Had the Leg-

[3] MCL 257.625a(8) provides:

> If a chemical test described in subsection (6) is administered, the test results shall be made available to the person charged or the person's attorney upon written request to the prosecution, with a copy of the request filed with the court. The prosecution shall furnish the results at least 2 days before the day of the trial. The prosecution shall offer the test results as evidence in that

islature intended a comparable remedy for a violation of subsection 6(d)—or even the more drastic remedy of dismissal—it could have so specified. Not only has the Legislature declined to provide a remedy for a violation of subsection 6(d), but in fact, the Legislature specified that "[t]he provisions of subsection (6) relating to chemical testing *do not limit the introduction of any other admissible evidence* . . . ."[4]

Given the absence of statutory language showing an intent by the Legislature to specify what remedy, if any, is to be imposed upon denial of this statutory right to a reasonable opportunity to obtain an independent test, and given the presence of statutory language showing an intent that a prosecutor can proceed on other nonchemical evidence, it was improper for this Court in *Koval* to rewrite the statute from the bench.

Now that *Koval*—with its judicially created extreme remedy of dismissal of drunk driving cases—has been overruled, the Legislature should consider whether it wishes to revise MCL 257.625a(6)(d) to supply a remedy for violation of that subsection. In doing so, the Legislature should consider whether any constitutional issues exist as it balances the interest of an accused defendant, who has been provided no remedy for the violation of the statutory right to an independent chemical test, with the public safety interest in keeping impaired drivers off the roads. This is a matter of public policy that the Legislature, not this Court, should decide because it has the ability, unlike this Court in deciding this case, to hold public hearings and to provide an opportunity for all those holding differing

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trial. *Failure to fully comply with the request bars the admission of the results into evidence by the prosecution*. [Emphasis added.]

[4] MCL 257.625a(7) (emphasis added).

views and possessing information on the wisest course to share their views and information with the Legislature.

CAVANAGH, J. (*dissenting*). Today the majority takes its most recent stride in eroding the statutory and constitutional rights of criminal defendants. Despite the Legislature's clear intent to bestow the right at issue, the majority elects to divest this Court of the ability to redress a violation of the right. Faced with a complaint that a police officer prohibited defendant from exercising his legislatively sanctioned constitutional right to an independent chemical test, the majority's magic wand of an opinion makes the right disappear. Today's edict puts Michigan citizens on notice that when the Legislature grants an explicit right —indeed, one with a constitutional dimension—but sees fit to leave the remedy for violating that right to a court's discretion, the right is really no right at all. The "consolation" the majority provides is the ability to tell the jury that the right was violated. So drivers be warned: Although our Legislature decided that you have an indelible right to a reasonably requested independent chemical test, this Court finds that if you attempt to exercise that right, the decision whether you are permitted to do so rests solely in the hands of your jailer. If that person decides, for good reason, bad reason, or no reason at all, to deprive you of that right, so be it. Thanks to the majority's continued plod through the volumes of our law, there are no meaningful consequences to that decision, so we have now amassed another right not worth the paper the Legislature printed it on.

The Oz-like curtain behind which the majority hides is its pronouncement that because the Legislature did not provide a remedy, courts are powerless to *enforce*

the statute. Rather than rectify the violation, a court can only make available a nonmandatory jury instruction that tells the jury that the right was violated, which instruction serves no remedial purpose.[1] This is in spite of the Legislature's purposeful use of the word "shall" when bestowing the right. A legislature that purposefully enacts a "mandatory" right while intending at the same time that it not be enforced would be an odd one indeed. Thus, to the trash bin goes the tenet that the job of a court is to discern and implement legislative intent because to hold that no enforcement was intended flies in the face of all logic. When the Legislature does not specify a particular remedy for violation of a mandatory right, it is incumbent on this Court to adjudicate a fair and just resolution in as best accord with legislative intent as possible. The remedy should *actually*, not theoretically, hypothetically, or suppositionally, rectify the violation. But instead of providing a way to truly remedy the situation of a defendant who was denied his mandatory right to an independent chemical test, the majority merely declares this Court powerless, shrouding the unreasonableness of its decision in the veil of a jury instruction of negligible force.

In direct contradiction of its oft-repeated mantra that no word in a statute can be changed or rewritten, the majority does indeed rewrite the statute of concern. MCL 257.625a(6)(d) states that a person who makes a reasonable request for an independent chemical test "*shall*" be given a reasonable opportunity to procure one. Notably, the Legislature did not choose the word "may" or "can" or "might." It chose "shall," with all its consequent mandatory implications. This Court has

[1] The majority carefully avoids calling its proposed instruction a "remedy," although it claims that a permissive jury instruction "gives meaning" and "concrete effect" to the right. *Ante* at 457 n 22, 459.

repeatedly held that "shall" is not permissive. See, e.g., *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006); *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000); *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997) (opinion by KELLY, J.). To hold that there is no meaningful remedy for violating a mandatory right directly contravenes the unambiguous rule of construction that no word in a statute can be rendered nugatory.

Preventing a court from enforcing this mandatory statute by truly remedying a violation of it not only rewrites the statute but does immeasurable violence to legislative intent. By failing to permit a meaningful remedy for a violation of the right the statute bestows, the majority changes "[you] *shall* be given a reasonable opportunity" to "it does not matter if you get an opportunity, but you can ask that the jury be told if you did not." In doing so, the majority fully emasculates the Legislature's clear intent to create a mandatory requirement, for a mandatory right with no meaningful remedy for its violation is no right at all.

The majority bases its reasoning in part on the fact that in § 625a(8) of the statute, the Legislature specified a remedy for violating that subsection. *Ante* at 443-444. Had the Legislature intended a remedy for § 625a(6), the majority reasons, then it would have provided one like it did in § 625a(8). I am not distracted, as is the majority, by that path of least resistance, for statutory analysis is neither one-dimensional nor necessarily simplistic. When comparison to another statute does not answer the question whether a remedy was intended, this Court should not simply close the books

and end the inquiry.[2] Rather, it is incumbent on us to use the additional rules and tools available to us until we discern the legislative intent. And those additional mechanisms, if used, lead to this conclusion: The Legislature is satisfied with the remedy of dismissing the charges when a defendant makes a reasonable request for an independent chemical and is denied that right.

The majority ostensibly recognizes that discerning legislative intent is the primary goal of statutory construction. *Ante* at 442-443. But while the majority duly notes that the Legislature did not specify a remedy for violating the statute, it refuses to also consider that the Legislature has declined to repudiate the longstanding remedy of dismissal or specify some other remedy in the 12 times over 43 years that it has amended the statute since our decision in *People v Koval*, 371 Mich 453; 124 NW2d 274 (1963). In *Koval*, of course, we held that dismissal was the proper remedy for violating § 625a(6)(d).[3] It bears repeating that the Legislature is presumed to know of our case law. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). Nonetheless, 12 times over, it has deliberately chosen to leave this Court's holding in place, while making other, at times substantial, changes to the law. Thus, it is perfectly logical, indeed, incumbent on us, to

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[2] The majority does indeed close the books on its search for legislative intent after finding no explicit remedy in the statute, despite that it continues on to craft its "nonremedy remedy" of a jury instruction. See *ante* at 452-453 n 17.

[3] The majority mistakenly asserts that the *Koval* Court incorrectly found a remedy despite that "the text of the statute makes clear that the Legislature did not intend the remedy of dismissal to follow from a violation" of the statute. *Ante* at 447. But considering that the text of the statute conveys a mandatory right, this Court found that dismissal was appropriate. Although the majority tries desperately to do so, the mandatory nature of the right simply cannot be separated from the determination of what remedy exists for violating the right.

conclude that the Legislature has not sensed any urgency either in invalidating the *Koval* decision or incorporating the remedy we found prudent in *Koval* because its *intent* is being carried out through that precedent. Because the Legislature has not acted to invalidate *Koval*, despite having 12 opportunities over 43 years to do so, we must presume it is satisfied with what this Court did in that case.

In stark contrast to this majority, our United States Supreme Court recognizes that the reenactment doctrine is a legitimate tool to assist in determining legislative intent. *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164, 185; 114 S Ct 1439; 128 L Ed 2d 119 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language. See, *e.g.*, *Keene Corp* v. *United States*, 508 U.S. 200, 212-213 [113 S Ct 2035; 124 L Ed 2d 118] [1993]; *Pierce* v. *Underwood*, 487 U.S. 552, 567 [108 S Ct 2541; 101 L Ed 2d 490] [1988]; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 [98 S Ct 866; 55 L Ed 2d 40] [1978]."). See also *United States v Rutherford*, 442 US 544, 554 & n 10; 99 S Ct 2470; 61 L Ed 2d 68 (1979). The majority's choice to ignore, and alternatively misapply, the reenactment doctrine plainly illustrates that it is not interested in truly discerning legislative intent but is satisfied with reaching a decision using less than all available mechanisms. Unjustifiably, the majority deprives a defendant of an ability to have a violation of his or her rights rectified merely because it has a personal aversion to the widely utilized reenactment rule. But applying this perfectly applicable tool of statutory construction not only provides needed interpretive assistance, but also assists in reaching a conclusion that is indubitably more logical than the one reached by the majority. Put

another way, the majority's refusal to account for the Legislature's decision not to invalidate *Koval* through its multiple reenactments results in a holding that a defendant given a mandatory right has no meaningful remedy for its violation. But taking into account the Legislature's choice not to change the result in *Koval* in its 12 reenactments of the statute since that 1963 decision results in the inescapably more sensible conclusion that a remedy does indeed exist, and that the remedy is that which this Court set forth in *Koval*. Misguided by its view that the Legislature would be so inefficient so as to fail to correct an erroneous interpretation of the law, this majority chooses to disregard rules of statutory construction to deprive drivers of a mandatory right.

In addition, the majority fundamentally misunderstands the workings of the reenactment doctrine by misapplying its statements in *Neal v Wilkes*, 470 Mich 661, 668 n 11; 685 NW2d 648 (2004). The majority claims that the reenactment doctrine is inapplicable here because "the amendments to MCL 257.625a(6)(d) do not clearly demonstrate through words the Legislature's intention to adopt or repudiate *Koval*'s interpretation of the statute." *Ante* at 445 n 7. The majority misses the point: The Legislature's failure to repudiate *Koval* in any of the 12 amendments to the statute *is* the clear indication that it accepted *Koval*. If the majority means that there must be some overt wording to that effect, then the majority renders the reenactment doctrine completely useless because obviously the Legislature's intent would then be clear from its words, and no determination whether it meant to adopt or repudiate the case would be necessary.

Along the same lines, the majority states that I disregard "the rule of statutory construction that

courts cannot assume that the Legislature *inadvertently omitted language* from one portion of the statute that it placed in another portion of the statute." *Ante* at 446 n 7 (emphasis added). First, I do not believe that the Legislature "inadvertently" omitted anything. Rather, in accord with the widely used reenactment doctrine, I conclude that the Legislature very advertently accepted the remedy we found necessary in *Koval*. Moreover, I choose not to rely solely on the rule of statutory construction the majority cites at the expense of ignoring other applicable rules that can aid in the analysis. The majority's selective use of rules of construction is transparent.

Further, the majority cites *Neal* for the proposition that the reenactment doctrine is a useful tool of statutory interpretation when statutory language is ambiguous. *Ante* at 445 n 7. The majority must believe that the language of the statute at issue here is ambiguous because it sanctions a jury instruction despite recognizing that none is clearly permitted in the language of the statute. I, too, believe that the remedy to be afforded a defendant who is divested of his mandatory right was initially left ambiguous by the Legislature. The difference in the approach taken by the majority and the dissent is that the majority ignores an applicable rule of construction that would lead to the conclusion that dismissal is the proper remedy, while I would employ it. Clearly, the majority's attempt to circumvent the reenactment doctrine is not soundly based.

The majority also unconvincingly attempts to disclaim that an important consideration in this case is the mandatory nature of the right to an independent chemical test. See *ante* at 446 n 7. I fail to see how we can determine what remedy best alleviates a violation of this right without first determining the level of entitle-

ment to the right. For instance, if the police had discretionary authority to honor a request for an independent chemical test (and if there were no constitutional ramifications of a denial of that right), then it is by no means certain that the proper remedy would be dismissal. But the fact that the Legislature made this right mandatory weighs, or should weigh, heavily on the analysis.

The majority also asserts a correlation between this case and *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001), relying on that case to avoid finding an available remedy for the current defendant. In *Sobczak-Obetts*, the police violated MCL 780.654 and 780.655 by failing to produce an affidavit with the otherwise valid warrant used to search the defendant's home. Notably, the defendant never argued that she was deprived of a constitutional right. See *Sobczak-Obetts*, *supra* at 697 n 9. In the Court of Appeals, the statutory requirement of producing the affidavit was characterized as " 'more of a ministerial duty than a right' " and " 'only barely relat[ing] to the substantive right the Legislature is seeking to protect.' " *Id.* at 693, quoting 238 Mich App 495, 503-504 (HOEKSTRA, J.). The majority agreed with that description, elaborating that the statutory requirement is a "*procedural* requirement[] that [is] to be followed by the police during and after the *execution* of an otherwise facially valid search warrant." *Sobczak-Obetts*, *supra* at 707-708 (emphasis in original). The requirement of producing the affidavit, in the majority's view, was "ministerial," *id.* at 710, "administrative," *id.*, and "technical," *id.* at 712. Thus, because the majority found that there was no legislative support for suppressing the fruit of a search when the police had committed a violation that was "technical," did not diminish the probable cause for the search, and

did not violate the defendant's constitutional rights, the majority declined to provide a remedy.

Despite whether one agrees with the majority's analysis in *Sobczak-Obetts*, any reliance on that case is drastically misplaced. The right bestowed by MCL 257.625a(6)(d) is hardly "technical," "ministerial," or "procedural." Rather, exercising the right to an independent chemical test under § 625a(6)(d) to gather physical bodily evidence is the *only* way a physically restrained drunk driving suspect can obtain such evidence. Moreover, and just as important, that independent test result is the *only* evidence available to a defendant to refute evidence the police gather by taking their own chemical tests. Equally important, the evidence is perishable, so once the extremely short window of time in which a defendant can obtain the evidence elapses, that evidence is forever unavailable. The result is that the defendant is left with *absolutely no meaningful way to refute the prosecutor's chemical evidence against him in a criminal trial*. See, e.g., *State v Minkoff*, 308 Mont 248, 253-255; 42 P3d 223 (2002), discussed later in this opinion.

The majority's assertion that, in lieu of using the results of the independent chemical test a defendant was deprived of obtaining, the defendant can simply "adduce nonchemical evidence, such as the testimony of a toxicology expert, who can give an expert opinion on the defendant's body alcohol level based on the number of drinks the defendant consumed over a course of time," *ante* at 455 n 20, is simply unpersuasive. Not only does that idea ignore the uncorrelative character of the different types of evidence, but the notion that a person's body alcohol level can be prognosticated on other bases is similar to the "deceptively simple process" of retrograde extrapolation, see Bostic, *Alcohol-*

related offenses: Retrograde extrapolation after Wager, 79 Mich B J 668 (2000), and presents the same problems. The discussion in J. Nicholas Bostic's article illuminates the significant debate within the scientific community over the reliability of prognosticated evidence. *Id.* at 669. This is because the "variability in the human response to alcohol (ethanol)" is "exacerbated by the difficulties in measuring the effects of alcohol on the human body and of human enzymes on alcohol." *Id.* While a lengthy recapitulation of the article is unnecessary here, the complexities involved in attempting to divine a person's body alcohol level through nonchemical means should not be underestimated. Among the factors bearing on the analysis are the timing of the onset of the postabsorptive stage, elimination rates, the effect of food on the postabsorptive onset, frequency of alcohol use, race, gender, interindividual differences, intraindividual differences, pathological conditions, and acid-blocking drugs.

As the article's citation of various studies illustrates, for any expert or study that one side can offer to support a particular premise, the other side is likely to be able to offer an expert or study that directly refutes that premise. Moreover, as the article also illustrates, while there may be a relatively consistent range of accuracy in extrapolation, it is, nonetheless, a *range*.[4]

[4] The same is true with respect to the majority's citation of *State v Vliet*, 95 Hawaii 94; 19 P3d 42 (2001). See *ante* at 455 n 20. Despite whether that court found the "Widmark formula" admissible, and despite whether the formula can be said to be widely reliable, this inequitable fact remains unchanged: a defendant is left to rebut chemical evidence with nonchemical extrapolation evidence despite the fact that he was entitled to obtain chemical evidence and was denied his right by the police.

By claiming that that situation is remedied because nonchemical evidence of a body alcohol range can raise a reasonable doubt in a

But when a defendant is trying to prove that his body alcohol level did not exceed a very precise statutorily proscribed level, namely, 0.08 grams of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, it is of little help that an expert might be able to demonstrate a range into which the defendant's body alcohol level likely fell. Thus, it is hardly consoling for the majority to pronounce that a defendant can simply offer expert testimony on his body alcohol level "based on the number of drinks the defendant consumed" or that "[t]he instruction gives the defendant an adequate opportunity to defend himself by arguing that the police-administered test was inaccurate and that an independent test would have produced a different result." *Ante* at 455 n 20, 457 n 21. Despite what nonchemical evidence the defendant can find to produce, the prosecutor will hold the clear advantage in that not only can he rebut any nonchemical evidence with expert testimony, but he alone possesses the results of a *chemical* test to which the defendant has no rebuttal at all.

Further, despite Justice CORRIGAN's interpretation of the principles she cites from three writings of her late husband and a foreword by Justice MARKMAN, see *ante* at 456-457, I fail to see how the truth-seeking process is enhanced or furthered by not only denying a defen-

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defendant's favor, the majority does not seem to grasp the unbalanced position into which it places a defendant. Nothing a defendant produces in this regard will go unrebutted by the prosecutor's own witnesses. So to edge out any reasonable doubt created by a defense expert who can testify to a "range" into which the defendant's body alcohol level *may have fallen*, a prosecutor will be armed with eyewitness observation evidence, field sobriety test results, a rebuttal expert for any nonchemical evidence the defendant produces, and, critically, *the indisputable results of a chemical test*. Undeniably, the scales of justice are tilted heavily in the prosecutor's favor.

dant's mandatory right to gather evidence in his defense, but also allowing the prosecutor to present evidence that the state has made impossible for the defendant to rebut. I do not believe this is the type of "truth-seeking process" envisioned by either the framers of our constitutions or by commentators on the criminal justice system. In fact, a passage quoted by Justice CORRIGAN belies her assertions that a jury instruction is sufficient to protect a defendant's right to a fair trial when the right denied defendant deprives him of " 'an adequate opportunity to defend against the charges.' " See *ante* at 456, quoting Grano, *Implementing the objectives of procedural reform: The proposed Michigan Rules of Criminal Procedure–Part I*, 32 Wayne L R 1007, 1018 (1986). Professor Joseph D. Grano was completely correct when he wrote the words Justice CORRIGAN quotes:

> "[T]he primary objective of criminal procedure is to facilitate the ascertainment of truth. To some extent, therefore, *fairness must encompass this concern*. Accordingly, *rules are unfair when they do not provide either party an adequate opportunity to develop and present his case*. The special concern with fairness for the defendant, however, stems from the special abhorrence of erroneous conviction. Thus, *basic agreement exists that a rule is unfair if it denies the defendant an adequate opportunity to defend against the charges*." [*Ante* at 456, quoting Grano, *supra* at 1018 (emphasis added).]

It is for the reasons Professor Grano outlined that the majority is misguided in asserting that dismissal is an inappropriate remedy because "the truth will never be discovered." See *ante* at 457 n 21 (emphasis omitted). Simply, denying a defendant's right to obtain evidence[5] in

[5] Oddly, the majority concludes that informing the jury that a defendant was denied his right to an independent test "plac[es] all the facts

his defense also prevents the truth from ever being discovered and exposes a defendant to the possibility of being wrongfully convicted, despite the "special concern for fairness" and "special abhorrence of erroneous conviction" identified by Professor Grano. And therein lies the fundamental difference of approach. While the majority favors rewarding the deprivation of the right to obtain evidence by proceeding with trial and exposing the defendant to wrongful conviction to further what it perceives as the "truth-seeking process," I favor a meaningful remedy that encourages the police to act according to a mandatory statute,[6] which in turn *pro-*

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before the fact-finder," provides "more, rather than less, information," "communicate[s] an accurate account of what transpired," and "gives the jury all of the available relevant information." See *ante* at 457 & n 21. The majority also asserts that the instruction informs the jury of "*all* the pertinent information, including what has been denied to them [sic]." *Ante* at 457. These propositions are simply incorrect. The "pertinent information" that is not placed before the jury is the results of an independent chemical test. The jury is denied this information and, thus, denied its right to *all* the facts. The jury thus receives less information than that to which it was entitled and is left with an incomplete account of transpired events. The majority's insistence that a permissive jury instruction furthers the truth-seeking process is simply backward logic.

[6] The majority's claim that the permissive jury instruction will "accord meaning to the right" and "deter police officers from violating that right" is ridiculous. See *ante* at 450. First, nothing about alerting the jury that a person was deprived of an ability to obtain an independent chemical test "accords meaning" to the right embodied in the statute. Simply, a jury instruction is "too little, too late." Second, the majority's rule of law actually *encourages* police officers to decline a person's request for an independent test because not only are there are no meaningful *negative* consequences to that decision, but the police are put in a *superior* position because they will hold the trump card of indisputable chemical evidence. In this way, police officers are indeed "permit[ted] . . . to ignore a defendant's mandatory statutory right . . . ." See *ante* at 458.

Not surprisingly, the majority disagrees with this assessment, but again, the majority's simplistic and idealistic view fails to account for the real-world practicalities about the way in which these scenarios will play out. See n 4 of this opinion. Moreover, because the defendant was denied

tects a defendant's right to a fair trial. This, in my view, is the more constitutionally sound fostering of the truth-seeking process.

It can be no clearer that a defendant's Sixth Amendment right to present a full defense is implicated when he is deprived of his codified right to an independent chemical test.[7] While the right to the test has been codified, the violation of the right is an unconstitutional deprivation of a defendant's right to a fair trial. Indeed, the intent behind § 625a(6)(d) further demonstrates that the Legislature never meant to afford one party scientific evidence while denying the other party an ability to independently obtain the same, thus further rebutting the majority's assertion, *ante* at 457 n 21, that a jury instruction sufficiently assists the "truth-seeking process":

> The intent of the Legislature in enacting MCL 257.625a(5); MSA 9.2325(1)(5) was to allow the production and preservation of chemical evidence in an orderly manner. *Broadwell v Secretary of State*, 158 Mich App 681, 686; 405 NW2d 120 (1987). The petitioner in *Broadwell* argued that he was entitled to have a person of his choosing administer the test without first being subjected to a chemical test by the police officer. However, this Court found that such a construction of the statute would place the only scientific evidence of chemical impairment within

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his constitutional right to an independent test, speculation regarding whether the test would have been favorable to him is unhelpful. The very point is that the jury will never know because the defendant was denied his constitutional right to obtain the evidence.

[7] I address this argument only because the trial court expressed in its opinion its belief that the right at issue was constitutional in nature. The trial court found it unnecessary to base its holding on constitutional principles because it found that the remedy of dismissal was clearly called for. However, it clearly considered the statutory right merely a codification of a due process right. Thus, I find that it would be judicially inefficient to not address this issue.

> the petitioner's sole disposal, contrary to the legislative intent of the statute. *Id.* In *People v Koval*, 371 Mich 453, 458; 124 NW2d 274 (1963), our Supreme Court found that the then existing statute, which does not significantly differ from the current one, was enacted for the protection and benefit of motorists charged with driving while under the influence of intoxicating liquor. Thus, it may be said that *the Legislature intended that the scientific evidence shall not be at the sole disposal of either party*, and it ensured this result by allowing police to administer one test and allowing the accused to choose an independent person to administer a second chemical test. [*People v Dicks*, 190 Mich App 694, 698-699; 476 NW2d 500 (1991) (emphasis added).]

Further, the majority's centering of its analysis on its characterization that the evidence defendant was deprived of, namely, an independent chemical test of his body alcohol level, was evidence that had not yet been "developed" is simply a game of semantics. See *ante* at 461. For despite the majority's strenuous attempt to minimize the importance of the right or the subsequent significance of the evidence, the fact remains that defendant had a due process right to obtain the evidence, whether that entailed "creating" it, "developing" it, or any other way of getting it, however stated. Simply, defendant sought to exercise his mandatory right to procure independent chemical testing, and, thus, documentation, of his already-existing body alcohol level at the time he was taken into custody. And he sought to exercise this right because the Legislature penned a statute that grants the right to do so. When the majority's fallacy of logic is exposed, its constitutional analysis falls apart.

The correct conclusion, and one that the trial court reached, is that the right at issue, though codified through statute, implicates a defendant's constitutional right when violated. Simply, refusing the defendant an

opportunity for an independent chemical test " 'is to deny him the only opportunity he has to defend himself against the charge.' " *People v Dawson*, 184 Cal App 2d Supp 881, 882; 7 Cal Rptr 384 (Cal Super App Dep't, 1960), quoting *In re Newbern*, 175 Cal App 2d 862, 866; 1 Cal Rptr 80 (1959). "[T]he accused has an absolute right to secure witnesses and obtain additional evidence to counteract the evidence obtained by the government, to establish a defense and to seek an acquittal. To hold otherwise is to return to the rack and the stake." *State v Myers*, 88 NM 16, 23; 536 P2d 280 (NM App, 1975) (Sutin, J., dissenting) (emphasis omitted).

Attempting to bolster its conclusions, the majority selectively extracts the following statement from *Arizona v Youngblood*, 488 US 51, 59; 109 S Ct 333; 102 L Ed 2d 281 (1988): " '[T]he defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.' " *Ante* at 462 n 26.[8] One need only view the excised statement in the context of the material from which it was extracted to reject the majority's curious reliance:

> The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P-30 test. 153 Ariz., at 54, 734 P. 2d, at 596. If the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for

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[8] In my opinion, to speak in terms of a police officer's "constitutional duty" obfuscates the issue and detracts from the true question involved. Thus, I believe the question is more accurately addressed in terms of whether a *defendant's* constitutional rights are violated when the police fail to comply with their *statutory* duty to permit a defendant an opportunity to obtain an independent chemical test. While not dispositive of the analysis, those terms avoid overshadowing that it is indeed *a defendant's constitutional right* under scrutiny.

> drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests. [*Youngblood*, *supra* at 58-59.]

As the reader can see, *Youngblood* did not involve body alcohol level testing and it did not involve a statutory right to testing. Clearly, the *Youngblood* Court was in no way commenting on the due process rights that arise when a defendant is denied a mandatory right to obtain independent testing of his body alcohol level.

In another citation that is inaccurate at best, the majority states that in *In re Martin*, 58 Cal 2d 509; 374 P2d 801; 24 Cal Rptr 833 (1962), the court held "that the police are not required to assist a defendant in obtaining a chemical test," and that " 'police officers are not required to take the initiative or even to assist in procuring evidence on behalf of a defendant which is deemed necessary to his defense.' " *Ante* at 462, quoting *Martin*, *supra* at 512. What the majority omits to tell the reader is that there was no statute that mandated the police to allow a person an opportunity for independent chemical testing. What the majority also omits to mention is that the defendant in *Martin* "was released within minutes after his 'booking' at the police station." *Martin*, *supra* at 512. Because of his fast release, the court concluded that "[n]o meritorious claim can be made that [the defendant] could not, at that time, have obtained a timely sampling if unhampered." *Id.*

Similarly, the majority mistakenly relies on *State v Choate*, 667 SW2d 111, 113 (Tenn Crim App, 1983), for the proposition that "the police have no constitutional duty to take affirmative action to transport the defendant from the place of his or her incarceration to a hospital of his or her choice for the requested test." *Ante*

at 462. Important, but ignored by the majority, is that the state statute at issue in that case required the suspect to submit to a police-administered chemical test, and the defendant had refused to take that test. *Choate*, *supra* at 111-112. The court could not find a due process violation, reasoning as follows:

> *Since he refused to take the breathalyzer test*, the police took no affirmative steps to assist the defendant in obtaining a blood sample. However, the defendant *was not hampered or prevented by the police from obtaining a blood test*, and he made no effort himself to arrange for a blood test although he had access to a telephone and was accompanied by a friend to the police station. [*Id.* at 112 (emphasis added).]

The same misplaced reliance is seen in the majority's citation of *People v Finnegan*, 85 NY2d 53, 58; 623 NYS2d 546; 647 NE2d 758 (1995). In *Finnegan*, the state statute allowed for an independent chemical test, but put no obligation on the police to assist suspects with obtaining the test. The statute stated: "Right to additional test. The person tested shall be permitted to choose a physician to administer a chemical test in addition to the one administered at the direction of the police officer." Veh & Traf Law 1194(4)(b). To the contrary, our statute states, "A person who takes a chemical test administered at a peace officer's request as provided in this section *shall be given a reasonable opportunity* to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention." MCL 257.625a(6)(d). Thus, by its plain words, the statute requires some affirmative action on the part of the police. For the majority to rely on *Finnegan* to excuse the police officer's violation of defendant's right in this case is simply misguided. What the majority is actually asserting is that our statute

places no duty on the police to assist a person who the police holds in custody by honoring the person's reasonable request to obtain an independent chemical test. Such an assertion rewrites the statute of concern.

As is evident by the above, the majority takes a painfully circuitous journey to reach what is ultimately a conclusion that there is no meaning to the right codified in § 625a(6)(d), and, thus, no purpose to the statute at all. The majority pronounces that there is no available remedy when a statute providing a mandatory right is violated and that the police have no "constitutional duty," *ante* at 461-463, to follow the statute. Moreover, in deciding that defendant was not deprived of his constitutional right to an independent chemical test, the majority engages in a pretense. It concludes that the police were not obligated to assist defendant with obtaining an independent chemical test. This is simply incorrect and illuminates that the majority again fundamentally misunderstands the crux of the right at issue.

Minkoff provides a thorough and well-reasoned discussion regarding the due process implications of interfering with a defendant's right to obtain an independent test. In *Minkoff*, the defendant, rather than requesting a test, asked the police officer for the officer's advice regarding whether he should obtain an independent test. *Id.* at 249. The officer told the defendant that a blood test " 'comes out with the exact amount and it's going to be higher than what the breath test is.' " *Id.* Accordingly, the defendant "did not request an independent blood test." *Id.* at 250. Deciding whether the defendant's due process argument that the officer "frustrated" his right to obtain an independent test had merit, the court provided the following fundamental principles:

> It is undisputed that a person accused of a criminal offense has a due process right to obtain existing exculpatory evidence. See *State v. Swanson* (1986), 222 Mont. 357, 360, 722 P.2d 1155, 1157. It also is undisputed that, when the charged offense is DUI, the accused has a right to obtain a test of the amount of alcohol in his or her blood independent of the test offered by the arresting officer, without regard to whether the accused has taken or rejected the offered test. *Swanson*, 222 Mont. at 360-61, 722 P.2d at 1157. Finally, it is undisputed that, while a law enforcement officer has no duty to affirmatively assist a person accused of DUI in obtaining an independent blood test, the officer cannot frustrate or impede the person's efforts to do so. See *Swanson*, 222 Mont. at 361, 722 P.2d at 1157-58. Moreover, we have held that the accused must be informed of his or her right to independent testing and that failure to so advise is a due process violation. *State v. Strand* (1997), 286 Mont. 122, 127, 951 P.2d 552, 555.
>
> In the present case, the District Court relied on [*State v*] *Sidmore* [286 Mont 357; 951 P2d 558 (1997)] in denying Minkoff's motion to dismiss. There, we clarified and, in fact, limited "the *Swanson* rule" that a DUI accused has a due process right to an independent blood test. We held that two criteria must be established to support an allegation of denial of due process rights with regard to the right to an independent test: (1) the accused must timely request the independent test, and (2) the officer must unreasonably impede the right to the test. *Sidmore*, 286 Mont. at 234-35, 951 P.2d at 568-69. Here, Minkoff did not request the independent test and, therefore, on the face of it, the District Court did not err in concluding that the *Sidmore* criteria had not been met. [*Id.* at 250-251.]

The court then considered the defendant's arguments that the officer unreasonably impeded his opportunity to obtain an independent test, and concluded that the officer did indeed do so:

> We have held that, while police have no duty to assist an accused in obtaining independent evidence of sobriety, "they cannot frustrate such an effort through either affir-

> mative acts or their rules and regulations." *Swanson*, 222 Mont. at 361-62, 722 P.2d at 1158 (*see also* § 61-8-405(2), MCA, "The peace officer may not unreasonably impede the person's right to obtain an independent blood test"). Here, the officer's repeated statements that the blood test would show a higher blood alcohol level, albeit well-intentioned, were affirmative acts which would frustrate, if not obliterate, the intention of any rational arrestee to obtain an independent blood test. Rare, indeed, would be the person who would persist in asking for an independent blood test after being advised—twice—that the amount of alcohol in the blood test result would show as higher than the amount in the offered breath test. We conclude that the officer's advice frustrated and unreasonably impeded Minkoff's due process right to the independent blood test. [*Id*. at 252.]

Finally, on the basis of the severely uneven footing on which the deprivation of the opportunity to obtain an independent chemical test placed the defendant, the court overruled its prior case law that held that suppression of the evidence was a sufficient remedy and concluded that the only constitutionally sufficient remedy was dismissal of the charges. See *id.* at 253-255.

No case cited in the majority's labored opinion either considered or addressed whether a person's due process rights are violated when that person submits to a required police-administered chemical test but is nonetheless denied a reasonable request for a statutorily required independent chemical test. But there is no shortage of states in which the deprivation of the right to an independent chemical test *has* been found to (1) be unconstitutional and (2) require dismissal of the charges. See anno: *Drunk driving: Motorist's right to private sobriety test*, 45 ALR4th 11. In Georgia, the court of appeals questioned the use, without enforcement, of a rule requiring a police officer to grant a reasonable request for an independent chemical test: "But of what value is that right if the accused is in

custody of law enforcement officials who either refuse or fail to allow him to exercise the right?" *Puett v State*, 147 Ga App 300, 301; 248 SE2d 560 (1978). An Arizona court, faced with a prosecutor's argument that the defendant had no right to an independent test unless he first took a police-initiated test, explained:

> If the [prosecutor's] contention was correct, the logical conclusion would be that the police could affirmatively prohibit every driver who refused a breathalyzer test from obtaining independent evidence of his sobriety, in essence suppressing evidence favorable to the defendant. Such a result would be violative of due process of law. [*Smith v Cada*, 114 Ariz 510, 512; 562 P2d 390 (Ariz App, 1977) (staying the prosecution on charges related to intoxicated driving).]

Further, in *Provo City v Werner*, 810 P2d 469 (Utah App, 1991), the court highlighted the due process concerns inherent in a defendant's right to an independent chemical test. That court stated:

> Similarly, *all that is required to provide due process is an opportunity to obtain an independent test*. "The purpose of due process is to prevent fundamental unfairness, and one of its essential elements is the *opportunity* to defend." *State v. Snipes*, 478 S.W.2d 299, 303 (Mo.), *cert. denied*, 409 U.S. 979, 93 S.Ct. 332, 34 L.Ed.2d 242 (1972). "*The issue is whether the defendant was afforded a reasonable opportunity to obtain an independent examination*; it is not necessary that such an examination in fact be conducted." *Commonwealth v. Alano*, 388 Mass. 871, 448 N.E.2d 1122, 1127 (1983). *See also Bilbrey v. State*, 531 So.2d 27, 30 (Ala. Ct. App. 1987) (defendant must prove by clear and convincing evidence that the conduct of the police was unreasonable in order to establish a due process violation). [*Id.* at 472 (emphasis added).]

Again, by its conclusion that the police did all they were required to do and had no further duty, the majority has changed the language of the statute and

rewritten an otherwise plainly worded requirement to eliminate any duty of the police to actually *honor* the reasonable request of a person attempting to obtain independent chemical evidence. See *ante* at 462 n 27.

If it is to be given any meaning at all, the statute clearly requires the police to assist in some way when a person attempts to exercise his right to obtain an independent chemical test. Here, of course, the police outright refused to take defendant where he asked to go, a decision that the prosecutor in this case has agreed was unjustifiable. Defendant's due process right to obtain the test was clearly violated.

Further, not punishing a violation of the statute with the strict remedy of dismissal and allowing the prosecution to go forward with the charges will enable a completely one-sided presentation of the evidence, even if the results of the police-initiated test are suppressed. By disallowing an independent chemical test, the police benefit from a win-win situation. Without scientific evidence, the prosecutor can easily persuade a jury with the police officer's observation evidence. A defendant can counter that testimony with absolutely nothing but his word.

As a Tennessee court succinctly explained, "We do not believe that simply suppressing the State's blood alcohol test is a sufficient safeguard of the Defendant's right to be able to gather and preserve evidence in his defense. This evidence, if favorable to the Defendant, could easily have secured his acquittal." *State v Livesay*, 941 SW2d 63, 66 (Tenn Crim App, 1996). And in Washington, the appellate court likewise rejected an argument for suppression of the results of the police-administered test as an adequate remedy. That court's reasoning bears repeating:

> The State contends the proper remedy for violation of Mr. McNichols' right to obtain an independent blood test is suppression of the State's breath test results. It argues the purpose of the independent test is to contest the accuracy of the State's breath test; therefore, if a defendant is unfairly deprived of an opportunity to challenge the State's test results, denying use of those results levels the playing field and leaves the defendant free to contest any other evidence of intoxication introduced by the State.
>
> We recognize dismissal is an extraordinary remedy, which is unwarranted when suppression of evidence will eliminate any prejudice caused by governmental misconduct. . . . Suppression is inadequate in the present case.
>
> In a DWI case the defendant's condition at the time of his arrest is critical to his defense. To defend against the charge against him, Mr. McNichols would have to present evidence that he was not under the influence of intoxicating liquor at the time of his arrest. That is true regardless whether the State introduces BAC test results or other evidence of intoxication. The State's interference with Mr. McNichols' right to obtain an independent alcohol concentration test foreclosed a fair trial by forever depriving him of material evidence which could potentially have supported a claim that he was innocent. Suppression of the State's BAC test results would not eliminate the prejudice because a favorable blood test is reliable evidence of nonintoxication that could be used to defend against other proof of intoxication. Because the error cannot be remedied by a new trial, dismissal is the appropriate remedy. [*State v McNichols*, 76 Wash App 283, 289-291; 884 P2d 620 (1994) (citations omitted).][9]

Finally, in *Minkoff* the court aptly explained why no remedy other than dismissal would rectify the constitutional violation:

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[9] While the Washington Supreme Court overturned this case on the basis that jail personnel did not interfere with the defendant's right to get an independent blood test, the Supreme Court agreed with the Court of Appeals that the right was a due process right. *State v McNichols*, 128 Wash 2d 242; 906 P2d 329 (1995).

In *Strand*, the issue of dismissal, as urged by the defendant, versus suppression, as argued by the state, was squarely before us. As discussed above, we opted for suppression and, in doing so, distinguished *Swanson* on the facts regarding whether the state's offered breath test had been taken or refused. In discussing the appropriate remedy in *Strand*, however, we made several statements on which we did not follow through. In that regard, while we relied on a Washington Supreme Court case for the proposition that the state cannot be permitted to use scientific evidence of intoxication which the defendant is unable to rebut because he was not apprised of his right to independent testing, we also stated that, while independent blood test results have value as rebuttal-type evidence to the state's evidence, such results also "have independent value as compelling scientific evidence, regardless of the evidence introduced by the State." *Strand*, 286 Mont. at 128, 951 P.2d at 555 (citation omitted). We discussed the possibility that a defendant might elect not to challenge potentially intoxication-related observations by the officer or field sobriety test results, but might produce—if given the opportunity—a scientific blood test conclusively showing a blood alcohol concentration below the legal limit. *Strand*, 286 Mont. at 128, 951 P.2d at 555-56. Had we followed through on these statements, rather than limiting our focus to the question of "like evidence," dismissal would have been the appropriate remedy.

Here, the State admitted Minkoff's .167 blood alcohol content as evidence during the jury trial. It also presented the arresting officer's testimony and videotape evidence on Minkoff's performance on field sobriety tests: he did not successfully recite the alphabet after the letter "T"; he swayed during the one-legged stand and put his hand on a door as a brace; and, during the walk and turn test, he stepped off the line, nearly fell over, and took more steps than he was instructed to take. Suppressing the State's breath test and allowing a new trial would leave Minkoff unable to rebut the field sobriety test evidence through an independent blood test—the right to which he was effectively denied. We conclude suppression of the breath test

> results is insufficient to remedy the deprivation of that right and, accordingly, we overrule the remedy set forth in *Strand*. [*Minkoff*, *supra* at 254.]

I find these concepts highly persuasive. Neither ignoring the constitutional violation nor allowing for suppression of the results of the state's chemical test will rectify the violation or put a defendant on equal footing with that of his accuser. Rather, a police officer can unilaterally place a defendant in a position from which he can never recover—namely, completely without chemical evidence to use to defend against the prosecutor's chemical evidence. And an officer's good or bad faith has no bearing on the fact that the defendant is still deprived of the only exculpatory evidence that he might possibly obtain. "This is not a case simply of 'justice' or 'fairness', in the abstract. Denial to defendant of the opportunity to conduct his own blood test was a denial of access to evidence he might have introduced in his own defense. For this reason, it is a denial of his constitutionally guaranteed due process of law." *Myers*, *supra* at 24. Thus, in my view, nothing less than dismissal cures the violation, for there is no other way to ensure a defendant's Sixth Amendment right to a fair trial.

A toothless jury instruction designed merely to inform the jury that the right was violated does nothing but elevate the prosecutor's position over that of the defendant and cannot be any further from adequate. The majority's proclamation that the case must go forward to preserve the quest for "truth" is simply unpersuasive when the truth-seeking process was deliberately thwarted by the state and resulted in categorically denying defendant the ability to bring any meaningful evidence in his defense. Under the majority's indiscriminate elevation of its distorted view of the

"truth-seeking process" over constitutional due process rights, no constitutional violation will ever merit the dismissal of a case or even suppression of evidence.

I would find that depriving a driver of the mandatory right to an independent chemical test is a due process violation for which dismissal of the charges is the only remedy. To hold otherwise is to not only ignore the clearly mandatory nature of the statute, but to disregard the constitutional implications of its violation. For these reasons, I respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

PAIGE v CITY OF STERLING HEIGHTS

Docket No. 127912. Decided July 31, 2006. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court vacated the decision of the Workers' Compensation Appellate Commission and remanded the matter to the commission for further proceedings.

Adam Paige filed a claim in the Bureau of Workers' Disability Compensation, seeking workers' compensation death dependency benefits pursuant to MCL 418.375(2), following the death of his father, Randall G. Paige, who died on January 4, 2001, as a result of acute myocardial infarction and coronary artery disease. Randall Paige, a firefighter for the city of Sterling Heights, suffered a myocardial infarction on October 12, 1991, while at work, did not return to work after the incident, and was granted an open award of workers' compensation benefits in 1993. Randall Paige suffered a second myocardial infarction on August 15, 2000. Adam Paige, who was eight years old when Randall Paige suffered his first heart attack and 17 when Randall Paige died, claimed that as a minor he had been dependent on his father for support and that the 1991 heart attack had contributed to his father's death by weakening his heart. Adam Paige claimed that the 1991 heart attack constituted "the proximate cause" of his father's death under *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), which held that the phrase "the proximate cause" does not mean the sole proximate cause of death but, rather, requires only a cause that is a substantial factor in the employee's death. The city of Sterling Heights (hereafter referred to as the defendant) opposed the claim, arguing that Adam Paige had not introduced evidence establishing that he was dependent on his father. The defendant also argued that *Hagerman* had been impliedly overruled by *Robinson v Detroit*, 462 Mich 439 (2000), which held that the phrase "the proximate cause" means the sole proximate cause or the one most immediate, efficient, and direct cause of the injury or damage. Defendant asserted that, under *Robinson*, Randall Paige's work-related 1991 heart attack was not "the proximate cause" of his death. A magistrate resolved both issues in favor of Adam Paige

and concluded that the 1991 heart attack was a substantial factor in Randall Paige's death in 2001 and that Adam Paige was entitled to death dependency benefits on the basis that he was listed as a dependent of his father when his father was awarded an open award of benefits in 1993 and also that that determination of dependency was controlling. The defendant appealed to the Workers' Compensation Appellate Commission (WCAC). The WCAC concluded that *Hagerman* was controlling and rejected the defendant's assertion that *Runnion v Speidel*, 270 Mich 18 (1934), required the magistrate to determine the extent of Adam Paige's dependency at the time of Randall Paige's 1991 work-related injury. The WCAC, instead, relied on *Murphy v Ameritech*, 221 Mich App 591 (1997), for the proposition that Adam Paige was entitled to the conclusive presumption set forth in MCL 418.331(b) that he was wholly dependent because he had been under the age of 16 at the time of his father's work-related 1991 heart attack. The Court of Appeals, WHITE, P.J., and WILDER and FORT HOOD, JJ., denied the defendant's application for leave to appeal in an unpublished order, entered January 10, 2005 (Docket No. 256451). The Supreme Court, in lieu of granting the defendant's application for leave to appeal, directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action. 474 Mich 862 (2005).

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

1. *Hagerman* must be overruled. The proper definition of the phrase "the proximate cause" can be ascertained solely by reference to the common meaning of the term "the" and the peculiar meaning that the phrase "proximate cause" has acquired in the law. The definition of the phrase "the proximate cause" set forth in *Robinson* applies to MCL 418.375(2). The phrase "the proximate cause" as used in MCL 418.375(2) refers to the sole proximate cause. In order for an employer to be liable for death benefits under the statute, the deceased employee's work-related injury must have been the one most immediate, efficient, and direct cause preceding the death. The decision of the WCAC must be vacated and the matter must be remanded to the WCAC for a determination whether Randall Paige's work-related injury was "the proximate cause" of his death under this standard.

2. If a work-related injury qualifies as "the proximate cause" of the employee's death, the next inquiry under MCL 418.375(2) is whether the employee left dependents and, if so, whether they were wholly or partly dependent on the employee for support. A

magistrate must make these determinations under MCL 418.341 by looking at the circumstances at the time of the work-related injury, not at the time of death.

3. The issue whether Adam Paige was dependent on his father at the time of his father's work-related injury is res judicata because the defendant did not appeal the magistrate's 1993 order that listed Adam Paige as a dependent of Randall Paige. However, the magistrate did not determine the extent of such dependency at the time of the work-related injury. If, on remand, the WCAC determines that the work-related injury was the proximate cause of Randall Paige's death, the WCAC must determine the extent of Adam Paige's dependency at the time of the work-related injury.

4. The WCAC erred in concluding that Adam Paige, who was under 16 at the time of the work-related injury but over the age of 16 at the time of his father's death, was entitled to the conclusive presumption of whole dependency provided in MCL 418.331(b). *Runnion* provides that the presumption of whole dependency applies only if the child was under the age of 16 at the time of the employee's death. If the child was, like Adam Paige, over the age of 16 at the time of the death, the child is not entitled to the conclusive presumption of whole dependency and whether the child was actually dependent, in whole or in part, at the time of the work-related injury is a question of fact.

Justice WEAVER, concurring, agreed with the result and analysis of the majority opinion, except for part III(B), which is the majority's response to Justice CAVANAGH's partial dissent.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, agreed with the majority that the presumption of whole dependency applies if the child was 16 years old at the time of the employee's death. However, he stated that *Hagerman v Gencorp Automotive* was properly decided and correctly interpreted the phrase "proximate cause" as it is used in MCL 418.375(2). *Hagerman* correctly held that the current majority's interpretation of MCL 418.375(2) has neither textual nor historical support. *Hagerman* should not be overruled. The majority failed to address the standard set forth in *Robinson v Detroit* for overruling precedent. Application of that standard does not support overruling *Hagerman*. This Court should not overrule a decision deliberately made unless it is convinced not merely that the case was wrongly decided, but also that less injury would result from overruling than from following it. Absent the rarest circumstances, this Court should remain faithful to established precedent.

Vacated and remanded to the Workers' Compensation Appellate Commission.

1. WORKERS' COMPENSATION — DEATH DEPENDENCY BENEFITS — WORDS AND PHRASES — THE PROXIMATE CAUSE.

The phrase "the proximate cause" as used in MCL 418.375(2) refers to the sole proximate cause; in order for an employer to be liable for death benefits under the statute, the deceased employee's work-related injury must have been the one most immediate, efficient, and direct cause preceding the death.

2. WORKERS' COMPENSATION — DEATH DEPENDENCY BENEFITS.

The determination under MCL 418.375(2) whether an employee who suffered a work-related injury that was the proximate cause of the employee's death left dependents that were wholly or partly dependent on the employee for support must be made pursuant to MCL 418.341 by looking at the circumstances at the time of the work-related injury, not at the time of death.

3. WORKERS' COMPENSATION — DEATH DEPENDENCY BENEFITS — PRESUMPTIONS OF DEPENDENCY.

The conclusive presumption of whole dependency for support upon a deceased employee applies to a child who was under the age of 16 at the time of the employee's death; where a child is over the age of 16 at the time of the employee's death, the issue whether the child was actually dependent, in whole or in part, at the time of the work-related injury that was the proximate cause of the death is a question of fact (MCL 418.331[b], 418.375[2]).

Teresa Martin and *Rapaport, Pollok, Farrell & Waldron, P.C.* (by *Steven J. Pollok*), for Adam Paige.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Ronald A. Weglarz*), for the city of Sterling Heights.

Amicus Curiae:

Conklin, Benham, Ducey, Listman & Chuhran, P.C. (by *Martin L. Critchell*), for Michigan Self-Insurers' Association.

TAYLOR, C. J. In this case involving the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*,

the first issue is whether the phrase "the proximate cause" in MCL 418.375(2) means the sole proximate cause, i.e., "the one most immediate, efficient, and direct cause of the injury or damage." We conclude that it does, as we did in construing the identical phrase in the governmental tort liability act (GTLA), MCL 691.140 *et seq*., in *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000). We therefore overrule *Hagerman v Gencorp Automotive,* 457 Mich 720; 579 NW2d 347 (1998), which incorrectly construed the phrase to mean "a proximate cause" that is a substantial factor in causing the event. Accordingly, we vacate the decision of the Workers' Compensation Appellate Commission (WCAC) and remand this case to the WCAC for reconsideration. The second issue is when, in the circumstance of a parent-employee's death, a child of that person is entitled to a presumption of whole dependency. We conclude that a child is only entitled to the presumption if he or she was under the age of 16 at the time of the parent-employee's death. Because the WCAC erred in holding to the contrary, on remand, the WCAC must make the necessary factual determinations to apply this holding.

I. FACTS AND PROCEEDINGS BELOW

Randall G. Paige worked as a firefighter for the city of Sterling Heights (hereafter defendant). On October 12, 1991, Paige was sent to the scene of a severe automobile accident. After extracting a three-year-old girl from an automobile and carrying her to an ambulance, Paige began experiencing an ache in his right arm. Approximately 30 minutes later, after he had returned to the fire station, Paige was completing a report of the automobile accident when he again experienced pain in his right arm. This time, the pain in his

arm was accompanied by chest pains and profuse sweating. Paige was transported to a hospital, where he was diagnosed as having suffered a myocardial infarction. He did not return to work after this incident. In 1993, he was granted an open award of workers' compensation benefits by magistrate Donald Miller.[1]

Paige suffered a second myocardial infarction on August 15, 2000. He was diagnosed as having coronary artery disease, and underwent a quadruple coronary artery bypass on August 21, 2000. On January 4, 2001, Paige died in his sleep. An autopsy report prepared by the Oakland County Medical Examiner's office noted that Paige suffered from occlusions of the left anterior descending coronary artery, right coronary artery, and four coronary bypass grafts. The deputy forensic pathologist who conducted the autopsy opined that Paige "died of arteriosclerotic[2] cardiovascular disease (heart attack)." The certificate of death that was completed by Paige's treating cardiologist, Dr. Mark Goldberg, lists the immediate cause of Paige's death as acute myocardial infarction, and further lists coronary artery disease as an underlying cause that existed for "years" before Paige's death and led to the immediate cause of death.

Paige's son, Adam Paige, who was eight years old when Paige suffered his first heart attack and 17 when Paige died, filed a claim for workers' compensation

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[1] This award of workers' compensation benefits, however, was made subject to Paige's election of like benefits in lieu of workers' compensation benefits under MCL 418.161(1)(c). Because Paige elected to receive duty disability pension benefits from Sterling Heights, and the amount of duty disability pension benefits exceeded his weekly workers' compensation benefit amount, he never in fact received workers' compensation benefits.

[2] Arteriosclerosis is a hardening of the arteries. *Stedman's Online Medical Dictionary,* <http://www.stedmans.com/section.cfm/45> (accessed April 14, 2006).

death dependency benefits pursuant to MCL 418.375(2).[3] Under this statute, the child of a deceased employee is entitled to death dependency benefits if he or she was dependent on the deceased employee and a work-related injury was the proximate cause of the parent-employee's death. In making his claim for death dependency benefits, Adam claimed that as a minor he had been dependent on his father for support. Further, he claimed that the work-related heart attack in 1991 had contributed to his father's death by weakening his heart and, therefore, constituted "the proximate cause" of his father's death under *Hagerman,* which held that the phrase does not mean the sole proximate cause of death but, rather, requires only a cause that is a substantial factor in the employee's death. *Hagerman, supra* at 728, 736. Defendant opposed the claim for death dependency benefits, arguing that Adam had not introduced evidence establishing that he was, in fact, dependent on his father. Moreover, defendant argued that *Hagerman* had been impliedly overruled by *Robinson,* which held that the phrase "the proximate

[3] MCL 418.375(2) provides:

> If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death. Such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.

cause" means the sole proximate cause or, in other words, "the one most immediate, efficient, and direct cause of the injury or damage. *Robinson, supra* at 462. Accordingly, defendant asserted that under the *Robinson* definition Randall Paige's work-related 1991 heart attack was not "the proximate cause" of his death.

Magistrate Andrew Sloss resolved both issues in Adam's favor. First, he determined that the *Hagerman* definition of "the proximate cause" applied and, therefore, the work-related heart attack that Randall Paige suffered in 1991 did not have to be the sole or most immediate cause of his death but, rather, only needed to be a substantial factor in the events leading to his death. He determined that the 1991 heart attack was a substantial factor in Paige's death, stating that all three doctors who testified at the hearing on Adam's claim "agreed that it was a combination of underlying coronary artery disease together with the cumulative damage to the heart that began with his work-related myocardial infarction in 1991" that caused Randall Paige's death in 2001. The magistrate concluded by determining that Adam was entitled to death dependency benefits as long as he qualified as a dependent. Noting that Adam's status as a dependent is to be determined as of the date of his father's 1991 work-related injury, MCL 418.341,[4] Magistrate Sloss recognized that Magistrate Miller had listed Adam as Randall Paige's dependent in his 1993 order granting

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[4] MCL 418.341 provides, in pertinent part:

> Questions as to who constitutes dependents and the extent of their dependency shall be determined as of the date of the injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions except as otherwise specifically provided in sections 321, 331 and 335.

Randall Paige an open award of benefits. He held that this determination of dependency was controlling, and granted Adam's request for death dependency benefits.

Defendant appealed Magistrate Sloss's ruling to the WCAC. Again, defendant argued that the magistrate should have applied the *Robinson* definition of "the proximate cause." The WCAC, however, rejected defendant's argument, concluding that *Hagerman* was controlling because it specifically addressed MCL 418.375(2) while *Robinson,* on the other hand, involved a provision of the GTLA. Defendant also again challenged Adam's status as a dependent. Although it did not directly challenge Magistrate Sloss's reliance on Magistrate Miller's determination that Adam was, in fact, dependent on his father at the time of the 1991 work-related injury, defendant argued that Magistrate Sloss had erred by failing to address the extent of Adam's dependency. Specifically, defendant asserted that under this Court's decision in *Runnion v Speidel,* 270 Mich 18; 257 NW 926 (1934), the magistrate was required to make a factual determination regarding whether Adam was wholly or partially dependent on his father at the time of the 1991 work-related injury and, because Magistrate Sloss did not do so, and no evidence of whole or partial dependency existed in the record, the correct weekly compensation amount could not be calculated. The WCAC, however, rejected defendant's assertion that *Runnion* required such a factual determination of dependency and, instead, relied on *Murphy v Ameritech,* 221 Mich App 591; 561 NW2d 875 (1997), for the proposition that Adam was entitled to the conclusive presumption set forth in MCL 418.331(b) that he was wholly dependent because he had been under the age of 16 at the time of his father's work-related heart attack in 1991.

Defendant applied for leave to appeal the WCAC's ruling in the Court of Appeals, again raising the proxi-

mate causation and dependency issues. The Court of Appeals, however, denied defendant's application for leave to appeal for lack of merit in the grounds presented. Unpublished order of the Court of Appeals, entered January 10, 2005 (Docket No. 256451). Defendant then applied for leave to appeal in this Court. We scheduled oral argument on whether to grant defendant's application or take other peremptory action permitted by MCR 7.302(G)(1), and directed the parties to address whether *Robinson* overruled *Hagerman*, and whether the WCAC erred by failing to follow *Runnion* and make a factual determination of the extent of Adam's dependency on his father at the time of his father's injury. 474 Mich 862 (2005).

II. STANDARD OF REVIEW

Resolution of the issues in this case involves the interpretation of provisions of the WDCA. Statutory interpretation is a question of law that we review de novo. *Reed v Yackell,* 473 Mich 520, 528; 703 NW2d 1 (2005). As we stated in *Reed, supra* at 528-529:

> Our fundamental obligation when interpreting statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). If the statute is unambiguous, judicial construction is neither required nor permitted. In other words, "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Id*.

III. ANALYSIS

If an employee who suffered an injury arising out of and in the course of employment dies before the period within which the employee is entitled to weekly work-

ers' compensation benefits ends, the employee's death is considered to have ended the disability and relieves the employer of liability for further weekly benefits to the injured employee. MCL 418.375(1). However, under MCL 418.375(2), in lieu of such weekly payments to the employee, the employer is required to pay death benefits pursuant to MCL 418.321[5] if two requirements are met: (1) the work-related injury was "the proximate cause" of the employee's death, and (2) the deceased employee leaves dependents who were wholly or partially dependent upon the employee for support.[6]

A. THE PROXIMATE CAUSE

Primarily at issue in this case is the first requirement of MCL 418.375(2) that the work-related injury be "*the* proximate cause" of the employee's death. In *Hagerman,* a majority of this Court relied on *Dedes v Asch,*[7]

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[5] MCL 418.321 provides, in relevant part:

> If death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death.

[6] See also MCL 418.301(1), which provides, in pertinent part:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act.

[7] 446 Mich 99; 521 NW2d 488 (1994), overruled in part in *Robinson, supra* at 458-459.

which involved MCL 691.1407(2)(c) of the GTLA, for the proposition that the Legislature's use of the definite article "the" instead of the indefinite article "a" is inconsequential.[8] Under its interpretation of common-law principles of proximate causation, the *Hagerman* majority rejected the idea that by using the phrase "*the* proximate cause," the Legislature meant that the work-related injury had to be the sole proximate cause of the employee's death in order for the employer to be liable for death benefits under MCL 418.375(2).[9] Instead, the majority held that the employer was liable for death benefits even if there was more than one proximate cause of the employee's death, as long as the work-related injury was a "substantial factor" in the employee's death.[10]

In a dissent joined by Justices WEAVER and BRICKLEY, I argued that the Legislature's use of the phrase "*the* proximate cause" in MCL 418.375(2) unambiguously indicated its intent that the work-related injury must be the sole proximate cause of the employee's death in order for the employer to be liable for death benefits. My primary reasons for this conclusion were twofold. First, the term "proximate cause" had a longstanding definition in Michigan's jurisprudence before the enactment of the WDCA.[11] Second, the majority's analysis had improperly rewritten the statute by failing to recognize the Legislature's use of the word "the."[12]

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[8] *Hagerman, supra* at 728-729.

[9] *Id.* at 729-734.

[10] *Id.* at 734-738.

[11] Although I did not directly reference it in my *Hagerman* dissent, the importance of this is that the Legislature has directed that when it uses terms in a statute that have acquired a peculiar and appropriate meaning in the law before the statute's enactment, the courts of this state are to accord those terms such peculiar and appropriate meaning. MCL 8.3a.

[12] *Hagerman, supra* at 752-757 (TAYLOR, J., dissenting).

Two years after *Hagerman,* in *Robinson, supra,* which involved MCL 691.1407(2)(c) of the GTLA, this Court overruled the part of *Dedes*, *supra,* on which the *Hagerman* majority had based its interpretation of MCL 418.375(2) of the WDCA, and held that the phrase "the proximate cause" as used in MCL 691.1407(2)(c) of the GTLA refers to the sole proximate cause, i.e., "the one most immediate, efficient, and direct cause preceding an injury."[13] The heart of the *Robinson* majority's rationale, which relied in part on my dissent in *Hagerman* that the phrase "the proximate cause" is not synonymous with the phrase "a proximate cause," was as follows, *Robinson, supra* at 460-462:

> [T]he Legislature has shown an awareness that it actually knows that the two phrases are different. It has done this by utilizing the phrase "a proximate cause" in at least five statutes[16] and has used the phrase "the proximate cause" in at least thirteen other statutes.[17] Given such a pattern, it is particularly indefensible that the *Dedes* majority felt free to read "the proximate cause" as if it said "a proximate cause." The error will not be compounded, as today this Court corrects the flawed analysis of the *Dedes* majority.
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> Nevertheless, the fact that the Legislature sometimes uses "a proximate cause" and at other times uses "the proximate cause" does not, of course, answer the question what "the proximate cause" means other than to show that the two phrases should not be interpreted the same way. Our duty is to give meaning to the Legislature's choice of one word over the other.
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> We agree with the following analysis found in the dissent in *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998):
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> "Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and

[13] *Robinson, supra* at 458-459.

'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . .' *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between 'a' and 'the' as the Legislature has directed that 'all words and phrases shall be construed and understood according to the common and approved usage of the language . . . .['] MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words 'the' and 'a' in common usage meant something different at the time this statute was enacted . . . ."

Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

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[16] See MCL 436.1801(3); MSA 18.1175(801)(3), MCL 600.2947(6)(a); MSA 27A.2947(6)(a), MCL 600.6304(8); MSA 27A.6304(8), MCL 691.1665(a); MSA 12.418(5)(a), and MCL 750.145o; MSA 28.342A(o).

[17] See MCL 257.633(2); MSA 9.2333(2), MCL 324.5527; MSA 13A.5527, MCL 324.5531(11); MSA 13A.5531(11), MCL 324.5534; MSA 13A.5534, MCL 418.375(2); MSA 17.237(375)(2), MCL 500.214(6); MSA 24.1214(6), MCL 600.2912b(4)(e); MSA 27A.2912(2)(4)(e), MCL 600.2912b(7)(d); MSA 27A.2912(2)(7)(d), MCL 600.2912d(1)(d); MSA 27A.2912(4)(1)(d), MCL

600.2947(3); MSA 27A.2947(3), MCL 600.5839(1); MSA 27A.5839(1), MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), and MCL 750.90e; MSA 28.285e.

Despite the fact that MCL 418.375(2) of the WDCA, at issue in this case, and MCL 691.1407(2) of the GTLA, which was at issue in *Robinson,* both use the phrase "the proximate cause," Adam argues that the definition of "the proximate cause" from *Robinson* should not be applied to MCL 418.375(2). Adam's primary argument in support of this assertion is that the GTLA, as a statute in derogation of the common law, is generally said to be strictly construed in favor of governmental immunity,[14] while the WDCA, being a remedial statute, is generally said to be liberally construed to grant, rather than deny, benefits.[15] Although we have stated and utilized these preferential rules of construction in the past, their application is unnecessary in this case because the proper definition of the phrase "the proximate cause" can be ascertained solely by reference to the common meaning of the term "the" and the peculiar meaning that the phrase "proximate cause" has acquired in the law. These preferential rules of construction do not nullify the general rule that statutes should be reasonably interpreted consistent with their plain and unambiguous meaning. See *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc,* 461 Mich 316, 320-321; 603 NW2d 257 (1999). More importantly, they do not override the Legislature's clear directive in MCL 8.3a that common words, such as "the," are to be construed according to their common meaning and that words that have acquired a peculiar and appropriate

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[14] *Robinson, supra* at 459.

[15] *Hagerman, supra* at 739.

meaning in the law, such as "proximate cause," are to be accorded such peculiar and appropriate meaning.

Accordingly, we overrule *Hagerman* and hold that the phrase "the proximate cause," as used in MCL 418.375(2) of the WDCA, refers to the sole proximate cause. In deciding to overrule *Hagerman*, we have not only considered the fact that it was wrongly decided but also whether less injury will result from overruling it than from following it.[16] In making this determination we have considered whether *Hagerman* defies "practical workability," whether reliance interests would work an undue hardship, and whether changes in the law and facts no longer justify the *Hagerman* decision.[17]

Hagerman defies practical workability because a person reading the statute surely would not know that he or she cannot rely on what the statute plainly says. That is, a reader and follower of the statute would, because of *Hagerman's* rewrite, not be behaving in accord with the law. Such a regime is unworkable in a rational polity. This all gets back to the unrebutted truth that "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions."[18] Furthermore, *Hagerman* is not only inconsistent with the plain language of the statute, it is also inconsistent with this Court's decision in *Robinson*. How are the people of this state to know what "the proximate cause" means when there is one case from this Court that states that it means one thing and another case that states that it means something else? When identical words in the law, lying within a similar statutory context, mean something altogether different,

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[16] *Pohutski v City of Allen Park,* 465 Mich 675, 693; 641 NW2d 219 (2002).

[17] *Robinson, supra* at 464.

[18] *Id.* at 467.

we do believe that there is a "practical workability" problem, not in the sense that a court of law cannot render some decision—no opinion of this Court is "unworkable" in that sense—but in the sense that the law is made a mockery, meaning one thing in one paragraph and something else in the next. The law is thereby made less workable in the sense that it is made more confusing and less decipherable to the ordinary citizen. As we noted this very term in *Joliet v Pitoniak,* 475 Mich 30, 40; 715 NW2d 60 (2006), when two decisions from this Court contain conflicting analysis, this Court is "obligated to resolve this conflict and decide which decision best reflects the legislative intent expressed in the words of the statute . . . ." This is true even where, as here, the conflicting decisions address the same or similar language, but not the same statutes.[19]

Regarding reliance interests, *Hagerman,* having been decided just eight years ago, has not become "so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."[20] Such reliance is only present where the prior decision has caused a large number of persons to attempt to conform their conduct to a certain norm. For example, where an entire class of individuals or businesses purchase insurance and another entire class does not in reliance on a decision by this Court, this may be viewed as the sort of reliance that could cause "practical

[19] Such was the case in *Joliet*, in which we overruled *Jacobson v Parda Fed Credit Union,* 457 Mich 318; 577 NW2d 881 (1998), a case involving a provision of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., because its analysis conflicted with that utilized in *Magee v Daimler-Chrysler Corp,* 472 Mich 108; 693 NW2d 166 (2005), a case involving a provision of the Civil Rights Act, MCL 37.2101 *et seq*.

[20] *Robinson, supra* at 466.

real-world dislocations." Cf. *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002). There is a significant distinction between merely *complying* with precedent and affirmatively altering one's behavior in reliance on precedent. Where there is mere *compliance* with precedent, the overruling of that precedent will not cause "practical real-world dislocations," but where a great number of people affirmatively alter their behavior in reliance on precedent, the overruling of a precedent may cause "practical real-world dislocations."[21] This Court's decision in *Hagerman* cannot be said to have caused a great number of persons to affirmatively alter their conduct in any way, except in

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[21] In his dissent Justice CAVANAGH criticizes our approach as "a standardless, arbitrary theory" and asserts that it "completely guts" the test set forth in *Robinson*. *Post* at 531. This is not true. This is exactly the same standard that we set forth in *Robinson*, and it is not standardless. As we explained in *Robinson*, the only instances in which we might decline to overrule a previous decision that erroneously interpreted a statute is when the previous decision has come to be relied upon by so many people and to such an extent that to overrule it "would produce chaos." *Robinson, supra* at 466 n 26. One of the several examples we gave in *Robinson* was this Court's initial advisory opinion determining that the no-fault automobile insurance act is constitutional. *In re Constitutionality of 1972 PA 294,* 389 Mich 441; 208 NW2d 469 (1973). In reliance on this decision, thousands of Michigan motorists have purchased mandatory insurance policies that differ in the coverage they afford from the policies issued in fault-based systems; insurers providing coverage in Michigan, both Michigan-based and those based out of state, have completely revised their policies and practices in order to conform to the no-fault act; the office of the Commissioner of Insurance has altered its procedures, instituted its own rules and practices, and issued various bulletins dealing with issues arising out of the no-fault act. This is the type of widespread reliance that may cause this Court, as a matter of prudence, to decline to overrule an earlier decision that was erroneously decided. In such a case, correcting the deficiency in this Court's prior ruling would be better left to the Legislature, which has the ability to enact comprehensive legislation that not only corrects this Court's error but also alleviates the problems caused by the extensive reliance interests.

the sense that any law requires general compliance with its terms. It cannot be seriously argued that Randall Paige positioned himself in reliance on *Hagerman*. He, as indeed any injured employee we might see, did not script his unfortunate injuries and illnesses with reference to *Hagerman* or any other case of this Court. Nor did his lawyers proceed any differently because of *Hagerman*. Furthermore, for most of the duration of this litigation *Hagerman's* status was precarious, and known to be such, because *Robinson,* which made *Hagerman* untenable, was decided only two years after *Hagerman*.

Finally, we need not consider whether changes in the law and facts no longer justify *Hagerman* because *Hagerman* itself was never justified as it was a change in the law that this Court had the power, but not the authority, to make. It was not justified from its inception.

Thus, with *Hagerman* no longer controlling, we return to the language of the statute. It is the case that in order for an employer to be liable for death benefits under MCL 418.375(2), the deceased employee's work-related injury must have been "the one most immediate, efficient, and direct cause preceding [the death]."[22] We therefore remand this case to the WCAC for a determination whether Randall Paige's work-related injury was "the proximate cause" of his death under this standard.

B. RESPONSE TO JUSTICE CAVANAGH

The dissent of Justice CAVANAGH stridently criticizes the positions the majority has taken. His theme is that our positions are tedious in that we have argued them

[22] *Robinson, supra* at 459.

in the past, as well as that we are irresponsible. It is true that we have argued them previously, but in the law consistency is not normally seen as a defect; if it is, the dissent's arguments against our rather simple thesis, which holds that one who says "the proximate cause" has said something different than one who says "a proximate cause," are equally shopworn. In attempting to provide buoyancy for his argument that we are irresponsible, Justice CAVANAGH restates the simply incorrect claim that we have overturned cases at an unprecedented rate. Yet, as we pointed out with statistics in *Sington v Chrysler Corp,* 467 Mich 144, 166-170; 648 NW2d 624 (2002), and *Mack v Detroit,* 467 Mich 186, 211; 649 NW2d 47 (2002), and as Victor E. Schwartz has also discussed in his article *A critical look at the jurisprudence of the Michigan Supreme Court,*[23] we have not done that. Unwilling to rebut either the statistics or the Schwartz analysis, Justice CAVANAGH continues making the claim, hoping, one surmises, that readers will not know any better. We think they will.

With regard to Justice CAVANAGH's claim that history's judgment of us will be unkind, this also is not a new claim.[24] We think the concern should be his. Our core argument is that texts should be approached using the same doctrines every time. This could be described as a "truth in reading" approach. His is the less easily defended notion that sometimes you read statutes using textual and grammatical rules that all users of the language normally employ, but on other entirely unpredictable occasions you do not. Accordingly, while Justice CAVANAGH in some cases does use the textual rules that

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[23] 85 Mich B J 38, 41 (January, 2006).

[24] See, e.g., *People v Goldston,* 470 Mich 523, 571; 682 NW2d 479 (2004) (CAVANAGH, J., dissenting).

courts have traditionally employed,[25] in others he jumps the textualist rails and employs interpretive approaches that disregard what the instrument actually says and instead rely on extratextual sources such as legislative testimony,[26] the perceived intent of the Legislature,[27] overarching policy considerations,[28] or even what has been described as the theory of "legislative befuddlement," which holds that the Legislature can, if we desire, be held to not know what it is doing and thus we need not do what it directs.[29] It bears emphasizing that he has in the past provided no rationale regarding which technique he will use in any given case so that litigants, or even citizens attempting to structure their conduct to accord with the law, have no idea which Justice CAVANAGH, the traditionalist or the deconstructionist, will decide the case. In response to this assertion, he now argues that he only departs from the traditional approach when a statute is unclear or ambiguous, *post* at 540, yet even a casual review of the

[25] See, e.g., *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004); *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516; 676 NW2d 207 (2004); *Stanton v Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002); *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001); *In re MCI Telecom Complaint*, 460 Mich 396; 573 NW2d 51 (1998); *In re Wirsing*, 456 Mich 467; 573 NW2d 51 (1999).

[26] See, e.g., *Mayor of Lansing v Pub Service Comm,* 470 Mich 154, 184; 680 NW2d 840 (2004) (CAVANAGH, J., dissenting); *Haynie v Dep't of State Police,* 468 Mich 302, 331-332; 664 NW2d 129 (2003) (CAVANAGH, J., dissenting).

[27] See, e.g., *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 599-603; 702 NW2d 539 (2005) (CAVANAGH, J., dissenting); *Mayor of Lansing, supra* at 173; *Neal v Wilkes,* 470 Mich 661, 674; 685 NW2d 648 (2004) (CAVANAGH, J., dissenting).

[28] See, e.g., *Devillers, supra* at 594-613 (CAVANAGH, J., dissenting); *Lind v Battle Creek,* 470 Mich 230, 235-243; 681 NW2d 334 (2004) (CAVANAGH, J., dissenting); *Veenstra v Washtenaw Country Club,* 466 Mich 155, 168-174; 645 NW2d 643 (2002) (CAVANAGH, J., dissenting).

[29] *Robinson, supra* at 460.

cases cited herein reveals that this defense will not bear scrutiny and that in fact he will find a way, no matter how tendentious (see in particular *Mayor of Lansing v Public Service Comm,* 470 Mich 154; 680 NW2d 840 [2004]), to declare that which he wishes to be ambiguous or unclear to be exactly that. It is an approach of ambiguity by fiat.

Supplementing all these extratextual tools Justice CAVANAGH uses to reach a desired outcome is his utilization of the notion of legislative acquiescence, which he deploys when an effort is made to overrule a past case where the law was not followed. On such occasions, he argues, as he does in this case, that this Court should retain the previous interpretation of a statute that is clearly wrong simply because the Legislature has not amended the statute to correct our error.[30] However, as this Court explained in *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), the doctrine of legislative acquiescence is not recognized in this state for the sensible reason that "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." (Emphasis in original.)[31] Not content to merely ignore *Donajkowski,* he advances a new argument for legislative acquiescence, which is the startling notion that once this Court " 'interprets a statute, then the statute becomes what this Court has

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[30] See, e.g., *Devillers, supra* at 613-614; *Neal, supra* at 676-677; *Jones v Dep't of Corrections,* 468 Mich 646, 665; 664 NW2d 717 (2003) (CAVANAGH, J., dissenting); *Mack v Detroit,* 467 Mich 186, 222; 649 NW2d 47 (2002) (CAVANAGH, J., dissenting); *Robertson v DaimlerChrysler Corp,* 465 Mich 732, 767-768; 641 NW2d 567 (2002) (CAVANAGH, J., dissenting).

[31] See also *Boys Markets, Inc v Retail Clerks Union, Local 770,* 398 US 235, 242; 90 S Ct 1583; 26 L Ed 2d 199 (1970) ("[T]he mere silence of Congress is not a sufficient reason for refusing to reconsider the decision.").

said it is' " and that it is " 'neither more nor less than an amendment,' "[32] therefore making it impermissible for this Court to ever revisit its interpretation of the statute. This is an odd argument for Justice CAVANAGH to make, and undeniably inconsistent with his own practices, given that he has in other cases in the last several years supported this Court's decisions to correct erroneous interpretations given to statutes in the past.[33] Moreover, his authority for this audacious statement is an unenthusiastic reference to United States Supreme Court Justice Hugo Black's lone dissenting statement in the 1970 case of *Boys Markets, Inc v Retail Clerks Union, Local 770*.[34] This is an unconvincing authority to cite, as even he seems to acknowledge, because the majority did not share Justice Black's view[35] and, in that very case, overruled an earlier case

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[32] *Post* at 537, quoting *Boys Markets, supra* at 257-258 (Black, J., dissenting).

[33] See, e.g., *People v Williams,* 475 Mich 245, 265; 716 NW2d 208 (2006) (CAVANAGH, J., concurring in the result only); *People v Schaefer,* 473 Mich 418, 450-451; 703 NW2d 774 (2005) (CAVANAGH, J., concurring).

[34] Justice CAVANAGH also attempts to support his position by selectively quoting from *Douglass v Pike Co,* 101 US 677, 687; 25 L Ed 968 (1879). *Douglass*, however, does not support Justice CAVANAGH's assertion that a judicial construction of a statute becomes part of the statute itself, thereby barring a court from revisiting its decision in the future. Rather, *Douglass* says only that a judicial construction of a statute becomes binding "so far as contract rights acquired under it are concerned." *Id.*

[35] Moreover, we would point out that Justice Black's conclusion to never revisit statutory construction cases is easier to square with the United States Constitution's separation of powers jurisprudence if it is seen, although he evidently did not, as an exercise of prudence. To not revisit a statute once construed is a utilitarian discipline perhaps compelled by that Court's need to devote itself primarily to constitutional adjudications. This "tyranny of the urgent" argument, if it pertains to the United States Supreme Court, which accepts appeals from 13 federal courts of appeals and all 50 states, surely does not pertain to this or any other state supreme court, and to our knowledge has never been asserted

that had improperly construed the statute at issue.[36] The consequential point, however, is that this dubious view of judicial power, even if it could be construed as defensible under the United States Constitution, is not defensible under the Michigan Constitution. Our Constitution strictly forbids a court from exercising legislative power by providing that "[n]o person exercising the powers of one branch [of government] shall exercise powers properly belonging to another branch . . . ."[37] In short, we cannot "amend" statutes and Justice CAVANAGH's view is directly at odds with our own Constitution.

With the claimed federal authorities exposed as no authority at all, we return to the fact that Justice CAVANAGH chooses to ignore the holding of this Court in *Donajkowski*, just as he has ignored this Court's holdings rejecting his unprincipled approach to declaring statutes ambiguous.[38] In doing so, Justice CAVANAGH reveals how little fidelity he has to precedent when he does not like the precedent. His argument on stare decisis then is, and should be seen as, entirely inconsis-

by one in this nation. We are frankly surprised that Justice CAVANAGH would, in light of these difficulties, advance it in our state.

[36] *Boys Market, supra* at 237-238.

[37] Const 1963, art 3, § 2.

[38] A by no means exhaustive list would include *Mayor of Lansing, supra* at 164-167; *Twichel v MIC General Ins Corp,* 469 Mich 524, 535; 676 NW2d 616 (2004); *People v Spann*, 469 Mich 904 (2003); *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass Industries, Inc),* 468 Mich 109, 114-117; 659 NW2d 597 (2003); *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 474; 663 NW2d 447 (2003); *People v Jackson,* 467 Mich 939 (2003); *Sington, supra*; *Dan De Farms v Sterling Farm Supply, Inc,* 467 Mich 857 (2002); *Koontz v Ameritech Services, Inc,* 466 Mich 304, 317-318; 645 NW2d 34 (2002); *Lesner v Liquid Disposal, Inc,* 466 Mich 95, 103 n 9; 643 NW2d 553 (2002); *Crowe v Detroit,* 465 Mich 1, 13-16; 631 NW2d 293 (2001); *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 175 n 30; 615 NW2d 702 (2000); *DiBenedetto v West Shore Hosp,* 461 Mich 394, 403-407; 605 NW2d 300 (2000).

tent. His test on when to leave the text and search for meaning elsewhere is really no more sophisticated than doing so when the desired outcome is one the text alone will not allow. This is, of course, an indefensible theory of jurisprudence even superficially. Further, it is dangerous because with it comes the death of predictability in the law. If institutionalized as a practice, our citizens could never tell in advance which judge, and thus what preferences, will control. If fully implemented in the law, our courts would be seen as only a scramble for jackpots. Much more can be said negatively of this "judicial supremacist" approach, and we have,[39] but at root it gives to judges, not to the people through the Legislature, control of public policy.[40] Our constitutions have never authorized such a usurpation,[41] and the cultivation and seizure of such power, we believe, itself invites history's reproach.

This response has also prompted Justice CAVANAGH to claim that we are attacking him personally and being insufficiently respectful of our predecessors on this Court. This is not only inaccurate but peculiar coming from a justice who himself has this term accused the majority of writing an opinion to advance the majority members' interests,[42] and has, in the past, accused the justices in the majority of making "unforgivable" fabri-

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[39] See, e.g., *Devillers supra* at 592-593; *Cameron v Auto Club Ins Ass'n,* 476 Mich 55, 64-67; 718 NW2d 784 (2006).

[40] *Sington, supra* at 169-170; *Halloran v Bahn,* 470 Mich 572, 579; 683 NW2d 129 (2004); *Van v Zahorik,* 460 Mich 320, 327; 597 NW2d 15 (1999).

[41] *Hagerman, supra* at 764-766 (TAYLOR, J., dissenting); Rehnquist, *The Supreme Court*, (New York: William Morrow and Company, Inc, 1987), p 275.

[42] *In re Haley,* 476 Mich 180, 201 n 1; 720 NW2d 246 (2006) (CAVANAGH, J., concurring).

cations,[43] basing decisions on the view of what is "socially acceptable behavior,"[44] and having a "complete lack of respect" for civil rights.[45]

All we are doing is pointing out the problems with his methodology of deciding cases. That is not a personal attack. His claim should be seen as the latest volley in a years-long effort by the remnants of the pre-1999 Court and its supporters to do what they can to bring back the less disciplined approach of that Court.

In that era, Justice CAVANAGH was much more influential because he had more colleagues who shared his approach. His influence has waned and with it the influence of those who benefit from the legal regime of which he was an unquestioned leader—a regime where the decisions were highly unpredictable, inconsistent, and virtually any claim was a possible winner. He and they are very unhappy with the changes and have not accommodated well to the current situation. The fact that we point out that Justice CAVANAGH has articulated no consistent legal principles or methodology for deciding cases is neither a personal attack nor an occasion for martyrdom. However, for Justice CAVANAGH, it is an inconvenient fact.

We close by returning to this case and what should not be lost sight of here. That is that in Justice CAVANAGH's world it is perfectly normal, indeed correct, that sometimes absolutely identical phrases in our statutes, here "the proximate cause," have different meanings in different statutes. To express the notion is to expose its flaw. To the extent that Justice CAVANAGH

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[43] *Henry v Dow Chemical Co,* 473 Mich 63, 117; 701 NW2d 684 (2005) (CAVANAGH, J., dissenting).

[44] *Shinholster v Annapolis Hosp,* 471 Mich 540, 601; 685 NW2d 275 (2004) (CAVANAGH, J., dissenting).

[45] *Lind v Battle Creek,* 470 Mich 230, 236; 681 NW2d 334 (2004) (CAVANAGH, J., dissenting).

continues to espouse it and its justifying nostrums, we will continue to do our best to write of their shortcomings and to expose how compromising to the development of a principled jurisprudence they are.

C. DEPENDENCY

If the work-related injury qualifies as "the proximate cause" of the employee's death under the definition we have set forth above, the next inquiry under MCL 418.375(2) is whether the employee left dependents and, if so, whether they were "wholly or partially dependent on him or her for support . . . ." The answers to these questions are provided in MCL 418.341, which provides, in relevant part:

> Questions as to who constitutes dependents and the extent of their dependency shall be determined as of the date of the injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions except as otherwise specifically provided in sections 321, 331 and 335.

Accordingly, under this statute, the workers' compensation magistrate must determine whether there were persons dependent on the deceased employee, and the extent of such dependency, by looking at the circumstances at the time of the work-related injury—not at the time of death. In the present case, Magistrate Miller listed Adam Paige as a dependent of Randall Paige when he issued his 1993 order granting Randall Paige an open award of benefits. Defendant did not appeal Magistrate Miller's 1993 order. Therefore, the issue whether Adam was dependent on his father at the time of the work-related injury is res judicata,[46] and defen-

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[46] The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the

dant may not challenge it now. But, as defendant correctly argues, Magistrate Miller did not determine the *extent* of Adam's dependency on his father at the time of the work-related injury, i.e., whether Adam was wholly or partially dependent upon Randall Paige. Without such a determination being made, the rate of any weekly death benefits to which Adam may be entitled cannot be calculated.

The WCAC rejected defendant's argument and held that Adam is conclusively presumed to be wholly dependent under MCL 418.331, which provides, in pertinent part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
>
> * * *
>
> (b) A child under the age of 16 years . . . upon the parent with whom he or she is living at the time of the death of that parent. . . . In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury.

The WCAC's conclusion that Adam, who was under the age of 16 at the time of the injury but over the age of 16 at the time of the death, is entitled to the conclusive presumption of whole dependency was erroneous. In *Runnion, supra,* we interpreted the predecessor of MCL 418.331(b), which was substantively similar,[47] consistently with its plain terms, i.e., that the presumption of whole dependency applies *only* if the

first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. *Baraga Co v State Tax Comm,* 466 Mich 264, 269; 645 NW2d 13 (2002); *Gursten v Kenney,* 375 Mich 330, 335; 134 NW2d 764 (1965).

[47] 1929 CL 8422 provided:

child was under the age of 16 at the time of the employee's *death*. If the child was, like Adam in this case, over the age of 16 at the time of the employee's death, the fact that the child was under the age of 16 at the time of the injury does not entitle the child to the conclusive presumption of whole dependency. Instead, "[w]hether there was actual dependency, total or in part, at the time of the injury is a question of fact."[48]

In the present case, the WCAC noted our decision in *Runnion* but essentially ignored it, relying instead on statements made by the Court of Appeals in *Murphy, supra,* to conclude that a child is entitled to the presumption as long as the child was under the age of 16 at the time of the work-related injury. There are two problems with the WCAC's having disregarded *Runnion* and relied on *Murphy*. First, *Runnion* directly addressed the proper interpretation of MCL 418.331(b) with regard to the issue presented here, while *Murphy* involved an altogether different issue implicating MCL 418.335.[49] Second, and more important, even if *Murphy* had directly addressed the statute and issue presented

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> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
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> * * *
>
> (b) A child or children under the age of sixteen years, . . . upon the parent with whom he is or they are living at the time of the death of such parent . . . . In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury.

[48] *Runnion, supra* at 24.

[49] *Murphy* concerned the amount of discretion afforded a magistrate by MCL 418.335 to order an employer to continue paying benefits until the dependent turns 18, even though the normal 500-week benefit period has expired. *Murphy, supra* at 596-601. Obviously, this had nothing to do with the proper interpretation of MCL 418.331(b).

in this case, the WCAC would not be justified in choosing to follow *Murphy* instead of *Runnion*. The obvious reason for this is the fundamental principle that only this Court has the authority to overrule one of its prior decisions. Until this Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). In short, the WCAC may not, as it has attempted to do here, presume to overrule this Court by disregarding *Runnion* and seeking to impose its own construction of MCL 418.331(b).

Accordingly, should the WCAC determine on remand that Randall Paige's work-related injury was the proximate cause of his death, we direct it to further determine the extent of Adam Paige's dependency on Randall Paige at the time Randall Paige suffered the work-related injury.

IV. CONCLUSION

We hold that the definition of the phrase "the proximate cause" set forth in *Robinson, supra,* applies to MCL 418.375(2) of the WDCA. In so holding, we overrule *Hagerman, supra*. Accordingly, we vacate the decision of the WCAC and remand this case to the WCAC for a determination of whether Randall Paige's work-related injury was "the proximate cause" of his death under the *Robinson* definition. Furthermore, the WCAC erred in determining that Adam Paige is entitled to a conclusive presumption of whole dependency under MCL 418.331(b). If, on remand, the WCAC determines that Randall Paige's work-related injury was "the proximate cause" of his death, we direct the WCAC to determine the extent of Adam Paige's dependency upon

Randall Paige at the time Randall Paige suffered the work-related injury in accordance with *Runnion, supra.*[50]

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

WEAVER, J. (*concurring*). I concur in the majority's result and analysis, except part III(B), which is the majority's response to Justice CAVANAGH'S partial dissent.

CAVANAGH, J. (*concurring in part and dissenting in part.*) Today, a majority of this Court vacates the decision of the Workers' Compensation Appellate Commission and remands this case for reconsideration in light of *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). In doing so, the majority overrules *Hagerman v Gencorp Automotive*, 457 Mich 720; 579 NW2d 347 (1998). I firmly believe that *Hagerman* was properly decided and correctly interpreted the phrase "proximate cause" as it is used in MCL 418.375(2).[1]

[50] Our disposition of this case makes consideration of defendant's third issue unnecessary.

[1] MCL 418.375(2) provides:

> If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in

Specifically, this Court correctly considered and rejected the interpretation adopted today; namely, use of the article "the" before the term "proximate cause" does not compel the conclusion that the phrase means sole cause. *Hagerman*, *supra* at 728-729. Further, this Court wisely reasoned that the interpretation adopted today would not only ignore the text of the statute, it would also be inconsistent with concurrent causation principles predating the enactment of MCL 418.375(2). *Hagerman, supra* at 729-734. Indeed, a sole proximate cause requirement would contradict the law's longstanding recognition that there may be more than one proximate cause, and there is no evidence that the Legislature intended to deviate from this principle in MCL 418.375(2). Therefore, *Hagerman* correctly held that the current majority's interpretation of MCL 418.375(2) has neither textual nor historical support. Instead, *Hagerman* held that death is within the range of compensable consequences if the injury was a substantial factor in the death, and such a determination will almost always depend on the facts presented in a given case. *Hagerman, supra* at 736. Accordingly, I must respectfully dissent from today's decision.

Despite my disagreement with the majority's interpretation of MCL 418.375(2) and its election to overrule *Hagerman*, I agree with the majority that the presumption of whole dependency applies if the child was less than 16 years old at the time of the employee's death. MCL 418.331(b); *Runnion v Speidel*, 270 Mich 18; 257 NW 926 (1934).

I could take this opportunity to further explain why *Hagerman* was correctly decided and should not be

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immediate death. Such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.

overruled. Specifically, I could dissect *Hagerman* and explain why a decision from this Court issued just eight years ago and examining the very same issue that is implicated in this case is now being improperly overruled. Further, similarly to how the majority crafts its opinion in this case, I suppose I could simply cut and paste the relevant portions of the *Hagerman* majority opinion in support of my view that *Hagerman* remains good law. Additionally, like the current majority does, I could quote at length from the dissents in *Robinson* to show why *Hagerman* was properly decided. But I believe that my views on this issue are well-documented, as are the majority's views. Accordingly, such an approach would not add much, if any, value to our jurisprudence. In other words, simply rehashing the same differences of opinion that this Court detailed just eight and six years ago does not benefit the bench and bar in any meaningful way. And more importantly, this regurgitation process would still not truly answer the question at hand: Why is a decision of this Court issued just eight years earlier and involving the same issue now being overruled?

Unfortunately, today's majority does not adequately answer that question. Instead, it is clear from today's decision, as well as from *Robinson* and its progeny, that the current majority does not like *Hagerman*. But mere disagreement with a validly issued opinion of this Court has never served as a legitimate basis for overruling precedent. Something more has always been required. *Robinson*, *supra* at 464-465. And the generic justifications the majority provides do not satisfy the standard it set forth in *Robinson* for overruling precedent.[2]

[2] In *Robinson*, this Court observed that before established precedent is overruled, this Court must first decide whether (1) the earlier case was wrongly decided, (2) the earlier case defies practical workability, (3)

Instead, the majority devotes considerable effort in explaining why it believes the *Hagerman* decision was wrong and in personally attacking me, but little attention is paid to carefully explaining why *Hagerman* defies practical workability, whether reliance interests on *Hagerman* weigh against overruling it, and whether there has been some legal or factual change that no longer makes *Hagerman* justifiable. See *Robinson*, *supra* at 464-466. This is both telling and troubling.

Under *Robinson*, before this Court can overrule established precedent, this Court must first decide whether the earlier decision was wrong. For the reasons stated earlier in this dissent, I believe that *Hagerman* was correctly decided. Nonetheless, the current majority disagrees. I must note, however, that apart from recycling *Robinson* and the *Hagerman* dissent, the majority does not set forth any new reasons why *Hagerman* was wrongly decided other than those that were expressly rejected in *Hagerman*. The majority is certainly permitted to reargue the merits of the *Hagerman* dissent in support of its conclusion that *Hagerman* was wrongly decided. And there is little doubt that the majority is entitled to its view. But again, under the doctrine of stare decisis and *Robinson*, merely believing that *Hagerman* was wrongly decided is an insufficient ground to overrule that decision. Other considerations must factor into the calculus. And in light of these other considerations, the majority has simply failed to satisfy the standard for overruling precedent. Therefore, regardless of whether this Court believes that *Hagerman* was correctly decided—like I do—or wrongly decided—

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reliance interests would work an undue hardship if the earlier case was overruled, and (4) changes in the law or facts no longer justify the earlier decision. *Robinson*, *supra* at 464-465; see also *Pohutski v City of Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002).

like the majority does—the doctrine of stare decisis prevents this Court from overruling *Hagerman* at this time.

For example, before this Court can overrule established precedent, this Court must also decide whether, apart from being wrongly decided, the earlier case defies practical workability. Here, the majority has not specifically demonstrated that *Hagerman* defies practical workability. Instead, the majority posits that *Hagerman* is unworkable because the majority believes *Hagerman* is inconsistent with the language of the statute. According to the majority, *Hagerman* is unworkable because a reader and a follower of the statute would not be behaving in accordance with the law because *Hagerman* rewrote MCL 418.375(2). But the majority's rationale with respect to *Hagerman*'s workability really goes back to the majority's belief that *Hagerman* was wrongly decided. Indeed, the majority has not demonstrated that injured employees, insurers, magistrates, or the Workers' Compensation Appellate Commission—the primary readers and followers of the statute—have found *Hagerman*'s interpretation to be unworkable. Indeed, in this case, neither the magistrate nor the Workers' Compensation Appellate Commission had any difficulty in applying *Hagerman* and concluding, on the basis of medical testimony, that the earlier heart attack proximately caused the death. Further, the majority's logic also ignores the notion that *Hagerman*'s interpretation was, in fact, the rule of law, and that the Legislature did not amend the statute because it believed *Hagerman* proved to be unworkable. Therefore, because the majority's rationale regarding *Hagerman*'s workability relates solely to its belief that *Hagerman* was wrongly decided, the majority has not satisfied the standard set forth in *Robinson* for overruling precedent.

Under *Robinson*, this Court must also consider whether reliance interests would be misplaced and cause an undue hardship if established precedent was overruled. Here, the majority's rationale regarding reliance interests is simply unpersuasive and does not satisfy the standard set forth in *Robinson*. The majority tells us that no reliance interests would be disturbed because injured workers, Randall Paige, and his counsel could not have feasibly relied on *Hagerman*, the controlling law at the time of this action. Such an assertion is preposterous because it suggests that injured workers and attorneys who practice in the area of workers' compensation do not, and should not, rely on this Court's interpretation of the Worker's Disability Compensation Act, MCL 418.101 *et seq*. Moreover, such logic is inconsistent with the majority's attempted rationale regarding *Hagerman*'s workability. Here, the majority attempts to claim that *Hagerman* is unworkable because people have a right to rely on the law; however, in its next breath, the majority posits that no reliance interest would be unsettled because people do not actually rely on the law.

Further, the majority also attempts to set forth a rather curious position lacking any legal foundation that "mere *compliance* with precedent" will never amount to a reliance interest. Rather, the majority posits that reliance interests are only considered where a "large number of persons," "an entire class of individuals," or "a great number of people" "attempt to conform their conduct to a certain norm." *Ante* at 511-512. But the majority does not provide any standard for what is a "large number of persons," "an entire class," or "a great number of people." Moreover, the majority theorizes that "mere *compliance* with precedent" is insufficient to affect reliance interests; rather, only where "a great number of people affirma-

tively alter their behavior" will reliance interests be considered. *Ante* at 512 (emphasis in original). Yet the majority does not provide any guidance on what it is that distinguishes "mere *compliance*" from "affirmatively altering . . . behavior." Nor does the majority explain *why* this distinction must pertain when this Court must decide whether to overrule precedent. Instead, the majority offers a standardless, arbitrary theory that lacks any principled legal basis. Because such a theory poses a serious threat to the jurisprudence of this Court, completely guts the test set forth by the majority in *Robinson* for overruling precedent, and invites abuse, such a theory is fundamentally flawed.

Worse still, the majority claims that no reliance interests would be unsettled because injured employees do not script their injuries and illnesses on the basis of the opinions of this Court. But such a claim is insulting to those who happen to be injured on the job, and it demonstrates that the majority's rationale regarding the reliance placed on *Hagerman* starts from a faulty premise. Granted, workers do not choose to become injured or sick on the basis of the decisions of this Court. Getting hurt or sick is often not a choice; workers simply get injured or sick. But when a worker suffers an injury or illness arising out of and in the course of employment, that worker and his counsel then rightfully rely on the rule of law when deciding how to protect and pursue the worker's rights. And the rule of law applicable at the time the worker in this case died was *Hagerman*. As a validly issued decision of this Court, *Hagerman* was the controlling law in this state. And a validly issued decision from this Court is only rendered "untenable" when it is properly overruled by this Court. Accordingly, *Hagerman*'s status was not precarious because *Robinson* did not expressly or im-

plicitly overrule *Hagerman*.[3] Therefore, the majority's rationale regarding the reliance interests placed on *Hagerman* does not satisfy the standard it set forth in *Robinson*.

Finally, before this Court can overrule established precedent, this Court must also decide whether changes in the law or facts no longer justify the earlier decision. Here, the majority simply concludes:

> [W]e need not consider whether changes in the law and facts no longer justify *Hagerman* because *Hagerman* itself was never justified as it was a change in the law that this Court had the power, but not the authority, to make. It was not justified from its inception. [*Ante* at 513.]

Clearly, such an assertion completely ignores the standard for overruling precedent set forth in *Robinson*. And importantly, the majority's rationale in this statement again reveals its belief that it can properly overrule *Hagerman* simply because it believes that *Hagerman* was wrongly decided. In other words, the majority does not feel the need to point to any special justification or change to support its election to overrule *Hagerman*. Perhaps that is because there has been no change in the law or the workers' compensation landscape in the eight years since *Hagerman* was decided. The only

[3] In any event, *Hagerman* was allegedly rendered "untenable" and "inconsistent" by design. The author of the *Hagerman* dissent was given the opportunity to examine an arguably similar issue and pen *Robinson*. In doing so, the author relied on his *Hagerman* dissent. Still, *Hagerman* was not expressly or impliedly overruled. Yet the seed was planted, the instant defendant seized this opportunity, and the author of the *Hagerman* dissent has now been granted his wish. Under these circumstances, it cannot honestly be said that this case falls within the class of cases where it is this Court's duty to reexamine precedent " ' "where its reasoning . . . is *fairly* called into question." ' " *Sington v Chrysler Corp*, 467 Mich 144, 161; 648 NW2d 624 (2002) (emphasis added; citations omitted). Rather, it was reasonable for the readers and followers of MCL 418.375(2) to rely on *Hagerman* until properly overruled.

change has been the composition of this Court. And unfortunately, this is the only reasonable answer to the question why a decision from this Court decided just eight years earlier and involving the same issue is now being overruled. But make no mistake, this answer is alarming, and it has become increasingly common. See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

Granted, it is said that stare decisis is not " 'an inexorable command.' " *Robinson*, *supra* at 464 (citation omitted). And under some circumstances, overruling precedent may be unavoidably necessary. But "this Court has consistently opined that, *absent the rarest circumstances*, we should remain faithful to established precedent." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (emphasis added). Moreover, this Court " 'will not overrule a decision deliberately made unless [it] is convinced not merely that the case was wrongly decided, but also that less injury would result from overruling than from following it.' " *Id*. (citation omitted). Thus, stare decisis is " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson*, *supra* at 463 (citation omitted).[4]

[4] In its response to this dissent, the majority includes a citation to a text written by Chief Justice William H. Rehnquist. However, the majority would be well-advised to read more of the late chief justice's jurisprudence, particularly his views on the doctrine of stare decisis. For example, it is no surprise that Chief Justice Rehnquist was highly critical of the constitutional rule announced in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See, e.g., *Michigan v Jackson*, 475 US 625, 637-642; 106 S Ct 1404; 89 L Ed 2d 631 (1986) (Rehnquist, J., dissenting). But Chief Justice Rehnquist was also the author of the Court's decision that later reaffirmed *Miranda*. *Dickerson v United States*, 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000). In *Dickerson*, Chief Justice Rehnquist wrote:

Here, overruling *Hagerman* does not advance any of these principles. In fact, just the opposite is true.

Again, the reasons the majority advances in support of overruling *Hagerman* are simply unpersuasive. As noted earlier, the current majority offers no *new* reasons why *Hagerman* was wrongly decided other than those duly considered and reasonably rejected in *Hagerman*.[5] So it cannot be said that overruling *Hagerman* contributes to the development of the law. Rather, overruling *Hagerman* in the manner employed today signals that any decision from this Court depends on and is only as strong as the Court's composition. When those justices who were once in the minority find themselves in the majority, today's decision gives those justices free license to vindicate their dissents and disregard the doctrine of stare decisis. There is nothing evenhanded or predictable in this approach. Nothing in such an approach fosters reliance on this Court's deci-

> Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. While " '*stare decisis* is not an inexorable command,' " particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " [*Id*. at 443 (citations omitted).]

As explained more fully earlier in this dissent, the majority in this case offers no "special justification" for overruling *Hagerman* other than its belief that it was wrongly decided. Therefore, the majority's approach in this case appears inconsistent with the late chief justice's views.

[5] The only new "analysis" set forth by the current majority involves its disapproval of what it considers so-called "preferential rules of construction." *Ante* at 509. But I disagree with the views expressed in this discussion. In any event, the majority's discussion of these "preferential rules of construction" does not even come close to establishing a legitimate, independent reason to overrule *Hagerman*.

sions. And certainly such actions destroy the actual and perceived integrity of this Court. This Court—including its past, current, and future members—and the rule of law are entitled to more respect. The mere dislike of some justices on this Court of decisions rendered by justices who previously sat in their chairs does not constitute a sufficient ground under the law to disregard and overrule those past decisions.

Let me be perfectly clear. This dissent cannot properly be characterized as "sour grapes" simply because I believe that *Hagerman* was correctly decided and, importantly, should not be overruled. If that were true, I would be guilty of roughly the same sin as the majority. Nor can this dissent be appropriately labeled as an expression of how I would *prefer* MCL 418.375(2) to be interpreted. Even a casual reading of *Hagerman* refutes such a charge.[6]

Instead, this dissent is intended to highlight the rather unremarkable principle that this Court and the laws of this state are larger than any individual justice, justices, or "philosophy." This dissent is also intended to urge the majority to follow the doctrine of stare decisis, a fundamental principle of our law. Further, this dissent is intended to observe that the doctrine of stare decisis is particularly strong in matters of statutory interpretation, like *Hagerman*, because if this Court previously interpreted a statute incorrectly, the Legislature can subsequently remedy that interpretation and fix the statute, which it has not done in this case. Moreover, this dissent is intended as a reminder that adherence to stare decisis in matters of statutory interpretation where the Legislature has not corrected the interpreta-

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[6] Interestingly, similar unfounded accusations were lodged by the *Hagerman* dissent and prudently rejected by the *Hagerman* majority. See *Hagerman*, *supra* at 734 n 12.

tion respects principles of separation of powers, is consistent with the "judicial role," and avoids arbitrariness. Finally, this dissent is intended to highlight the principle that the rule of law also includes this Court's precedent. Sadly, these principles remain a mystery to the current Court, and the underlying debate involving these principles has been going on for some time. See, e.g., *Robertson v DaimlerChrysler*, 465 Mich 732; 641 NW2d 567 (2002).

Nonetheless, the majority completely misses the point of this dissent. Rather than adequately explaining why stare decisis is being ignored in this case—the point raised by this dissent—the majority seeks to blur what this case is truly about. In doing so, the majority confuses the legal issues and simultaneously attempts to silence those who disagree. But once the histrionics are peeled away, the pretense of the majority's decision in this particular case is evident.

For example, the majority speaks of consistency and predictability. But again, the majority does not adequately explain why it disregards the doctrine of stare decisis—*a doctrine that is fundamentally based on consistency and predictability*. Accordingly, what the majority professes to be a basis for its "philosophy" is at odds with what the majority is actually doing in this particular case. Moreover, the majority speaks of constitutional usurpation and separation of powers. But again, the majority does not adequately explain why it disregards the doctrine of stare decisis in a matter of statutory interpretation when the Legislature itself has not seen fit in eight years to correct *Hagerman*'s allegedly incorrect interpretation. Therefore, the majority's rhetoric concerning public policy is at odds with what the majority is actually doing in this particular

case—*making a policy choice for the Legislature and the people*.[7]

In matters of stare decisis, Justice Black summed up his own views on the issue in his dissent in *Boys Markets, Inc v Retail Clerks Union, Local 770*, 398 US 235, 257-258; 90 S Ct 1583; 26 L Ed 2d 199 (1970). And while it is unnecessary to adopt Justice Black's views for Michigan law, his views, and the underlying principles, are at least worthy of consideration. Justice Black observed:

> In the ordinary case, considerations of certainty and the equal treatment of similarly situated litigants will provide a strong incentive to adhere to precedent.
>
> When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws. Of course, when this Court first interprets a statute, then the statute becomes what this Court has said it is. Such an initial interpretation is proper, and unavoidable, in any system in which courts have the task of applying general statutes in a multitude of situations. The Court undertakes the task of interpretation, however, not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it. When the law has been settled by an earlier case then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.

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[7] See, e.g., *Douglass v Pike Co*, 101 US 677, 687; 25 L Ed 968 (1879) ("After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.").

> Altering the important provisions of a statute is a legislative function. And the Constitution states simply and unequivocally: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." It is the Congress, not this Court, that responds to the pressures of political groups, pressures entirely proper in a free society . . . . This Court should, therefore, interject itself as little as possible into the law-making and law-changing process. Having given our view on the meaning of a statute, our task is concluded, *absent extraordinary circumstances*. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature. [*Id*. at 257-258 (Black, J., dissenting) (emphasis added; citations omitted).][8]

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[8] Remarkably, the majority proclaims that Justice Black's views are "no authority at all" and, thus, his views need not even be considered in this debate. *Ante* at 518. Accordingly, the majority tries mightily to ignore Justice Black's view that overruling precedent that previously interpreted a statute always amounts to a violation of separation of powers. Presumably this is because those in the majority believe that a separation of powers argument is uniquely theirs to make. But the majority's attempts to discount Justice Black's views are flawed. For example, the majority claims that Justice Black's view may be consistent with the United States Constitution's separation of powers principles but not our own. Yet the majority does not explain how the fundamental principle embodied in the United States Constitution practically differs from Michigan's: "the doctrine of separation of powers . . . is set forth in Const 1963, art 3, § 2, which provides that '[t]he powers of government are divided into three branches: legislative, executive and judicial,' and further provides that '[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.' " *Warda v Flushing City Council*, 472 Mich 326, 334 n 4; 696 NW2d 671 (2005). Additionally, the majority claims that Justice Black's view may be applicable in the United States Supreme Court given the peculiar nature of "that Court's need to devote itself primarily to constitutional adjudications." *Ante* at 517 n 35. However, contrary to the majority's understanding, the United States Supreme Court's jurisdiction is not so limited:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and

> Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. [US Const, art III, § 2.]

See also Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), pp 13-14 ("A very small proportion of judges' work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I and all federal judges do is interpret the meaning of federal statutes and federal agency regulations.").

Further, the majority claims that Justice Black's view may pertain to the United States Supreme Court, but not state supreme courts, because the United States Supreme Court's workload is daunting because that Court accepts appeals from many lower courts under its jurisdiction. But such an assertion ignores the reality that state supreme courts, including the Michigan Supreme Court, also accept appeals from the lower courts under their jurisdiction. Additionally and, frankly, comically, the majority attempts to discount Justice Black's views simply because he voiced them in a dissent and the majority in that case rejected his views. But in the very case before this Court, the majority uses the *Hagerman* dissent as its primary authority for concluding that *Hagerman* was wrongly decided and, therefore, must be overruled.

Finally, the majority attempts to argue that Justice Black's view is not defensible under the Michigan Constitution because our Constitution forbids a court from exercising legislative power. Accordingly, the majority protests and simplistically asserts that it cannot amend statutes. But this is the very point Justice Black was attempting to make, and apparently this point is lost on the majority. Justice Black posits that any "reinterpretation" of a settled statute is effectively an amendment. And because "we cannot 'amend' statutes," Justice Black asserts that doing so would violate principles of separation of powers. *Ante* at 518. Again, it is not necessary to adopt Justice Black's view for Michigan's jurisprudence, and I am not advocating that we do so now. I do believe, however, that a Court that consistently preaches the importance of separation of powers should at least consider the thoughtful points raised on this very issue by a United States Supreme Court justice.

Yet in light of the points raised by this dissent, at its basic core, the majority nevertheless tells the people of this state that its "philosophy" and "preferences" should control the outcome of a given case. But the rule of law and the facts of the case should control the outcome, not any "philosophy." In matters of statutory interpretation, I have never wavered from the principle that a plain and unambiguous statute is to be applied as written. Under some circumstances, however, a statute may be unclear or ambiguous, which is likely to happen in cases reaching the highest Court in this state. As such, when a statute is unclear, then well-established, centuries-old rules of construction often come into play and may help this Court resolve the controversy and determine the Legislature's intent.

Accordingly, I encourage readers to examine the sampling of cases that the majority sets forth and judge my fidelity for themselves. See *ante* at 515 nn 26-29. For example, sometimes a statute is plain and unambiguous; therefore, the judge applies the statute as written. *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004); *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516; 676 NW2d 207 (2004); *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002); *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001); *In re MCI Telecom Complaint*, 460 Mich 396; 596 NW2d 164 (1999); *In re Wirsing*, 456 Mich 467; 573 NW2d 51 (1998). Other times a statute may be ambiguous or unclear, and judicial construction then becomes necessary and the judge must "jump the textualist rails." See, e.g., *Lansing Mayor v Public Service Comm,* 470 Mich 154, 174; 680 NW2d 840 (2004) (CAVANAGH, J., dissenting) ("I, on the other hand, believe that the statute is ambiguous and turn to legislative history accompanying the statute to discern the Legislature's true intent."). And other times principles of stare decisis in

matters of statutory interpretation, particularly where the Legislature has not responded to a prior interpretation, weigh against overruling precedent absent sound and specific justification. See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 613-614; 702 NW2d 539 (2005) (CAVANAGH, J., dissenting); *Neal v Wilkes*, 470 Mich 661, 676-677; 685 NW2d 648 (2004) (CAVANAGH, J., dissenting); *People v Moore,* 470 Mich 56, 78-79; 679 NW2d 41 (2004) (CAVANAGH, J., dissenting); *Jones v Dep't of Corrections,* 468 Mich 646, 665; 664 NW2d 717 (2003) (CAVANAGH, J., dissenting); *Mack v Detroit,* 467 Mich 186, 221-222; 649 NW2d 47 (2002) (CAVANAGH, J., dissenting); *Robertson*, *supra* at 767-768 (CAVANAGH, J., dissenting). Thus, I fail to see how these universally accepted legal principles are unsound, unpredictable, or unprincipled. Rather, I believe that the rule of law and the facts of the case should control the outcome, not ideology or "philosophy." And if the majority wishes to characterize this in itself as a "philosophy" or "methodology," so be it. But as the majority's own rhetoric in this case shows, labels can be dangerous and are often misleading.

I have no doubt that the majority firmly believes that it dispenses justice and that its "philosophy" is the best means to this end and best serves the people of this state. But far too often the majority merely pays lip service to its stated "philosophy" or entirely misapplies it. For example, in cases involving issues of statutory interpretation, the majority and I often disagree whether a particular statute is ambiguous. But because there are two sound, reasonable interpretations based on the statutory language, this should signal that the statute may not be as clear as the majority purports it to be. See, e.g., *Yellow Freight System, Inc v Michigan*, 464 Mich 21; 627 NW2d 236 (2001), rev'd 537 US 36 (2002), vacated and remanded 468 Mich 862 (2003), on remand

257 Mich App 602; 669 NW2d 553 (2003). In any event, because it claims to abhor most well-accepted rules of statutory construction, the majority nonetheless is reluctant in some cases to find ambiguity or conclude that something is unclear. *But no judge should ignore ambiguity when it is present merely to reach a given result, just as no judge should manufacture ambiguity*.[9] Nonetheless, when in cases of statutory interpretation there is a basic, reasonable difference of opinion about whether language is ambiguous, the majority's standard procedure is to vehemently claim a statute is plain and unambiguous, resort to numerous dictionary definitions, and accuse the dissenters and past justices of this Court of legislating from the bench, usurping the role of the Legislature, advancing their own policy preferences, or some combination of these accusations. This approach destroys the public's confidence in this Court.

This case is a perfect example. The majority chooses to criticize me rather than respond and adequately

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[9] For example, in *Twichel v MIC Gen Ins Corp*, 469 Mich 524; 676 NW2d 616 (2004), cited by the majority in this case, the current majority and the dissenters disagreed over whether the term "owner" as used in a particular insurance policy was ambiguous. After selectively consulting numerous dictionary definitions, the *Twichel* majority opined that "possession, control, and dominion are among the primary features of ownership." *Id*. at 534 (emphasis deleted). Relying on these "primary features," the current majority opined that the term "owner" was plain and, therefore, concluded that the person who died in that case was not entitled to benefits. On the other hand, the dissenters concluded that ownership may entail more than possession, dominion, and control. Rather unremarkably, the dissenters reasoned that "owner" may also mean the person " 'who has the legal or rightful title, whether he is the possessor or not.' " *Id*. at 537 (citation omitted) (CAVANAGH, J., dissenting). Accordingly, the majority's citation of *Twichel*, and other similar cases, is illuminating because, as the majority rightfully suggests, it clearly shows the differences between the current majority's and the dissent's views on ambiguity, as well as standard rules of judicial construction.

explain why *Hagerman* must be overruled under accepted principles of stare decisis. In turn, this case has become less about stare decisis and respect for precedent and more about giving the majority another opportunity to extol the virtues of its "philosophy" while simultaneously disregarding the principles that supposedly support its "philosophy," as well as attacking those who disagree. This blurs what this case is really about: *stare decisis and respect for precedent*.

Further, I have no doubt that the majority truly believes that it is fixing what it perceives to be a wrong in this case. However, I believe that *Hagerman* was properly decided. Nonetheless, my disagreement on that point is not really the main thrust of this dissent. Rather, this dissent is intended to observe that there are larger issues at stake in this case: the rule of law, respect for precedent, the integrity of this Court, and judicial restraint. Accordingly, larger institutional issues are implicated in this case.

This case, like all cases that come before this Court, should be about the rule of law, not ideology or partisanship. The cases this Court decides are not some sort of game or political football, complete with "regime[s]," "influence," and "winner[s]." *Ante* at 520. Further, this Court must always be mindful that our decisions have real implications and affect real people. This Court must also be mindful that attacking sitting colleagues who happen to disagree, as well as attacking past justices—who cannot defend themselves—and characterizing them as inferior, "unpredictable," and "inconsistent," does an extreme disservice to this Court and the citizens of this state. *Ante* at 520. Such attacks are disrespectful. Such attacks are not robust legal debate by any definition. And such attacks and rhetoric wound this Court as an institution.

Nonetheless, far too often, the members of the current majority prefer to attack and spin. Far too often, the members of the current majority use terms such as "textualism," "judicial role," "usurpation," "separation of powers," and "policy preferences" when conducting damage control and to mask the rationale of some of its opinions, not to mention the results of some of its opinions. When this occurs, members of this Court must voice their disagreement. And far too often, the majority will then elect to ignore the legal merits of any disagreement and, instead, choose to criticize the person who happens to disagree. But the majority is quite right that history, not me, will ultimately pass judgment on the current Court's fidelity and jurisprudence.[10] Indeed, long after those in the current majority are gone, their decisions will remain. And I am sure it is their hope that when future members of this Court consider their body of work, those future justices will exercise more respect, wisdom, and restraint than the current majority has shown today.

KELLY, J., concurred with CAVANAGH, J.

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[10] Likewise, I will leave it to history and others to evaluate my record as well. Thus, I see no need to "rebut" the majority's compilation in *Sington, supra,* or Victor E. Schwartz's article in a recent Michigan Bar Journal, *A critical look at the jurisprudence of the Michigan Supreme Court*, 85 Mich B J 38 (January, 2006). I must note, however, that Mr. Schwartz is a renowned "tort-reform" advocate, and filed an amicus brief in support of the result reached by the majority in *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005). I must also note that Mr. Schwartz's article was part of a point-counterpoint discussion. Thus, I encourage readers to also explore Professor Nelson P. Miller's companion piece (*Judicial Politics: Restoring the Michigan Supreme Court*) disagreeing with Mr. Schwartz's characterization, as well as the countless letters to the editors passionately disagreeing with Mr. Schwartz's description of this Court that have appeared in subsequent issues of the bar journal. See 85 Mich B J 10-12 (March, 2006); 85 Mich B J 14 (May, 2006).

WOODARD v CUSTER
WOODARD v UNIVERSITY OF MICHIGAN MEDICAL CENTER
HAMILTON v KULIGOWSKI

Docket Nos. 124994, 124995, 126275. Argued December 14, 2005 (Calendar Nos. 2-3). Decided July 31, 2006.

Johanna Woodard, individually and as next friend of Austin D. Woodard, a minor, and Steve Woodard brought an action in the Washtenaw Circuit Court against Joseph R. Custer, M.D., and others and an action in the Court of Claims against the University of Michigan Medical Center, alleging medical malpractice. The actions were consolidated in the circuit court, and the court, Timothy P. Connors, J., granted the defendants' motion to strike the plaintiffs' proposed expert witness, who is board-certified in pediatrics, on the basis that he was not qualified under MCL 600.2169(1) to testify against Dr. Custer, who is board-certified in pediatrics and has certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. The court dismissed the plaintiffs' claim with prejudice. The Court of Appeals, METER, P.J., and TALBOT and BORRELLO, JJ., in an unpublished opinion per curiam and in an unpublished opinion concurring in part and dissenting in part by METER, P.J. (BORRELLO, J., dissenting in a separate opinion), issued October 21, 2003 (Docket Nos. 239868, 239869), affirmed the holding that the plaintiffs' proposed witness was not qualified under § 2169(1), but, as a result of the opinions by Judge METER and Judge BORRELLO, reversed the trial court's dismissal and remanded for a trial on the basis that expert testimony was not necessary because of the doctrine of res ipsa loquitur, i.e., an inference of negligence may be drawn from the fact that the infant was admitted to the Pediatric Intensive Care Unit with healthy legs and was discharged from the unit with fractured legs. The defendants sought leave to appeal, and the plaintiffs sought leave to cross-appeal. The Supreme Court heard oral argument on whether to grant the applications or take other peremptory action. 471 Mich 890 (2004). After hearing oral argument, the Supreme Court issued an opinion that concerned only the defendants' application for leave to appeal, in which the Supreme Court reversed the Court of Appeals decision that res ipsa loquitur applied to relieve the plaintiffs of the need to present

expert testimony. 473 Mich 1 (2005). The Supreme Court simultaneously granted the plaintiffs' cross-application for leave to appeal the Court of Appeals determination that their proposed expert was not qualified under MCL 600.2169(1). 473 Mich 856 (2005).

Shirley Hamilton, as personal representative of the estate of Rosalie Ackley, deceased, brought a medical malpractice action in the Saginaw Circuit Court against Mark F. Kuligowski, D.O., who is board-certified in internal medicine. During the jury trial, the plaintiff offered an expert witness to testify regarding the applicable standard of care. The proposed expert is board-certified in internal medicine and devotes a majority of his professional time to treating infectious diseases. The defendant asked the trial court to strike the expert witness under MCL 600.2169(1) because the vast majority of the expert's clinical practice was devoted to infectious diseases. The trial court, William A. Crane, J., ruled that the proposed expert's testimony was precluded under MCL 600.2169(1)(b)(*i*) and granted the defendant's motion for a directed verdict. The plaintiff appealed as of right. The Court of Appeals, O'CONNELL, P.J., and JANSEN and MURRAY, JJ., reversed the judgment of the trial court, concluding that the plaintiff's expert is qualified to testify against the defendant because both the plaintiff's expert and the defendant specialize in internal medicine and because the plaintiff's expert did devote a majority of his professional time to the practice of internal medicine given that the treatment of infectious diseases is a subspecialty of internal medicine. The Court of Appeals remanded the matter to the circuit court for further proceedings. 261 Mich App 608 (2004). The Supreme Court granted the defendant's application for leave to appeal. 473 Mich 858 (2005).

In an opinion by Justice MARKMAN, joined by Justices CAVANAGH, WEAVER, and KELLY, the Supreme Court *held*:

1. Section 2169(1)(a) requires that, where a defendant physician specializes in multiple specialties, the plaintiff's expert witness on the standard of practice or care must specialize only in the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice, i.e., the one most relevant specialty, and if the defendant physician is board-certified in that specialty, the plaintiff's expert must also be board-certified in that specialty. Irrelevant specialties and board certificates do not have to match.

2. Under § 2169(1), a "specialty" is a particular branch of medicine or surgery in which one can potentially become board-certified.

3. A "subspecialty" is a "specialty" within the meaning of § 2169(1), and, thus, if a defendant physician specializes in a subspecialty and that subspecialty is the one most relevant subspecialty, the plaintiff's expert witness on the standard of practice or care must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action to be qualified to testify under § 2169(1)(a).

4. To be "board certified" within the meaning of § 2169(1)(a) means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications.

5. A certificate of special qualifications is a board certificate within the meaning of § 2169(1)(a), and, thus, if the defendant physician has received a certificate of special qualifications in the one most relevant specialty, the plaintiff's expert witness on the standard of practice or care must have obtained the same certificate of special qualifications in order to be qualified to testify under § 2169(1)(a).

6. The plaintiff's expert, in order to be qualified to testify on the standard of practice or care under § 2169(1)(b), must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty or subspecialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty or subspecialty.

7. If a person does not meet all the requirements of § 2169(1), the person cannot testify about the standard of practice or care. An assemblage of experts cannot join their expertise to collectively satisfy the requirements of § 2169(1).

8. Although an expert may be qualified to testify under § 2169(1), the trial court may disqualify the expert on other grounds. See MCL 600.2169(2), 600.2169(3), 600.2955, and MRE 702.

9. In *Woodard*, the defendant physician specializes in pediatric critical care medicine and was practicing pediatric critical care medicine at the time of the alleged malpractice. Therefore, pediatric critical care medicine is the one most relevant specialty. The plaintiffs' proposed expert did not specialize in pediatric critical care medicine at the time of the alleged malpractice and, therefore, does not satisfy the same specialty requirement of § 2169(1)(a). The defendant physician is board-certified in pediatric critical care medicine. The plaintiffs' proposed expert is not board-certified in pediatric critical medicine and, therefore, does not satisfy the same

board certificate requirement of § 2169(1)(a). The plaintiffs' proposed expert also does not satisfy the same practice/instruction requirement of § 2169(1)(b), because he did not practice or teach pediatric critical care medicine during the year immediately preceding the alleged malpractice. The trial court did not abuse its discretion in dismissing the plaintiffs' claim with prejudice on the basis that the plaintiffs failed to present an expert qualified under § 2169(1) to testify regarding the appropriate standard of practice or care.

10. In *Hamilton*, the defendant physician specializes in general internal medicine and was practicing general internal medicine at the time of the alleged malpractice. During the year immediately preceding the alleged malpractice, the plaintiff's proposed expert did not devote a majority of his time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases. Therefore, the plaintiff's proposed expert does not satisfy the same practice/instruction requirement of § 2169(1)(b). The trial court did not abuse its discretion in directing a verdict for the defendant on the basis that the plaintiff failed to present an expert qualified under § 2169(1) to testify regarding the appropriate standard of practice or care.

In a concurring opinion by Justice MARKMAN and a concurring opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, the Supreme Court *held*:

A defendant physician's relevant multiple areas of specialty may be considered under MCL 600.2169(2) and MRE 702 in barring the testimony of an expert witness who does not possess the same relevant multiple areas of medical specialty.

Justice CAVANAGH, joined by Justice KELLY, concurring, stated his continued belief that MCL 600.2169 is unconstitutional for the reasons set forth in his dissent in *McDougall v Schanz*, 461 Mich 15, 38 (1999) (CAVANAGH, J., dissenting). However, since the statute remains in place, the bench and bar are entitled to be guided in its application. For that reason, Justice CAVANAGH joined the majority opinion's statutory analysis outlined by Justice MARKMAN.

Justice MARKMAN, concurring, wrote separately to note that although only the most relevant specialty must match under MCL 600.2169(1), a trial court may require other relevant specialties to match pursuant to § 2169(2), § 2169(3), and MRE 702.

Chief Justice TAYLOR, joined by Justices CORRIGAN and YOUNG, concurring in the result only, concurred with the results reached in the majority opinion but wrote separately to offer alternative analyses to reach those results. Chief Justice TAYLOR also concurred with that portion of Justice MARKMAN's concurring opinion

stating that although only the one most relevant specialty must match under MCL 600.2169(1), the trial court may require that other relevant specialties match pursuant to § 2169(2), § 2169(3), and MRE 702. Therefore, more than one medical specialty may be germane in establishing the requisite standard of care and plaintiffs may be required to introduce expert testimony regarding other relevant specialties. Chief Justice TAYLOR also stated that the practice and teaching requirements in § 2169(1)(b) preclude any expert from providing testimony regarding more than one specialty area. It logically follows, therefore, that because plaintiffs can be obligated to produce expert testimony regarding more than one specialty area, and every expert may only testify regarding one specialty area, plaintiffs must be able to utilize more than one expert to establish a breach of the applicable standard of care. According to Chief Justice TAYLOR, the following should be utilized in reaching the results in these cases:

The term "specialist" as used in MCL 600.2169 denotes a physician who holds himself or herself out as either (1) limiting his or her practice primarily to a particular branch of medicine or surgery, or to a certain class of patients, organs, or diseases, or (2) having advanced training or knowledge in a specific branch of medicine or surgery, or a certain class of patients, organs, or diseases.

The term "board certified" as used in MCL 600.2169 denotes a credential bestowed by a national, independent medical board indicating proficiency in a medical specialty. Any difference between what are traditionally referred to as board certifications and what have commonly been called certificates of special qualifications is merely one of semantics. When a certificate of special qualifications is a credential bestowed by a national, independent medical board indicating proficiency in a medical specialty, it is itself a board certification that must be matched.

The issue whether a plaintiff needs to introduce expert testimony at all, and, if so, whether the plaintiff needs to introduce expert testimony concerning the standard of care applicable to all the defendant doctor's specialties and board certifications, depends not on MCL 600.2169, but on the specialties and board certifications that are put into issue by the parties during the pleading and discovery process.

MCL 600.2169 does not require the plaintiff to produce one expert qualified to offer evidence to prove both that the standard of care asserted by the defendant doctor does not apply and that the standard of care asserted by the plaintiff is applicable and how it was breached by the defendant doctor. The plaintiff may produce

multiple experts, each matching the defendant doctor's credentials with regard to one specialty area, to fulfill the plaintiff's burden.

A defendant doctor may offer testimony regarding the appropriate standard of care for more than one specialty area. However, it is impossible under the statute for a plaintiff to present one expert to testify regarding the appropriate standard of care for more than one specialty area because the statute requires that the plaintiff's proposed expert must have devoted a majority of his or her professional time during the year immediately preceding the alleged malpractice to either the active clinical practice of, or the teaching of, the specialty about which he or she will testify.

The trial court properly dismissed the lawsuit in *Woodard*. The part of the judgment of the Court of Appeals that held that the plaintiffs' expert was not qualified must be affirmed and the matter must be remanded to the circuit court for reentry of the order dismissing the plaintiffs' claim with prejudice.

The trial court properly granted the defendant's motion for a directed verdict in *Hamilton*. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for reentry of the order directing a verdict for the defendant.

Woodard, affirmed in part and remanded to the trial court for reentry of the order dismissing the plaintiffs' claim with prejudice.

Hamilton, reversed and remanded to the trial court for reentry of the order granting a directed verdict to the defendant.

1. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE — WORDS AND PHRASES — SPECIALTY — SUBSPECIALTY.

A "specialty" for purposes of the statute governing expert witnesses in medical malpractice actions is a particular branch of medicine or surgery in which one can potentially become board-certified; a "subspecialty" is a "specialty" within the meaning of the statute (MCL 600. 2169[1]).

2. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action is a specialist and the defendant physician was practicing that specialty at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must have specialized in the same specialty as the defendant physician at the time of the occurrence that is the basis for the action; if the defendant

physician specializes in a subspecialty and was practicing that subspecialty at the time of the alleged malpractice, the plaintiff's expert must have specialized in the same subspecialty (MCL 600.2169[1]).

3. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

To be "board certified" means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications; a certificate of special qualifications is a board certificate (MCL 600.2169[1][a]).

4. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action is a specialist who is board-certified and the defendant physician was practicing that specialty at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must be a specialist who is board-certified in the same specialty (MCL 600.2169[1][a]).

5. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action has a certificate of special qualifications in the specialty that the defendant physician was practicing at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must have the same certificate of special qualifications (MCL 600.2169[1][a]).

6. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician specializes in several specialties, the plaintiff's expert witness on the standard of practice or care must have specialized in the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice, i.e., the one most relevant specialty; irrelevant specialties do not have to match (MCL 600.2169[1][a]).

7. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action is board-certified in several specialties, the plaintiff's expert witness on the standard of practice or care must be board-certified in the specialty that the defendant physician was engaged in during the course of the alleged malpractice, i.e., the one most relevant specialty; irrelevant board certificates do not have to match (MCL 600.2169[1][a]).

8. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action is a specialist, the plaintiff's expert witness on the standard of practice or care must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty (MCL 600.2169[1][b]).

9. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

If the defendant physician in a medical malpractice action specializes in a subspecialty, the plaintiff's expert witness on the standard of practice or care must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the subspecialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant subspecialty (MCL 600.2169[1][b]).

10. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE.

Although an expert may be qualified to testify under MCL 600.2169(1), the trial court may still disqualify the expert after examining the expert in view of the other considerations listed in MCL 600.2169(2), MCL 600.2955, and MRE 702.

Nemier, Tolari, Landry, Mazzeo & Johnson, P.C. (by *Craig L. Nemier, Michelle E. Mathieu*, and *Nancy Vayda Dembinski*), and *Mark R. Granzotto*, for Johanna and Steven Woodard.

McKeen & Associates, P.C. (by *Brian J. McKeen* and *Ramona C. Howard*), for Shirley Hamilton.

Hebert, Eller & Chandler, PLLC (by *Kevin P. Hanbury*), and *Smith Haughey Rice & Roegge* (by *Richard C. Kraus*), for Joseph R. Custer, and University of Michigan Medical Center.

Siemion, Huckabay, Bodary, Padilla, Morganti & Bowerman, P.C. (by *Raymond W. Morganti*), for Mark F. Kuligowski.

John J. Hays for Blue Cross and Blue Shield of Michigan.

Amici Curiae:

Butzel Long (by *Max R. Hoffman, Jr.*; *M. Brian Cavanaugh*; and *Debra A. Geroux*) and *Kirkland & Ellis LLP* (by *James W. Rankin* and *Angela B. Frye*) for American Board of Pediatrics.

Butzel Long (by *Max R. Hoffman, Jr.*; *M. Brian Cavanaugh*; and *Debra A. Geroux*) and *Johnson & Bell, Ltd.* (by *William K. McVisk*), for American Board of Medical Specialties.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson* and *Daniel J. Schulte*), for Michigan State Medical Society.

Mark R. Bendure for Michigan Trial Lawyers Association.

Wildman, Harrold, Allen & Dixon LLP (by *Douglas R. Carlson* and *Douglas L. Prochnow*) for Accreditation Council for Graduate Medical Education.

MARKMAN, J. We granted leave to appeal in these two cases to consider whether plaintiffs' proposed expert witnesses are qualified under MCL 600.2169(1) to give expert testimony on the appropriate standards of medical practice or care. The trial courts in both cases ruled that plaintiffs' expert witnesses are not qualified under § 2169(1). In *Woodard,* the Court of Appeals affirmed the trial court's ruling on this issue, and, in *Hamilton,* the Court of Appeals reversed the trial court's decision. We conclude that the trial courts did not abuse their discretion in concluding that plaintiffs' proposed expert witnesses are not qualified under § 2169(1). Therefore,

in *Woodard,* we affirm the part of the Court of Appeals judgment that held that plaintiffs' proposed expert is not qualified and remand to the trial court for reentry of its order dismissing plaintiffs' claim with prejudice. In *Hamilton,* we reverse the Court of Appeals judgment and remand to the trial court for reentry of its order granting a directed verdict to defendant.[1]

I. FACTS AND PROCEDURAL HISTORY

A. *WOODARD v CUSTER*

We summarized the facts underlying this case in our recent decision in *Woodard v Custer,* 473 Mich 1, 3-5; 702 NW2d 522 (2005) (*Woodard I*):

> Plaintiffs' fifteen-day-old son was admitted to the Pediatric Intensive Care Unit (PICU) at the University of Michigan Hospital, where he was treated for a respiratory problem. During his stay in the PICU, he was under the care of Dr. Joseph R. Custer, the Director of Pediatric Critical Care Medicine. When the infant was moved to the general hospital ward, physicians in that ward discovered that both of the infant's legs were fractured. Plaintiffs sued Dr. Custer and the hospital, alleging that the fractures were the result of negligent medical procedures, namely, the improper placement of an arterial line in the femoral vein of the infant's right leg and the improper placement of a venous catheter in the infant's left leg.
>
> Defendant physician is board-certified in pediatrics and has certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. Plaintiffs' proposed expert witness, who signed plaintiffs' affidavit of

[1] Contrary to Chief Justice TAYLOR's concurrence's assertion, *this* opinion is the *majority* opinion in this case given that it has four supporters— Justices CAVANAGH, WEAVER, and KELLY, and myself. Chief Justice TAYLOR's concurrence sows confusion in an area of the law that is desperately in need of clarity.

merit, is board-certified in pediatrics, but does not have any certificates of special qualifications.

Before discovery, the trial court denied defendants' motion for summary disposition, concluding that plaintiffs' attorney had a "reasonable belief" under MCL 600.2912d(1) that plaintiffs' proposed expert witness was qualified under MCL 600.2169 to testify against the defendant physician, and, thus, that plaintiffs' affidavit of merit was sufficient. After discovery, the trial court granted defendants' motion to strike plaintiffs' expert witness on the basis that he was not actually qualified under MCL 600.2169 to testify against the defendant physician. The trial court dismissed plaintiffs' claim with prejudice, concluding that plaintiffs could not reach a jury without expert testimony.

The Court of Appeals affirmed the trial court's ruling that plaintiffs' proposed expert witness was not qualified under MCL 600.2169 to testify against the defendant physician (Judge BORRELLO dissented on this issue), but reversed the trial court's dismissal on the basis that expert testimony was unnecessary under the doctrine of res ipsa loquitur, i.e., an inference of negligence may be drawn from the fact that the infant was admitted to the PICU with healthy legs and discharged from the PICU with fractured legs (Judge TALBOT dissented on this issue). Unpublished opinion per curiam, issued October 21, 2003 (Docket Nos. 239868-239869). The case was remanded for trial.

Defendants sought leave to appeal the Court of Appeals decision that res ipsa loquitur applies and that expert testimony was not necessary. Plaintiffs sought leave to cross-appeal the Court of Appeals decision that their proposed expert witness was not qualified under MCL 600.2169 to testify against the defendant physician. We heard oral argument on whether to grant the applications or take other peremptory action permitted by MCR 7.302(G)(1). 471 Mich 890 (2004).

In *Woodard I,* we addressed defendants' application for leave to appeal and held that expert testimony is necessary in this case. At the same time, we granted plaintiffs' cross-application for leave to appeal to ad-

dress whether plaintiffs' proposed expert witness is qualified under MCL 600.2169(1), which is the subject of the instant opinion. 473 Mich 856 (2005).[2]

B. *HAMILTON v KULIGOWSKI*

Plaintiff alleges that the defendant physician failed to properly diagnose and treat the decedent while she exhibited prestroke symptoms. The defendant physician is board certified in general internal medicine and specializes in general internal medicine. Plaintiff's proposed expert witness is board certified in general internal medicine and devotes a majority of his professional time to treating infectious diseases, a subspecialty of internal medicine. The trial court granted defendant's motion for a directed verdict on the basis that plaintiff's expert is not qualified to testify against the defendant physician because plaintiff's expert specializes in infectious diseases and did not devote a majority of his professional time to practicing or teaching general internal medicine. The Court of Appeals reversed, concluding that plaintiff's expert is qualified to testify against the defendant physician because both plaintiff's

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[2] We directed the parties to address:

> (1) what are the appropriate definitions of the terms "specialty" and "board certified" as used in MCL 600.2169(1)(a); (2) whether either "specialty" or "board certified" includes subspecialties or certificates of special qualifications; (3) whether MCL 600.2169(1)(b) requires an expert witness to practice or teach the same subspecialty as the defendant; (4) whether MCL 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualifications that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice. See *Tate v Detroit Receiving Hosp*, 249 Mich App 212 (2002); and (5) what are the relevant specialties, subspecialties, and certificates of special qualifications in this case.

proposed expert witness and the defendant physician specialize in internal medicine and because plaintiff's proposed expert did devote a majority of his professional time to the practice of internal medicine given that the treatment of infectious diseases is a subspecialty of internal medicine. 261 Mich App 608; 684 NW2d 366 (2004). We granted defendant's application for leave to appeal. 473 Mich 858 (2005).[3]

II. STANDARD OF REVIEW

These cases both involve the interpretation of MCL 600.2169(1). This Court reviews questions of statutory interpretation de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). However, this Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion. *Cox v Flint Bd of Hosp Managers,* 467 Mich 1, 16 n 16; 651 NW2d 356 (2002). An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Novi v Robert Adell Children's Funded Trust,* 473 Mich 242, 254; 701 NW2d 144 (2005).

III. ANALYSIS

MCL 600.2169 provides, in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the *appropriate* standard

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[3] We directed the parties to address:

> (1) the proper construction of the words "specialist" and "that specialty" in MCL 600.2169(1)(a) and MCL 600.2169(1)(b)(*i*); and (2) the proper construction of "active clinical practice" and "active clinical practice of that specialty" as those terms are used in MCL 600.2169(1)(b)(*i*).

> of practice or care unless *the person* is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in *the same specialty* as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in *that specialty*.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a *majority* of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of *that specialty*.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in *the same specialty*. [Emphasis added.][4]

A. MOST RELEVANT SPECIALTY AND BOARD CERTIFICATION

Although specialties and board certificates must match, not *all* specialties and board certificates must match. Rather, § 2169(1) states that "a person shall not give expert testimony on the *appropriate* standard of

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[4] MCL 600.2169(1) only applies to expert testimony on the appropriate standard of practice or care; it does not apply to other kinds of expert testimony, such as expert testimony on causation.

practice or care unless . . . ." (Emphasis added.) That is, § 2169(1) addresses the necessary qualifications of an expert witness to testify regarding the "*appropriate* standard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify. As this Court explained in *McDougall v Schanz*, 461 Mich 15, 24-25; 597 NW2d 148 (1999), "[MCL 600.2169(1)] operates to preclude certain witnesses from testifying solely on the basis of the witness' lack of practice or teaching experience in the *relevant* specialty." (Emphasis added.)

Further, § 2169(1) refers to "the same specialty" and "that specialty." It does not refer to "the same specialties" and "those specialties." That is, § 2169(1) requires the matching of a singular specialty, not multiple specialties. As the Court of Appeals explained in *Tate v Detroit Receiving Hosp,* 249 Mich App 212, 218; 642 NW2d 346 (2002), "the statute expressly uses the word 'specialty,' as opposed to 'specialties,' thereby implying that the specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold."

Moreover, § 2169(1)(b) requires the plaintiff's expert to have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a *majority* of his or her professional time to either" the "active clinical practice" or the "instruction of students" in "the same specialty" as the

defendant physician.[5] (Emphasis added.) Obviously, a specialist can only devote a *majority* of his professional time to *one* specialty. Therefore, it is clear that § 2169(1) only requires the plaintiff's expert to match one of the defendant physician's specialties. Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty.

B. SAME SPECIALTY REQUIREMENT

The first requirement of § 2169(1)(a) is that "[i]f the party against whom or on whose behalf the testimony is offered is a specialist, [the expert witness must have] specialize[d] at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered." That is, if a defendant physician is a specialist, the plaintiff's expert witness must have specialized in

[5] Because the two cases at issue here involve questions pertaining to plaintiffs' expert witnesses' qualifications, we repeatedly refer to § 2169(1) as imposing requirements on plaintiffs' experts. However, contrary to Chief Justice TAYLOR's concurrence's contention, *post* at 627-628, we recognize that § 2169(1) applies equally to a defendant's expert witnesses because it applies both to expert testimony offered "against" and on "behalf" of the defendant physician. We also note that although we repeatedly refer to the defendant physician, we recognize that § 2169(1) applies to all licensed health professionals, not just physicians.

the same specialty as the defendant physician at the time of the alleged malpractice.

MCL 600.2169(1) does not define the term "specialty." "We may consult dictionary definitions of terms that are not defined in a statute." *People v Perkins,* 473 Mich 626, 639; 703 NW2d 448 (2005). "[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. Because § 2169(1) pertains to "actions[s] alleging *medical* malpractice" and because the term "specialty" may have acquired a "peculiar and appropriate meaning" in the medical field, it is appropriate to look to medical dictionaries to define the term "specialty." (Emphasis added.)

Dorland's Illustrated Medical Dictionary (28th ed) defines a "specialist" as "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." MCL 600.2169(1)(a) requires the plaintiff's expert to specialize in the same specialty as the defendant physician, and, if the defendant physician is "a *specialist who is board certified*, the expert witness must be a specialist who is board certified in that specialty." (Emphasis added.) Both the dictionary definition of "specialist" and the plain language of § 2169(1)(a) make it clear that a physician can be a specialist who is not board certified. They also make it clear that a "specialist" is somebody who can potentially become board certified. Therefore, a "specialty" is a particular branch of medicine or surgery in which one can potentially become board certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially be-

come board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery.

Plaintiffs argue that § 2169(1)(a) only requires their expert witnesses to have specialized in the same specialty as the defendant physician, not the same subspecialty. We respectfully disagree. As explained above, "specialty" is defined as a particular branch of medicine or surgery in which one can potentially become board certified. Moreover, "sub" is defined as "a prefix . . . with the meanings 'under,' 'below,' 'beneath' . . . 'secondary,' 'at a lower point in a hierarchy[.]' " *Random House Webster's College Dictionary* (1997). Therefore, a "subspecialty" is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty. A subspecialty, although a more particularized specialty, is nevertheless a specialty. Therefore, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action.[6]

C. SAME BOARD CERTIFICATE REQUIREMENT

The next requirement of § 2169(1)(a) is that "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." As we recently explained in *Halloran, supra* at 574, "MCL 600.2169(1)(a) requires that the proposed expert witness must have the same board

[6] We note that the American Board of Medical Specialties, the national certifying board by which 90 percent of all physicians are certified, states in its amicus curiae brief that a subspecialty constitutes a specialty.

certification as the party against whom or on whose behalf the testimony is offered."

Plaintiffs argue that the definition of "board certified" found in the Public Health Code should apply here. We respectfully disagree. The Public Health Code, MCL 333.2701(a), defines "board certified" as "certified to practice in a particular medical specialty by a national board recognized by the American board of medical specialties or the American osteopathic association." However, the Legislature specifically limited the use of the Public Health Code's definition of "board certified" to the Public Health Code by stating, "*As used in this part* . . . '[b]oard certified' means . . . ." MCL 333.2701(a) (emphasis added). The statute at issue here, MCL 600.2169(1), is part of the Revised Judicature Act, not the Public Health Code, and, thus, the Public Health Code's definition of "board certified" does not apply to the statute at issue here.[7]

Moreover, the Legislature has defined "board certified" differently in other statutes. Therefore, even if we thought it appropriate to borrow another statute's definition of "board certified," the definition would vary depending on which statute's definition was borrowed. For instance, the Legislature has defined "board certified" in the Insurance Code, MCL 500.2212a(4), as "certified to practice in a particular medical or other health professional specialty by the American board of medical specialties or another appropriate national health professional organization." Plaintiffs fail to explain why we should choose the Public Health Code's

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[7] Further, as this Court explained in *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993), "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."

definition over the Insurance Code's definition. We also note that the Legislature limited the Insurance Code's definition of "board certified" to the Insurance Code by stating, "*As used in this section*, 'board certified' means . . . ." *Id.* (emphasis added). Because the statute at issue here is part of the Revised Judicature Act, not the Insurance Code, the Insurance Code's definition does not apply to the statute at issue here. Since the Legislature has not defined "board certified" in the statute at issue here, we instead look to the medical dictionary definition of "board certified." *Perkins, supra* at 639.

Taber's Cyclopedic Medical Dictionary (18th ed) defines "certification" as "a legal document prepared by an official body that indicates a person or institution has met certain standards, or that a person has completed a prescribed course of instruction or training." Similarly, *Gould Medical Dictionary* (3d ed) defines "certification" as "[a] statement by an officially recognized and legally constituted body, such as a medical board, that a person or institution has met or complied with certain standards of excellence." Therefore, we conclude that to be "board certified" within the meaning of § 2169(1)(a) means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications.[8] Accordingly, if a defendant physician has received certification from a medical organization to this effect, the plaintiff's expert witness must also have obtained the same certification in order to be qualified to testify concerning the appropriate standard of medical practice or care.

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[8] We find it befuddling that Chief Justice TAYLOR's concurrence would adopt the definition of "board certified" set forth by the Appellate Division of the Supreme Court of New York without further explanation.

Plaintiffs argue that a certificate of special qualifications[9] is not a board certificate. We respectfully disagree. Contrary to plaintiffs' assertion, nothing in § 2169(1)(a) limits the meaning of board certificate to certificates in the 24 primary medical specialties recognized by the American Board of Medical Specialties or the 18 primary medical specialties recognized by the American Osteopathic Association. Because a certificate of special qualifications is a document from an official organization that directs or supervises the practice of medicine that provides evidence of one's medical qualifications, it constitutes a board certificate. Accordingly, if a defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have obtained the same certificate of special qualifications in order to be qualified to testify under § 2169(1)(a).[10]

D. SAME PRACTICE/INSTRUCTION REQUIREMENT

MCL 600.2169(1)(b) provides that if the defendant physician is a specialist, the expert witness must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . the active clinical practice of that specialty [or] [t]he instruction of students in an . . . accredited health professional school or accredited residency or clinical research program in the same specialty."[11] Once

[9] We note that these certificates are also sometimes referred to as "certificates of added qualification."

[10] We note that the American Board of Medical Specialties stated in its amicus curiae brief that it considers certificates of special qualifications to constitute board certificates.

[11] If the defendant physician is not a specialist, § 2169(1)(b) requires the plaintiff's expert witness to have "during the year immediately

again the statute refers to "the same specialty" and "that specialty," implying that only a single specialty must be matched. In addition, § 2169(1)(b) requires the plaintiff's expert to have "devoted a majority of his or her professional time" to practicing or teaching the specialty in which the defendant physician specializes. As we explained above, one cannot devote a "majority" of one's professional time to more than one specialty. Therefore, in order to be qualified to testify under § 2169(1)(b), the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty.[12]

E. RESPONSE TO CHIEF JUSTICE TAYLOR'S CONCURRENCE

Chief Justice TAYLOR's concurrence concludes that unless the defendant physician *himself* concedes that not all of his specialties are relevant, the plaintiff's expert must match all of the defendant physician's

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preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed [or] [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ."

[12] Just as a subspecialty is a specialty within the meaning of § 2169(1)(a), a subspecialty is a specialty within the meaning of § 2169(1)(b). Therefore, if the defendant physician specializes in a subspecialty and was doing so at the time of the alleged malpractice, the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching that subspecialty.

specialties. However, because the concurrence recognizes that it would be impossible to obtain an expert witness who devotes a majority of his professional time to all of the defendant physician's specialties, see § 2169(1)(b) and part III(D) of this opinion, the concurrence concludes that the plaintiff can simply employ multiple experts to satisfy the requirements of § 2169(1). That is, a single expert does not have to satisfy all of the requirements of § 2169(1), as long as a group of experts collectively satisfy these requirements. We respectfully disagree.

MCL 600.2169(1) states, "*a person* shall not give expert testimony on the appropriate standard of practice or care unless *the person* is licensed as a health professional in this state or another state and meets the following criteria . . . ." (Emphasis added.) That is, § 2169(1) states that a person cannot testify unless that person meets all of the requirements of § 2169(1). If that person does not meet all of the requirements of § 2169(1), that person cannot testify.[13] For the reasons discussed above, we conclude that the plaintiff's expert does not have to match all of the defendant physician's

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[13] Contrary to Chief Justice TAYLOR's concurrence's contention, we do not hold that "only one expert may be utilized." *Post* at 592. Rather, we make a distinction between experts testifying about the standard of practice or care and experts testifying about issues that are not related to the standard of practice or care. Regarding the former, we conclude that only one standard of practice or care was envisioned under § 2169(1), and, thus, the plaintiff need only produce one expert to testify about that standard. If a plaintiff wishes to, however, he is free to offer several different experts to testify regarding that relevant specialty, and each must meet the criteria of § 2169(1). With respect to experts who are testifying about issues unrelated to the standard of practice or care, there are no limitations on how many experts a plaintiff can produce, and a trial court will consider whether each expert is qualified using the considerations set forth in § 2169(2) as well as any other applicable requirements.

specialties; rather, the plaintiff's expert only has to match the one most relevant specialty.

Not only is the approach of Chief Justice TAYLOR's concurrence contrary to the requirements of the statute, it is also an approach that we believe would be unworkable in the real world. Under the concurrence's approach, if the defendant physician specializes in five specialties, for example, and refuses to concede that not all of these specialties are relevant to the alleged malpractice, the plaintiff would be required to present five expert witnesses to testify. Not only would this be extraordinarily burdensome for the plaintiff, it would also be extraordinarily burdensome for the trier of fact by infecting the entirety of the trial process with irrelevant, distracting, and confusing arguments.[14]

The concurrence by Chief Justice TAYLOR accuses the majority of "misunderstand[ing] completely the traditional roles played by the judge and jury in the trial process." *Post* at 619. However, we believe that it is the concurrence that misunderstands these roles. Typically, the trial court allows the parties to introduce relevant

[14] The concurrence by Chief Justice TAYLOR seems to believe that this would not be a problem because MCL 600.2955 precludes opinion testimony that is not based on "proven theories and methodologies." *Post* at 621 n 58. By this argument, the concurrence seems to be confusing relevancy and reliability. Just because an expert testifies that the standard of care with regard to nephrology is "X," and this testimony is reliable in the sense that it is based on "proven theories and methodologies," does not mean that it is relevant testimony. Evidence is only relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. If the defendant physician was not practicing nephrology at the time of the alleged malpractice, testimony regarding the standard of care for nephrology will not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." If the standard of care for nephrology is irrelevant, why require an expert witness to specialize in nephrology?

evidence and does not allow the parties to introduce irrelevant evidence. See MRE 402, which provides, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." Under the concurrence's approach, however, the parties would effectively be required to present irrelevant evidence, potentially a great amount of such evidence. And, instead of the trial court itself reviewing the evidence to determine what is and what is not relevant, the trier of fact would be required to do so.[15]

Requiring the admission of irrelevant evidence would not only be a waste of time and limited judicial resources, it would also cause enormous confusion and

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[15] The concurrence by Chief Justice TAYLOR asks us, "How is the trial judge to determine which specialties are 'relevant' without expert testimony . . . ?" *Post* at 625. First, in most cases, expert testimony probably will not be required to determine which specialties are relevant. For instance, if a defendant physician specializes in cardiovascular surgery and podiatry and he was performing heart surgery at the time of the alleged malpractice, we doubt very highly that the trial court will need expert testimony to determine that cardiovascular surgery is the relevant specialty. The concurrence states that it finds our belief that the trial court may be able to determine without expert testimony which specialty is relevant "curious given this Court's historical recognition that expert testimony is almost always needed to establish the standard of care in medical malpractice actions. . . ." *Post* at 625 n 64. The concurrence appears to be ignoring the distinction between determining which specialty is relevant and determining the appropriate standard of care. Using the cardiovascular surgeon/podiatrist example, although the trial court can probably determine without expert testimony that cardiovascular surgery is the relevant specialty, the trial court probably cannot determine what the appropriate standard of care is for cardiovascular surgeons performing heart surgery.

Second, the trial court is, of course, not precluded from seeking expert testimony if it believes that such testimony is necessary for it to determine which specialty is relevant.

distraction for the fact-finder. For instance, if the defendant physician claims to specialize in dermatology, internal medicine, plastic surgery, pediatrics, and urology and he negligently prescribes an adult dosage of amoxicillin to a three-year-old child suffering from an ear infection, under the majority's approach, the plaintiff's expert would have to specialize in pediatrics. However, under the approach of Chief Justice TAYLOR's concurrence, the plaintiff's phalanx of experts would have to specialize in dermatology, internal medicine, plastic surgery, pediatrics, and urology. That is, instead of the jury hearing testimony regarding the relevant specialty of pediatrics, the jury would be required also to endure testimony regarding the irrelevant specialties of dermatology, internal medicine, plastic surgery, and urology. To require the jury to hear such irrelevant testimony would confuse the jury and distract it from evaluating the relevant legal issues. Because this is not how the trial process is typically conducted in Michigan, and because the statute does not require trials to be conducted in such a confusing manner, we refuse to impose such a requirement upon the process.

The concurrence by Chief Justice TAYLOR contends that we are giving the trial court "a power of theory preclusion . . . heretofore unknown in our jurisprudence." *Post* at 618-619. First, whether expert testimony is described as a "theory" or evidence supporting a theory, testimony regarding a specialty that was not being practiced at the time of the alleged malpractice is irrelevant, and, thus, inadmissible. In other words, irrelevant expert testimony does not magically become relevant and admissible simply by calling it a "theory." To use the concurrence's collapsed building hypothetical, the defendant architect would obviously be able to introduce relevant evidence of an earthquake. However,

he would not be able to introduce irrelevant evidence of an earthquake, for instance, evidence that an earthquake occurred years after the building collapsed in a country half way around the world. That is, the defendant architect is not precluded from introducing relevant theories, i.e., that the building collapsed because an earthquake occurred that same day in a neighboring city, but he is precluded from introducing irrelevant theories, i.e., that the building collapsed because an earthquake occurred years after the building collapsed in a country half way around the world.

Second, our holding that relevant expert testimony is admissible and irrelevant expert testimony is inadmissible is hardly a novel holding. As we have explained, it has always been the trial court's job to facilitate the introduction of relevant evidence and to preclude the introduction of irrelevant evidence.[16] We are aware of no precedent that would require all irrelevant specialties

[16] The concurrence by Chief Justice TAYLOR contends that our opinion will deny parties their constitutional right to have a jury determine factual matters. *Post* at 619. This is simply incorrect. Whether expert testimony is relevant and whether an expert is qualified to testify have historically been decisions for the trial court, not a jury, to make. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004). Relevancy is not, and has never been, a factual determination that is left to the jury to make. MRE 402 and 702.

The concurrence also contends that our opinion will deny parties their procedural due process rights because it will deny them the right to present evidence. *Post* at 626-628. Although parties have a right to present relevant evidence, as long as the admission of such evidence does not violate the Constitution of the United States, the Constitution of the state of Michigan, a rule of evidence, or a court rule, parties do not have a right to present irrelevant evidence. MRE 402. Further, parties are not precluded from arguing that a certain specialty is relevant. However, it is up to the trial court in its gatekeeping role to determine whether the specialty is actually relevant. *Gilbert*, *supra* at 780 n 46.

to match, or that would countenance a phalanx of experts, each of whom would be charged with testifying about a different irrelevant specialty. As the concurrence by Chief Justice TAYLOR itself recognizes, it is they, not the majority, that are advocating a change in the status, because the Court of Appeals in *Tate* held that irrelevant specialties do not have to match. The horror stories predicted by the concurrence upon the adoption of the majority position simply have not been borne out under *Tate*. Moreover, we note that *none* of the parties in these two cases argued that irrelevant specialties and board certificates must match, and none of the parties or the amici curiae argued in favor of the approach adopted by Chief Justice TAYLOR's concurrence.

Further, we note that just because an expert is qualified under § 2169(1) does not mean that the trial court cannot disqualify the expert on other grounds. MCL 600.2169(2) provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

In addition, MCL 600.2169(3) specifically states, "[t]his section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." MCL 600.2955 provides:

(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

> (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

Finally, MRE 702 further provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Therefore, even when a proffered expert meets the criteria contained in § 2169(1), the expert is subject to further scrutiny under § 2169(2), § 2169(3), § 2955, and MRE 702.[17]

Moreover, if a defendant believes that the plaintiff's expert is not qualified because he does not specialize in what the defendant believes to be the relevant specialty, the defendant can file a motion to strike the plaintiff's expert. If the trial court denies that motion, the defendant can then, of course, appeal that decision. The defendant can either file an interlocutory appeal or he can wait until the jury renders a verdict to file an application for leave to appeal. Either way, the defendant can certainly preserve the issue for appeal by objecting to the plaintiff's expert's testimony on the

[17] We note that, while § 2169(1) only applies to "expert testimony on the appropriate standard of practice or care," § 2169(2), § 2955, and MRE 702 apply to all expert testimony in medical malpractice actions. Therefore, while all experts must meet the requirements of § 2169(2), § 2955, and MRE 702, only those experts testifying regarding the appropriate standard of practice or care have to meet the requirements of § 2169(1).

basis that the expert is not qualified because he does not specialize in the relevant specialty. At this point, the defendant should make clear what he thinks the relevant specialty is and why he thinks such is the relevant specialty.[18]

IV. APPLICATION

A. *WOODARD v CUSTER*

The defendant physician is the director of pediatric critical care medicine at the University of Michigan Hospital, and specializes in pediatric critical care medicine. "Pediatrics" is "[t]he medical specialty concerned with the study and treatment of children in health and disease during development from birth through adolescence." *Stedman's Medical Dictionary* (26th ed). "Critical" is defined as "[d]enoting a morbid condition in which death is possible." *Id.* Pediatric critical care medicine is the branch of medicine concerned with the care of children who are critically ill. Plaintiffs claim that an arterial line was improperly placed in the femoral vein of the infant patient's right leg and that a venous catheter was improperly placed in the infant patient's left leg while the infant was a patient in the defendant hospital's pediatric intensive care unit. There is no question that the infant patient was critically ill when these procedures were performed. For

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[18] The concurrence by Chief Justice TAYLOR apparently believes that this will require the creation of a separate record and that each party will have to present its own experts at this point. We respectfully disagree. All a defendant has to do to preserve the issue for appeal is to object to the admission of the plaintiff's expert's testimony and to state why he believes the plaintiff's expert is not qualified. If the issue is appealed and the appellate court believes that it does not have enough information before it to review the trial court's decision, it can certainly remand for an evidentiary hearing or take other appropriate action. The concurrence creates the potential for procedural confusion out of thin air.

these reasons, we conclude that the trial court did not abuse its discretion in finding that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice, and, thus, pediatric critical care medicine is the one most relevant specialty.[19] Plaintiffs' proposed expert witness undeniably did not specialize in pediatric critical care medicine at the time of the alleged malpractice and has never specialized in pediatric critical care medicine. Therefore, plaintiffs' proposed expert witness does not satisfy the same specialty requirement of § 2169(1)(a).[20]

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[19] Chief Justice TAYLOR's concurrence asks us how we "know" that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice. *Post* at 624. We "know" this because all of the admissible evidence supports the trial court's finding that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice. Further, as Chief Justice TAYLOR's concurrence points out, *post* at 623, 632-633, the plaintiffs did not rebut that finding by presenting qualified expert testimony to support their argument that the defendant physician was not practicing pediatric critical care medicine at the time of the alleged malpractice. Contrary to what Chief Justice TAYLOR's concurrence suggests, even assuming that plaintiffs' expert is qualified to testify that defendant was not practicing pediatric critical care medicine at the time of the alleged malpractice, plaintiffs' expert cannot reasonably be understood to have testified that the defendant was not practicing pediatric critical care medicine at the time of the alleged malpractice. Plaintiffs' expert only testified that *he* performed the procedures in this case during his residency. Unlike Chief Justice TAYLOR's concurrence, we do not believe that the jury could have reasonably inferred from this testimony that it is "relatively common for doctors who practice only general pediatric care to perform the procedures in this case . . . ." *Post* at 624 n 63. Moreover, it is not our task to "know" whether pediatric critical care medicine is or is not the relevant specialty; rather, our task is to determine whether the trial court abused its discretion in determining that pediatric critical care medicine is the relevant specialty.

[20] Plaintiffs' proposed expert witness is a pediatrician, not a pediatric critical care specialist. A good illustration of the differences between these two types of physicians can be found in this very case: when the infant began to have respiratory problems, plaintiffs took their son to the pediatrician; the pediatrician, recognizing that the infant needed to be

The defendant physician is board certified in pediatric critical care medicine, and, as explained above, pediatric critical care medicine is the one most relevant specialty. Plaintiffs' proposed expert witness is not board certified in pediatric critical care medicine. Therefore, plaintiffs' proposed expert witness does not satisfy the same board certificate requirement of § 2169(1)(a).

As explained above, the defendant physician specializes in pediatric critical care medicine and pediatric critical care medicine is the one most relevant specialty. During the year immediately preceding the alleged malpractice, plaintiffs' proposed expert witness did not practice or teach pediatric critical care medicine.[21] Therefore, plaintiffs' proposed expert witness also does not satisfy the same practice/instruction requirement of § 2169(1)(b).

For these reasons, the trial court did not abuse its discretion in concluding that plaintiffs' proposed expert witness is not qualified to testify on the appropriate standard of practice or care under § 2169(1). Because plaintiffs failed to present an expert qualified under § 2169(1) to testify with regard to the appropriate standard of practice or care, the trial court properly dismissed plaintiffs' claim with prejudice.

B. *HAMILTON v KULIGOWSKI*

The defendant physician specializes in general internal medicine and was practicing general internal medi-

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treated by a pediatric critical care specialist, then placed the infant in an ambulance and sent him to the defendant hospital, for treatment by the defendant physician.

[21] In fact, plaintiffs' proposed expert witness has never worked as an attending physician in a pediatric intensive care unit nor has he ever taught pediatric critical care medicine. Further, plaintiffs' proposed expert has not inserted an arterial line or a venous catheter in an infant, the specific medical procedure that was allegedly performed negligently in this case, since his residency in the early 1980's.

cine at the time of the alleged malpractice. During the year immediately preceding the alleged malpractice, plaintiff's proposed expert witness did not devote a majority of his time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases. As he himself acknowledged, he is "not sure what the average internist sees day in and day out." Therefore, plaintiff's proposed expert witness does not satisfy the same practice/instruction requirement of § 2169(1)(b).

For this reason, the trial court did not abuse its discretion in concluding that plaintiff's proposed expert witness is not qualified to testify regarding the appropriate standard of practice or care under § 2169(1). Because plaintiff failed to present an expert qualified under § 2169(1) to testify with regard to the appropriate standard of practice or care, the trial court properly granted a directed verdict in favor of defendant.

V. CONCLUSION

If a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the occurrence that is the basis for the action. If a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action. If the defendant physician is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty. If the defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have obtained the same certificate of special qualifications. However, under § 2169(1)(a), only the one most relevant specialty or

subspecialty must match; and only the one most relevant board certificate or certificate of special qualifications must match. We are aware of no precedent that would, as required by Chief Justice TAYLOR's concurrence, require all irrelevant specialties to match or countenance a phalanx of experts, each of whom would be charged with testifying about a different irrelevant specialty. In addition, under § 2169(1)(b), if the defendant physician is a specialist, the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty or subspecialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty or subspecialty.

The trial courts did not abuse their discretion here in concluding that plaintiffs' proposed expert witnesses were not qualified under MCL 600.2169(1) to testify regarding the appropriate medical standard of practice or care. Therefore, in *Woodard,* we affirm the part of the Court of Appeals judgment that held that plaintiffs' proposed expert is not qualified and remand this case to the trial court for reentry of its order dismissing plaintiffs' claim with prejudice. In *Hamilton,* we reverse the Court of Appeals judgment and remand this case to the trial court for reentry of its order granting a directed verdict to defendant.

CAVANAGH, WEAVER, and KELLY, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*concurring*). I continue to believe that MCL 600.2169 is unconstitutional for the reasons set forth in my dissent in *McDougall v Schanz*, 461 Mich 15, 38; 597 NW2d 148 (1999) (CAVANAGH, J., dissenting).

But because a majority of my colleagues disagree, the statute remains in place. Accordingly, the bench and bar are entitled to be guided in its application. It is for that reason that I join the majority opinion's statutory analysis outlined by Justice MARKMAN.

Nonetheless, I take this opportunity to point out that the difficulties in interpreting and applying § 2169 are highlighted both by the frequency with which a variety of issues surrounding the statute arise and the inability of this Court to reach a consensus on how the statute is to operate. In my view, this serves to validate the many concerns I held when *McDougall, supra*, was decided, and those concerns remain far from resolved.

MARKMAN, J. (*concurring*). I write separately to set forth an additional argument in support of the majority's conclusion that only the one most relevant specialty and board certificate must match under MCL 600.2169(1), and to explain that although only the one most relevant specialty must match under § 2169(1), the trial court may require that other relevant specialties match pursuant to MCL 600.2169(2), MCL 600.2169(3), and MRE 702. I write also to respond to Chief Justice TAYLOR's concurrence's contention that this opinion is inconsistent with the majority opinion. I have also set forth an appendix that summarizes recent Michigan Supreme Court decisions in the increasingly complex area of medical malpractice.

ANALYSIS

MCL 600.2169(1)(a) requires a plaintiff's expert to have specialized "in *the* same specialty" as the defendant physician. And, if the defendant physician is a specialist who is board certified, § 2169(1)(a) requires the plaintiff's expert to be "board certified in *that*

specialty." (Emphasis added.) In *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000), this Court held that the phrase "the proximate cause" as used in the governmental immunity act, MCL 691.1407(2), means "the one most immediate, efficient, and direct cause of the injury or damage . . . ." We explained that because " 'the' is a definite article, and 'cause' is a singular noun, it is clear that the phrase 'the proximate cause' contemplates *one* cause." *Id.* (emphasis in original). The same is true here. That is, because "the" is a definite article, and "specialty" is a singular noun, the phrase "the same specialty" contemplates *one* specialty— the most relevant specialty.[1] Therefore, where a defendant physician specializes in multiple specialties, § 2169(1)(a) requires an expert witness to specialize only in the same specialty engaged in by the defendant physician during the course of the alleged malpractice, i.e., the one most relevant specialty. And, if the defendant physician is board certified in "that specialty"— the one most relevant specialty— the plaintiff's expert witness must also be board certified in that specialty.

As the majority opinion explains, the requirements of § 2169(1) are not the only requirements that a medical expert must satisfy in order to be able to testify. MCL 600.2169(2) provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.

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[1] I note that Chief Justice TAYLOR's concurrence does not even attempt to reconcile its position in this case that "*the* same *specialty*" means *multiple* specialties with this Court's decision in *Robinson* that "*the* proximate *cause*" means *one* cause. See also *Paige v City of Sterling Hts*, 476 Mich 495; 720 NW2d 219 (2006).

> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

In addition, MCL 600.2169(3) specifically states, "This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." Finally, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Therefore, although the fact that the defendant physician specializes in multiple specialties and the plaintiff's expert witness does not may not be considered under § 2169(1), it *may* be considered under § 2169(2) and MRE 702. For instance, if the defendant physician specializes in two specialties and both of these specialties are relevant, i.e., the defendant physician's actions were informed by both specialties at the time of the alleged malpractice, the trial court may well conclude that, although the plaintiff's expert witness is qualified under § 2169(1) because he specializes in the one most relevant specialty, he may not be qualified under § 2169(2) or MRE 702 because he does not specialize in both relevant specialties. Through the application of § 2169(1), as well as by the exercise of judicial discretion

under § 2169(2) and MRE 702, plaintiffs are *not* obligated to produce experts matching irrelevant specialties of defendants, but they are obligated, in my judgment, to produce experts matching relevant specialties.

RESPONSE TO CHIEF JUSTICE TAYLOR'S CONCURRENCE

Chief Justice TAYLOR's concurrence contends that this concurrence is inconsistent with the majority opinion that I have written. This is simply incorrect. I agree completely with everything said in the majority opinion: (a) The majority opinion holds that irrelevant specialties do not have to match. I agree. (b) The majority opinion holds that under § 2169(1) only the one most relevant specialty must match. I agree. (c) The majority opinion holds that an individual expert must meet all of the requirements of § 2169(1) in order to testify; a group of experts cannot pool their expertise to collectively satisfy the requirements of § 2169(1). I agree. (d) The majority opinion holds that just because an expert is qualified under § 2169(1) does not mean that the trial court cannot disqualify the expert on "other grounds." I agree.

I write separately only to explain that I believe that one of these "other grounds" for disqualification can be the failure of the plaintiff's expert to match *other* relevant specialties. Contrary to Chief Justice TAYLOR's concurrence's contention, there is nothing in the majority opinion that precludes this conclusion. While the majority opinion holds that under § 2169(1) only the one most relevant specialty must match, this does not mean that a different provision of law cannot require that other relevant specialties be matched.

Chief Justice TAYLOR's concurrence asserts that the majority opinion holds that "only one expert may be utilized" and the concurrence allows more. *Post* at 592.

This is again incorrect. As I have explained, I agree completely with the majority opinion that an individual expert must meet all of the requirements of § 2169(1) in order to testify. Contrary to Chief Justice TAYLOR's concurrence, I do not believe that an assemblage of experts can join their expertise to collectively satisfy the requirements of § 2169(1). I further agree with the majority opinion that only one standard of practice or care was envisioned under § 2169(1), and, thus, the plaintiff need only produce one expert to testify about that standard, but, if a plaintiff wishes to, he is free to offer several different experts to testify regarding that relevant specialty, as long as each expert meets the criteria of § 2169(1).

Chief Justice TAYLOR's concurrence contends that because I believe that multiple *specialties* may be relevant, this must also mean that I share its view that a plaintiff can utilize multiple experts because it would be impossible for any one expert to meet the requirements of MCL 600.2169(1)(b). *Post* at 631 n 71. This provision requires the proposed expert to have "devoted a majority of his or her professional time" to practicing or teaching the specialty in which the defendant physician specializes. That is, Chief Justice TAYLOR's concurrence contends that because I believe that multiple specialties may be relevant, and because MCL 600.2169(1)(b) requires the proposed expert to have "devoted a majority of his or her professional time" to practicing or teaching the specialty in which the defendant physician specializes, I must necessarily agree with them that the plaintiff can utilize multiple experts because one expert cannot possibly devote a majority of his professional time to practicing or teaching multiple specialties.

However, Chief Justice TAYLOR's concurrence overlooks that I agree with the majority opinion that under

§ 2169(1) only the one most relevant specialty must match, and disagree with Chief Justice TAYLOR's concurrence that all specialties, however irrelevant, must match under § 2169(1). Because only the one most relevant specialty must match under § 2169(1), it is not at all impossible for an expert to meet the requirements of § 2169(1)(b). Moreover, contrary to Chief Justice TAYLOR's concurrence's contention, § 2169(1)(b) does not "preclude any expert from providing testimony regarding more than one specialty area." *Post* at 592. For instance, using Chief Justice TAYLOR's concurrence's hypothetical defendant physician who specializes in cardiovascular surgery and nephrology and who negligently inserts a pacemaker, if the trial court determines that cardiovascular surgery is the one most relevant specialty, under § 2169(1)(a), the plaintiff's expert must specialize in cardiovascular surgery and, under § 2169(1)(b), he must have devoted a majority of his professional time practicing or teaching cardiovascular surgery. However, even if the plaintiff's expert meets the requirements of § 2169(1), the trial court may conclude that nephrology is also a relevant specialty and that, if the expert does not also specialize in nephrology, he is not qualified under either § 2169(2) or MRE 702. Again, there is nothing inconsistent with holding that an expert may be qualified under one provision of law, but is not qualified under a different provision. Moreover, if the plaintiff's expert devotes a majority of his professional time to practicing or teaching cardiovascular surgery and also specializes in nephrology, nothing precludes that expert from testifying about both cardiovascular surgery and nephrology because § 2169(1)(b) only applies to the one most relevant specialty.

Chief Justice TAYLOR's concurrence professes to concur with my concurring opinion. *Post* at 591. While this

would be welcome, those who signed Chief Justice TAYLOR's opinion should understand my concurring opinion more clearly than they do. While this opinion and Chief Justice TAYLOR's concurrence are in agreement with the proposition that all relevant specialties must match, our analyses differ. While this opinion grounds this conclusion in § 2169(2) and MRE 702, Chief Justice TAYLOR's concurrence grounds this conclusion in § 2169(1). Of greater practical significance, the analysis in this opinion, unlike that of Chief Justice TAYLOR's concurrence, cannot be separated from the majority opinion's proposition that no irrelevant specialties must match and that an individual expert must meet all of the requirements of § 2169(1) in order to testify.

Because Chief Justice TAYLOR's concurrence sows confusion regarding where the majority lies, I will attempt to clarify this. In my judgment, there is majority support for the following propositions:

(1) Irrelevant specialties do not have to match (Justices CAVANAGH, WEAVER, and KELLY, and myself);

(2) Under § 2169(1), only the one most relevant specialty must match (Justices CAVANAGH, WEAVER, and KELLY, and myself);

(3) An individual expert must meet all of the requirements of § 2169(1) in order to testify (Justices CAVANAGH, WEAVER, and KELLY, and myself);

(4) An assemblage of experts cannot join their expertise to collectively satisfy the requirements of § 2169(1) (Justices CAVANAGH, WEAVER, and KELLY, and myself);

(5) That an expert is qualified under § 2169(1) does not mean that the trial court cannot disqualify the expert on other grounds (Chief Justice TAYLOR and Justices CAVANAGH, WEAVER, KELLY, CORRIGAN, and YOUNG, and myself);

(6) Other relevant specialties may have to match under § 2169(2) and MRE 702 (Chief Justice TAYLOR and Justices CORRIGAN and YOUNG, and myself).

APPENDIX

In light of the growing complexity of medical malpractice statutes in Michigan and the resultant case law, the following is designed as a brief summary of recent Michigan Supreme Court decisions in this area.

(1) If the claim pertains to an action that occurred within the course of a professional medical relationship and the claim raises questions of medical judgment beyond the realm of common knowledge and experience, the claim sounds in medical malpractice, not ordinary negligence. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004).

(2) The period of limitations is two years for an action charging malpractice. MCL 600.5805(6).

(3) A person cannot commence a medical malpractice action without first giving the defendant written notice. MCL 600.2912b(1).

(4) No suit can be commenced for 182 days after written notice is given. MCL 600.2912b(1).

(5) The 182-day no-suit period can be shortened to 154 days if the defendant does not provide a written response within 154 days. MCL 600.2912b(8). The 182-day no-suit period can be shortened to 91 days under certain circumstances. MCL 600.2912b(3). Finally, the 182-day no-suit period can be shortened to some other number of days if the defendant informs the plaintiff in writing that the defendant does not intend to settle the claim. MCL 600.2912b(9).

(6) If the notice of intent is given 182 days or less before the end of the two-year limitations period, this

tolls the two-year limitations period for 182 days. MCL 600.5856(c); *Omelenchuk v City of Warren,* 461 Mich 567; 609 NW2d 177 (2000).

(7) A notice of intent must include: (a) the factual basis for the claim; (b) the applicable standard of practice or care alleged by the claimant; (c) the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility; (d) the alleged action that should have been taken to achieve compliance with the alleged standard of practice or care; (e) the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice; and (f) the names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. MCL 600.2912b(4); *Roberts v Mecosta Gen Hosp (After Remand),* 470 Mich 679; 684 NW2d 711 (2004).

(8) A notice of intent that is not in full compliance with MCL 600.2912b(4) does not toll the limitations period. MCL 600.5856(c); *Roberts, supra*.

(9) The tacking or addition of successive 182-day periods is prohibited. MCL 600.2912b(6).

(10) A second notice of intent can toll the period of limitations if the first notice of intent did not toll the period of limitations. MCL 600.2912b(6); *Mayberry v Gen Orthopedics, PC,* 474 Mich 1; 704 NW2d 69 (2005).

(11) A complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b does not toll the period of limitations. MCL 600.2912b(1); *Burton v Reed City Hosp Corp,* 471 Mich 745; 691 NW2d 424 (2005).

(12) If a person dies before the period of limitations has run or within 30 days after the period of limitations

has run, the personal representative of the decedent's estate can file a wrongful death action up to two years after letters of authority are issued, as long as the action is brought within three years after the period of limitations has run. MCL 600.5852.

(13) A successor personal representative has two years after appointment to file an action on behalf of the estate as long as the action is filed within three years after the period of limitations has run. MCL 600.5852; *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003).

(14) A notice of intent does not toll the additional period permitted for filing wrongful death actions under the wrongful death saving provision, MCL 600.5852. MCL 600.5856(c); *Waltz v Wyse,* 469 Mich 642; 677 NW2d 813 (2004).

(15) A plaintiff is required to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169. MCL 600.2912d(1); *Grossman v Brown,* 470 Mich 593; 685 NW2d 198 (2004).

(16) A complaint alleging medical malpractice that is not accompanied by the statutorily required affidavit of merit does not toll the limitations period. MCL 600.2912d(1); *Scarsella v Pollak,* 461 Mich 547; 607 NW2d 711 (2000).

(17) If a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the occurrence that is the basis for the action. MCL 600.2169(1)(a); *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006).

(18) If a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action. MCL 600.2169(1)(a); *Woodard II, supra*.

(19) If the defendant physician is a specialist who is board certified, the plaintiff's expert witness must be a specialist who is board certified in that specialty. MCL 600.2169(1)(a); *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004).

(20) If a defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have received the same certificate of special qualifications. MCL 600.2169(1)(a); *Woodard II*.

(21) Where a defendant physician specializes in several specialties, the plaintiff's expert witness must have specialized in the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice, i.e., the one most relevant specialty. MCL 600.2169(1)(a); *Woodard II*.

(22) Where a defendant physician is board certified in several specialties, the plaintiff's expert witness must be board certified in the specialty that the defendant physician was engaged in during the course of the alleged malpractice, i.e., the one most relevant specialty. MCL 600.2169(1)(a); *Woodard II*.

(23) If the defendant physician is a specialist, the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty. MCL 600.2169(1)(b); *Woodard II*.

(24) If the defendant physician specializes in a subspecialty, the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the subspecialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant subspecialty. MCL 600.2169(1)(b); *Woodard II*.

(25) Because an expert is qualified under MCL 600.2169(1) does not mean that the trial court cannot disqualify the expert on other grounds. MCL 600.2169(2); § 2169(3); MCL 600.2955; MRE 702; *Woodard II*.

TAYLOR, C.J. (*concurring in the result only*). We concur in that portion of Justice MARKMAN's concurrence stating that a defendant physician's multiple areas of specialty "may be considered under [MCL 600.2169(2)] and MRE 702" in barring the testimony of an expert witness who does not possess the same multiple areas of medical specialty. *Ante* at 582 (emphasis omitted). Thus, we agree with Justice MARKMAN's concurring opinion that there can be more than one relevant area of medical specialty at issue in establishing a breach of the applicable standard of care, and that a proffered expert may be excluded on that basis. At first glance, Justice MARKMAN's concurrence appears to be inconsistent with his lead opinion because the lead opinion would only permit evidence of a singular medical specialty to be adduced. The lead opinion concludes that the trial court must choose *one*, and only one, specialty that is relevant to establishing the appropriate standard of care and precludes the parties from introducing expert testimony with regard to any other relevant specialty. Justice MARKMAN's concurrence, however, concludes, as we do, that *more than one* medical specialty may be ger-

mane in establishing the requisite standard of care and that plaintiffs may be required to introduce expert testimony regarding other relevant specialties.

Furthermore, we agree with Justice MARKMAN's concurring opinion that the practice and teaching requirements in MCL 600.2169(1)(b) preclude any expert from providing testimony regarding more than one specialty area. Thus, because he opines that plaintiffs can be obligated to produce expert testimony regarding more than one specialty area, and every expert may only testify regarding one specialty area, it logically follows that plaintiffs *must* be able to utilize *more than one* expert to establish a breach of the applicable standard of care, a conclusion with which we wholeheartedly agree.

Thus, we believe that Justice MARKMAN's "concurrence" more closely resembles this opinion than the lead opinion. We therefore concur with his concurrence insofar as it concludes that there can be more than one specialty germane to establishing the appropriate standard of care, and also insofar as it implicitly stands for the conclusion that multiple experts may be utilized in establishing a breach of the appropriate standard of care.[1] As such, there are four votes for these two conclusions of law, just as the lead opinion purports to carry four votes for the conclusions that there can be only one relevant specialty and that only one expert may be utilized.[2] However, in this peculiar, perhaps

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[1] We do not, however, agree with his conclusion that the trial court, rather than the parties themselves or the jury, is to determine which specialties are germane. We also do not join in his appendix, because much of its discussion is obiter dictum.

[2] The lead opinion asserts that it has four votes, apparently believing that stating it makes it so. However, as we have pointed out, the inconsistencies between Justice MARKMAN's concurrence and his lead opinion evince that the lead opinion does not, in fact, carry four votes.

unprecedented, situation, we conclude that Justice MARKMAN's concurrence, insofar as it concludes that multiple specialties may be relevant and that multiple experts may be utilized, is the law. Certainly, the fact that Justice MARKMAN lends his signature to two incompatible opinions does not lead to the conclusion that he may cast two separate votes. Rather, because his concurrence was written conceptually later in time than his lead opinion, his concurrence is the law. While some of our analysis goes beyond these two points of his concurrence, it is submitted as the better approach to the statute under review and may be of use in later cases.

INTRODUCTION

In these medical malpractice cases, we granted leave to appeal to consider whether plaintiffs' proposed expert witnesses qualify under MCL 600.2169 to testify regarding what standards of care the defendant doctors should have met. The trial courts in both cases granted defendants' motions to strike plaintiffs' proposed experts on the basis that they were not qualified under MCL 600.2169. In *Woodard*, a majority of the Court of Appeals affirmed the trial court's ruling on this issue.[3] In *Hamilton*, the Court of Appeals reversed the trial

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Further evidence that Justice MARKMAN's concurrence is not in harmony with the lead opinion is that he had to file it *because* none of the other justices signing his lead opinion agree with his position.

[3] Unpublished opinion per curiam of the Court of Appeals and separate unpublished opinion concurring in part and dissenting in part by METER, J., issued October 21, 2003 (Docket Nos. 239868, 239869). A separate majority, however, determined that the doctrine of res ipsa loquitur applied to obviate plaintiffs' need to present expert testimony. Unpublished opinion concurring in part and dissenting in part by METER, J., and unpublished dissenting opinion by BORRELLO, J. We have previously reversed that portion of the Court of Appeals holding in *Woodard v Custer,* 473 Mich 1; 702 NW2d 522 (2005) (*Woodard I).*

court's judgment.[4] We conclude in both cases that plaintiffs' proposed experts do not meet the requirements of MCL 600.2169 and, therefore, that plaintiffs have failed to present expert testimony sufficient to support their claims. Therefore, in *Woodard*, we affirm the part of the Court of Appeals judgment that held that plaintiffs' proposed expert is not qualified and remand this case to the circuit court for reinstatement of its order dismissing plaintiffs' claim with prejudice. In *Hamilton*, we reverse the Court of Appeals judgment that plaintiff's proposed expert is qualified and remand this case to the circuit court for reinstatement of its order granting a directed verdict to defendant.

I. FACTS AND PROCEEDINGS BELOW

A. *WOODARD v CUSTER*

We summarized the facts underlying this case in our recent decision in *Woodard I*:

> Plaintiffs' fifteen-day-old son was admitted to the Pediatric Intensive Care Unit (PICU) at the University of Michigan Hospital, where he was treated for a respiratory problem. During his stay in the PICU, he was under the care of Dr. Joseph R. Custer, the Director of Pediatric Critical Care Medicine. When the infant was moved to the general hospital ward, physicians in that ward discovered that both of the infant's legs were fractured. Plaintiffs sued Dr. Custer and the hospital, alleging that the fractures were the result of negligent medical procedures, namely, the improper placement of an arterial line in the femoral vein of the infant's right leg and the improper placement of a venous catheter in the infant's left leg.
>
> Defendant physician is board-certified in pediatrics and has certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. Plaintiffs'

[4] 261 Mich App 608; 684 NW2d 366 (2004).

proposed expert witness, who signed plaintiffs' affidavit of merit, is board-certified in pediatrics, but does not have any certificates of special qualifications.

Before discovery, the trial court denied defendants' motion for summary disposition, concluding that plaintiffs' attorney had a "reasonable belief" under MCL 600.2912d(1) that plaintiffs' proposed expert witness was qualified under MCL 600.2169 to testify against the defendant physician, and, thus, that plaintiffs' affidavit of merit was sufficient. After discovery, the trial court granted defendants' motion to strike plaintiffs' expert witness on the basis that he was not actually qualified under MCL 600.2169 to testify against the defendant physician. The trial court dismissed plaintiffs' claim with prejudice, concluding that plaintiffs could not reach a jury without expert testimony.

The Court of Appeals affirmed the trial court's ruling that plaintiffs' proposed expert witness was not qualified under MCL 600.2169 to testify against the defendant physician (Judge BORRELLO dissented on this issue), but reversed the trial court's dismissal on the basis that expert testimony was unnecessary under the doctrine of res ipsa loquitur, i.e., an inference of negligence may be drawn from the fact that the infant was admitted to the PICU with healthy legs and discharged from the PICU with fractured legs (Judge TALBOT dissented on this issue).[5] The case was remanded for trial.

Defendants sought leave to appeal the Court of Appeals decision that res ipsa loquitur applies and that expert testimony was not necessary. Plaintiffs sought leave to cross-appeal the Court of Appeals decision that their proposed expert witness was not qualified under MCL 600.2169 to testify against the defendant physician. We heard oral argument on whether to grant the applications

[5] Unpublished opinion per curiam of the Court of Appeals and separate opinion concurring in part and dissenting in part by METER, J., and separate dissenting opinion by BORRELLO, J., decided October 21, 2003 (Docket Nos. 239868, 239869).

> or take other peremptory action permitted by MCR 7.302(G)(1).[6] [*Woodard I, supra,* 473 Mich at 3-5.]

After hearing oral argument, we issued our opinion in *Woodard I*, which concerned only defendants' application for leave to appeal. In that opinion, we reversed the Court of Appeals decision that res ipsa loquitur applied to relieve plaintiffs of the need to present expert testimony.[7] Because our decision in *Woodard I* required plaintiffs to produce expert testimony to support their claims, we simultaneously granted plaintiffs' cross-application for leave to appeal the Court of Appeals determination that their proposed expert was not qualified under MCL 600.2169.[8]

B. *HAMILTON v KULIGOWSKI*

Between 1992 and 1998, defendant Dr. Mark F. Kuligowski treated Rosalie Ackley for hypertension, diabetes, weight control, and a thyroid ailment. On March 19, 1998, Ackley, who was in her seventies, complained of numbness and weakness in her left arm. She further informed Kuligowski that she had been diagnosed with a blockage in her neck several years earlier. After detecting abnormal sounds in Ackley's carotid artery during a physical examination, Kuligowski suspected that she had suffered a minor stroke and possibly suffered from bilateral carotid artery disease. Although he ordered a bilateral carotid Doppler echocardiography,[9] Kuligowski advised Ackley that

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[6] 471 Mich 890 (2004).

[7] *Woodard I, supra,* 473 Mich at 9-10.

[8] 473 Mich 856 (2005).

[9] A "Doppler echocardiography" is an "ultrasound used to measure cardiovascular blood flow velocity for diagnostic purposes (as for evalu-

there was no cause for immediate concern. Three days later, Ackley suffered a stroke. She subsequently died in December 2000.

Plaintiff, Ackley's daughter, filed the instant medical malpractice action on behalf of Ackley's estate alleging that Kuligowski was negligent in failing to recognize Ackley's prestroke symptoms and render appropriate treatment. Kuligowski is board-certified in internal medicine, and primarily sees geriatric patients. In support of her claims, plaintiff called as a witness a proposed expert who, like Kuligowski, is board-certified in internal medicine. Plaintiff's proposed expert spends half of his professional time in his office treating internal medicine and infectious disease patients and the other half in a hospital treating primarily infectious disease patients.

Kuligowski moved to strike plaintiff's proposed expert, arguing that he was not qualified under MCL 600.2169 to testify with regard to the appropriate standard of care because he specializes in infectious diseases while Kuligowski himself specializes in general internal medicine. The circuit court granted Kuligowski's motion, ruling that plaintiff's proposed expert was not qualified under MCL 600.2169(1)(b) because he did not devote a majority of his time to the practice of general internal medicine but, instead, to the treatment of infectious diseases. Thereafter, the circuit court also granted Kuligowski's motion for a directed verdict on the basis that plaintiff did not have a qualified expert to support her claims.

The Court of Appeals reversed the trial court's ruling and held that plaintiff's proposed expert was qualified

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ating valve function)." *Merriam Webster's Medline Plus*, <http://www2.merrriam-webster.com/cgi-bin/mwmednlm> (accessed January 9, 2006).

under MCL 600.2169. The panel concluded that the treatment of infectious diseases was merely a "subspecialty" within the broader specialty of internal medicine, and that the statute does not require the matching of subspecialties. It further concluded that, because the treatment of infectious diseases is merely a branch of internal medicine with a narrower focus, plaintiff's proposed expert did, in fact, devote a majority of his time to the practice of internal medicine. The Court of Appeals therefore remanded the case for further proceedings.[10]

We granted Kuligowski's application for leave to appeal.[11]

II. STANDARD OF REVIEW

These cases involve the interpretation of MCL 600.2169. We review questions of statutory interpretation de novo.[12] As always, our goal is to discern and give effect to the legislative intent that is expressed in the statutory language.[13] If the statutory language is unambiguous, then the Legislature's intent is clear and we must enforce the statute as written.[14]

III. ANALYSIS

Before 1986, the question whether a plaintiff's proposed expert was qualified to testify with regard to the appropriate standard of care in a medical malpractice

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[10] 261 Mich App 608; 684 NW2d 366 (2004).

[11] 473 Mich 858 (2005).

[12] *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

[13] *Halloran v Bhan,* 470 Mich 572, 576; 683 NW2d 129 (2004).

[14] *Mayor of Lansing v Pub Service Comm,* 470 Mich 154, 157; 680 NW2d 840 (2004).

case was governed by MRE 702.[15] This evidentiary rule provided trial courts with broad discretion to qualify proposed experts if they determined that scientific, technical, or other specialized knowledge was needed to assist the trier of fact in determining the appropriate standard of care the defendant doctor should have met and that the proposed expert was qualified to offer such testimony on the basis of the expert's " 'knowledge, skill, experience, training, or education.' "[16]

However, as we discussed in *McDougall v Schanz,*[17] our Legislature ultimately deemed MRE 702 ineffective

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[15] At the time the first version of MCL 600.2169 was enacted in 1986, MRE 702 provided:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A recent amendment of MRE 702, which became effective on January 1, 2004, further limits a trial court's discretion to qualify a proposed expert by adding that the court may only admit the expert's testimony if:

> (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As stated in the staff comments that follow MRE 702, the purpose of this amendment was to emphasize the trial court's role as gatekeeper to exclude expert testimony that is unreliable because it is based on unproven theories or methodologies in conformance with *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael,* 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

[16] See *McDougall v Schanz,* 461 Mich 15, 25; 597 NW2d 148 (1999), quoting MRE 702.

[17] *Id*.

in assuring that proposed experts presented reliable testimony in medical malpractice cases.[18] The primary deficiency with MRE 702 was that it failed to ensure that trial judges excluded proposed experts who were not actively involved in the medical field about which they sought to testify.[19] Therefore, in 1986 our Legislature enacted the first version of MCL 600.2169, which was designed to limit a trial court's discretion to qualify experts in medical malpractice cases by systematically "preclud[ing] certain witnesses from testifying solely on the basis of the witness' lack of practice or teaching experience . . . ."[20]

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[18] *Id*. at 25, 36.

[19] *McDougall, supra*, 461 Mich at 25 n 9, quoting the dissenting Court of Appeals judge's opinion in *McDougall,* 218 Mich App 501, 509 n 1; 554 NW2d 56 (1996) (TAYLOR, P.J., dissenting), quoting the *Report of the Senate Select Committee on Civil Justice Reform*, issued September 26, 1995:

> "As a practical matter, in many courts merely a license to practice medicine is needed to become a medical expert on an issue.
>
> "This has given rise to a group of national professional witnesses who travel the country routinely testifying for plaintiffs in malpractice actions. These 'hired guns' advertise extensively in professional journals and compete fiercely with each other for the expert witness business. For many, testifying is a full-time occupation and they rarely actually engage in the practice of medicine. There is a perception that these so-called expert witnesses will testify to whatever someone pays them to testify about.
>
> "This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying. In particular, with the malpractice crisis facing high-risk specialists, such as neurosurgeons, orthopedic surgeons and ob/gyns, this reform is necessary to insure that in malpractice suits against specialists the expert witnesses actually practice in the same speciality. This will protect the integrity of our judicial system by requiring real experts instead of 'hired guns.' "

[20] *McDougall, supra,* 461 Mich at 24-25.

Our Legislature further limited the discretion of trial judges to qualify proposed experts in 1993 when it enacted 1993 PA 78, which amended MCL 600.2169 to set forth even more restrictive criteria than the 1986 version.[21] In its current form, MCL 600.2169 now provides, in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.[22]

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[21] *McDougall, supra,* 461 Mich at 21 n 2.

[22] Like MCL 600.2169(1)(a) and (b), which set forth the minimum criteria for proposed experts who will testify regarding the standard of

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> (3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

Accordingly, these provisions set forth a number of specific, minimum criteria that a proposed expert must satisfy in order to testify regarding the appropriate standard of care in a medical malpractice case.[23] The first of these, of course, is that the proposed expert must be a licensed health professional.[24] The statute then goes on to set forth several additional requirements aimed at ensuring that the proposed expert possesses the same professional credentials as the defendant

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care that a specialist should have followed, MCL 600.2169(1)(c) sets forth criteria for cases involving general practitioners. Because both these cases involve specialists, however, MCL 600.2169(1)(c) is not germane to our decision. Additionally, MCL 600.2169(2) sets forth specific criteria that a trial court must consider when determining whether *any* proposed expert in a medical malpractice case—not just those offered to testify regarding the appropriate standard of care, but such matters as causation, and so forth—is qualified to testify. *Halloran, supra,* 470 Mich at 578 n 6. However, because both proposed experts in these cases sought to testify with regard to the appropriate standard of care, their qualification is governed by the more specific requirements of MCL 600.2169(1). *Id.* Therefore, MCL 600.2169(2) is also not relevant to our decision in these cases.

[23] We agree with the lead opinion that, although we refer to MCL 600.2169(1) throughout this opinion as imposing requirements on proposed plaintiff's experts, the statute applies equally to standard of care experts offered by the defendant because it applies to standard of care testimony offered "against" and on "behalf" of the defendant doctor. The lead opinion seems to think we disagree with this, *ante* at 560 n 5, but that is not the case. Instead, what we point out later in this opinion is that, contrary to the lead opinion's apparent belief, it will not always be defendants that assert that multiple specialties are germane to establishing the standard of care that the defendant doctor should have exercised. Rather, we believe there will be circumstances in which plaintiffs will also assert that more than one of the defendant doctor's specialty areas are germane to understanding the standard of care the defendant doctor should have exercised.

[24] MCL 600.2169(1).

doctor, thereby assuring that the proposed expert is familiar with the standards and techniques that should typically be followed by a physician in the defendant's position. In particular, the statute requires that if the defendant doctor is a specialist, the proposed expert must also be a specialist in the same specialty. Further, if the defendant doctor is a board-certified specialist, the proposed expert must also be a board-certified specialist in the same specialty.[25]

Moreover, in addition to requiring that the proposed expert possess the same specialty qualifications as the defendant doctor, the statute, unlike MRE 702, also seeks to ensure that the proposed expert possesses actual, recent experience in that specialty area. It does this by requiring that the proposed expert have devoted a majority of his or her professional time during the year preceding the alleged malpractice to either the active clinical practice of the defendant's specialty area or the instruction of that specialty area.[26]

Finally, the statute makes clear that the above requirements represent only the bare *minimum* that a proposed expert must meet in order to testify regarding the standard of care. It does this by explicitly granting a trial court the discretion to disqualify a proposed expert for other, unenumerated reasons;[27] for example, if the trial court determines that the proposed expert's testimony is unreliable under MCL 600.2955[28] or the three factors recently added to MRE 702.

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[25] MCL 600.2169(1)(a).

[26] MCL 600.2169(1)(b).

[27] MCL 600.2169(3).

[28] MCL 600.2955 requires a trial court to determine whether a scientific opinion rendered by an otherwise qualified expert is reliable by assessing, among other things, whether the opinion and its basis have been subjected to testing and peer review publication. MCL 600.2955(3)

A. "SPECIALIST" DEFINED

As is obvious from the above synopsis of the statute, the determination whether a proposed expert is minimally qualified to testify regarding the appropriate standard of care often turns on whether the defendant doctor qualifies as a specialist in a given area of medicine, thereby requiring the proposed expert to likewise qualify as a specialist in that area. MCL 600.2169, however, does not define the term "specialist." It therefore falls upon us to accord a meaning to that term that best comports with the Legislature's intent. In doing so, we are guided by two principles. The first is that MCL 600.2169 does not stand alone. Rather, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ."[29] The second comes from the Legislature's decree in MCL 8.3a that undefined words or phrases shall be given their common and ordinary meaning, but that technical words and phrases, and legal terms of art, are to be construed according to their peculiar and appropriate meaning.[30]

Applying the first of these principles, we first note that some indication regarding the meaning of the term

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specifically provides that the provisions of MCL 600.2955 are in addition to the criteria for expert testimony in medical malpractice actions provided in MCL 600.2169.

[29] *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982).

[30] MCL 8.3a provides:

> 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.

"specialist" can be gleaned from the relationship of MCL 600.2169 to MCL 600.2912d(1).[31] The latter statute, in conjunction with MCL 600.2169, requires the plaintiff's counsel to file an affidavit of merit with the complaint that is signed by a physician who counsel *reasonably believes* specializes in the same specialty as the defendant physician.[32] Accordingly, the Legislature intended for a plaintiff to be able to form a reasonable belief regarding whether a defendant doctor is a specialist at the commencement of the action—i.e., before the discovery process. Therefore, it is reasonable to conclude that the Legislature intended for the determination whether a defendant doctor is a specialist to correlate to how the defendant doctor subjectively represents himself or herself; in other words, whether the doctor holds himself or herself out as a specialist.

Further indication of what the Legislature intended when it used the term "specialist" can be gleaned from dictionary definitions. Because MCL 600.2169 uses the term "specialist" in the context of a *medical* specialist, it is a technical term that must be accorded its "peculiar and appropriate meaning" within the medical community. MCL 8.3a. Accordingly, it is necessary in this instance for us to refer to medical, rather than lay, dictionaries.[33]

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[31] MCL 600.2912d(1) provides in relevant part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

[32] *Grossman, supra,* 470 Mich at 596.

[33] We realize that in *Cox v Flint Bd of Hosp Managers,* 467 Mich 1, 18-19; 651 NW2d 356 (2002), quoting *Random House Webster's College*

Some medical dictionaries base the determination whether a doctor is a specialist on how that doctor allocates time during practice; in other words, whether that doctor limits his or her practice primarily to a particular branch of medicine or surgery, or to a certain class of patients, organs, or diseases.[34] Other medical dictionaries, however, define a specialist not according to how the doctor allocates time, but rather according to whether the doctor has advanced training or knowledge in a specific branch of medicine or surgery, or a certain class of patients, organs, or diseases.[35]

Dictionary (1997), this Court defined the term "specialist" as " 'a medical practitioner who deals only with a particular class of diseases, conditions, patients, etc.' " There, we listed several medical terms with their definitions as a reference for the issue under discussion in that case: the scope of a nurse's responsibilities. *Id.* Accordingly, we are not bound by this dictum, particularly where we resolved that case on another ground.

[34] See *Dorland's Illustrated Medical Dictionary* (28th ed), defining a "specialist" as "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." Accord *Gould Medical Dictionary* (3d ed), which similarly defines a "specialist" as "[a] physician or surgeon who limits his practice to certain diseases, or to the diseases of a single organ or class, or to a certain type of therapy . . . ." See also *Stedman's Medical Dictionary* (26th ed), defining a "specialist" as "[o]ne who devotes professional attention to a particular specialty or subject area," and a "specialty" as "[t]he particular subject area or branch of medical science to which one devotes professional attention."

[35] See *Taber's Cyclopedic Medical Dictionary* (18th ed), which defines "specialist" as

> [a] dentist, nurse, physician, or other health professional who has advanced education and training in one clinical area of practice such as internal medicine, pediatrics, surgery, ophthalmology, neurology, maternal and child health, or cardiology. In most specialized areas of health care, there are organizations offering qualifying examinations. When an individual meets all of the criteria of such a board, he or she is called "board certified" in that area.

Thus, taking into consideration these technical definitions of the term "specialty," as well as the meaning that can be ascribed to it from the relationship of MCL 600.2169 to MCL 600.2912d(1), we conclude that the Legislature intended the term "specialist" as used in MCL 600.2169 to denote a physician who holds himself or herself out as either (1) limiting his or her practice primarily to a particular branch of medicine or surgery, or to a certain class of patients, organs, or diseases, or (2) having advanced training or knowledge in a specific branch of medicine or surgery, or a certain class of patients, organs, or diseases.[36]

We note at this point that many areas of specialization contain narrower, more limited areas within them. For instance, a physician who specializes in pediatrics

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See also *Mosby's Medical Dictionary* (6th ed), which defines "specialist" as "a health care professional who practices a specialty." It then defines "specialty" as

> a branch of medicine or nursing in which the professional is specially qualified to practice by having attended an advanced program of study, by having passed an examination given by an organization of the members of the specialty, or by having gained experience through extensive practice in the specialty.

[36] In their briefs filed in this Court, the plaintiffs in both *Woodard* and *Hamilton*, as well as several of their amici, have argued emphatically that a "specialty" area must be defined as being synonymous with the areas of medicine in which a doctor can obtain board certification from either the American Board of Medical Specialties (ABMS) or the American Osteopathic Association (AOA). In support of this argument, they rely on the Legislature's mandate in MCL 600.2169(1)(a) that if the defendant doctor is a board-certified specialist, the proposed expert witness "must be a specialist who is *board certified in that specialty.*" (Emphasis added.) We disagree. Although this language indicates that specialty areas can overlap with areas in which a doctor can obtain board certification, it in no way limits the definition of specialty to only those areas. Moreover, the above definitions of the term "specialist" from *Taber's* and *Dorland's* make clear that the areas of medicine in which a doctor can specialize are not limited only to those in which a doctor can obtain board certification.

can focus on general pediatric care, or can further concentrate on the more limited fields of pediatric critical care or neonatal-perinatal care. Similarly, a physician who specializes in internal medicine can focus on general internal medicine or further concentrate his or her practice on any one of numerous, more limited fields such as cardiology, infectious diseases, gastroenterology, nephrology, and so forth. Plaintiffs maintain that the term "specialty" refers only to those areas of medicine that are recognized and designated as such by the American Board of Medical Specialties (ABMS) and the American Osteopathic Association (AOA). Under the ABMS/AOA framework, more generalized fields are termed "specialties" and more limited fields are termed "subspecialties." Thus, plaintiffs argue that their proposed experts' qualifications and the defendant doctors' qualifications need only match at the broader, more generalized level. They assert that the narrower, more focused areas are not specialties but "subspecialties" under the ABMS/AOA framework and that the language of MCL 600.2169 does not contemplate subspecialties.

We reject this assertion. The plain language of MCL 600.2169(1)(a) is completely devoid of any indication that the Legislature intended that a physician's "specialty" be circumscribed by the designations given by the ABMS and the AOA. Clearly, the unambiguous language of MCL 600.2169(1)(a) contemplates board-certified specialists as well as non-board-certified specialists. Because the statute permits a physician to be a "specialist" without board certification of *any variety,* there is no basis to conclude that the designations given by optional certifying organizations dictate a physician's "specialist" status.[37] Moreover, permitting the

[37] As amicus ABMS acknowledges in its brief, a physician need not be certified in a particular area of medicine in order to practice it. Thus,

"specialty" designations given by the ABMS and the AOA to determine a physician's specialty would render MCL 600.2169(1)(c) nugatory. Because both certifying boards award specialty certification in family medicine,[38] every general practitioner would be considered a "specialist" and subject to the expert witness requirements of MCL 600.2169(1)(a) instead of the expert witness requirements applicable to generalists under § 2169(1)(c).

Instead, we turn to the generally accepted technical meaning of the term "specialty," which encompasses narrower, more focused areas of medical practice, qualifying them as specialties in and of themselves.[39] Thus, because the broader, more generalized areas and the narrower, more limited areas within them both constitute specialties under the accepted technical meaning of the word "specialty," a plaintiff's proposed expert must match the defendant doctor's qualifications at both levels.[40]

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certifying organizations such as the ABMS do not control a physician's practice area. Such organizations develop and administer various benchmarks of competency for those physicians who *voluntarily elect* to be certified in their chosen areas of specialty.

[38] The American Board of Family Medicine is a member board of the ABMS. See <https://www.theabfm.org> (accessed April 20, 2006). The American Osteopathic Board of Family Physicians is a member board of the AOA. See <http://www.aobfp.org/home.html> (accessed April 20, 2006).

[39] Our construction of the term "specialty" as also encompassing so-called "subspecialties" is consistent with the technical meaning of the term "subspecialty," which is defined as "a subordinate field of specialization." *Merriam Webster's Medline Plus*, <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va'subspecialty> (accessed January 9, 2006).

[40] An example of a case where a plaintiff's proposed expert did not match the defendant doctor's qualifications at both levels can be seen in our recent decision in *Halloran v Bhan,* 470 Mich 572; 683 NW2d 129 (2004). In *Halloran*, we held that the plaintiff's proposed expert failed to

B. "BOARD-CERTIFIED" DEFINED

Once it is determined that a defendant doctor qualifies as a specialist in a given area, the next inquiry is whether he or she also qualifies as a board-certified specialist in that area. Before defining what it means to be board-certified, however, one point bears emphasis. That is that the statute does not require the matching of board certifications in and of themselves. Rather, it only makes board certifications germane if the defendant doctor is a "*specialist* who is board certified." Accordingly, the fact that a defendant doctor has obtained a board certification in a given area is irrelevant to the issue of credential matching unless the defendant doctor first qualifies as a specialist in that area.

Like with the term "specialty," the Legislature did not define the phrase "board certified" in MCL 600.2169. Because of this, the plaintiffs in both these cases have argued that we should read MCL 600.2169 *in pari materia* with MCL 333.2701(a) of the Public Health Code, which defines "board certified" as "certified to practice in a particular medical specialty by a national board recognized by the American board of medical specialties [ABMS] or the American osteopathic association [AOA]." Accordingly, plaintiffs urge this Court to hold that a proposed expert need only match a defendant doctor's board certification if that certification was issued by the ABMS or the AOA.

We decline to impute the definition of "board certified" from MCL 333.2701(a) to MCL 600.2169 for several reasons. First, the Legislature made clear that the definition of "board certified" set forth in MCL 333.2701(a) applies only to the Public Health Code by

meet the requirements of MCL 600.2169 because, although he arguably matched the defendant doctor's credentials at the subspecialty level, he failed to match them at the broader specialty level. *Id.*

prefacing it with the statement "*As used in this part* [of the Public Health Code] . . . 'Board certified' means . . . ." (Emphasis added.) Especially in light of such clear words of limitation, we must presume that the Legislature intended that the definition of "board certified" set forth in MCL 333.2701(a) would not be applied to other statutes using the same phrase.[41] Second, statutes are only read *in pari materia* when they relate to the same subject or share a common purpose,[42] and not when, as here, their scope and aim are distinct and unconnected.[43] The Legislature's purpose in enacting the Public Health Code was to protect the public health, safety, and welfare,[44] by regulating the persons, facilities, and agencies that affect them. Its purpose in enacting the Revised Judicature Act, of which MCL 600.2169 is a part, was to set forth the organization and jurisdiction of the judiciary and to effect procedural improvements in civil and criminal actions.[45] MCL 600.2169 fulfills this purpose by setting minimum requirements for proposed experts to ensure

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[41] See *Grimes v Dep't of Transportation,* 475 Mich 72, 85; 715 NW2d 275 (2006); see also *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *Detroit v Redford Twp,* 253 Mich 453, 456; 235 NW 217 (1931) ("Courts cannot attach provisions not found therein to an act of the legislature because they have been incorporated in other similar acts."), citing *Michigan v Sparrow,* 89 Mich 263, 269; 50 NW 1088 (1891).

[42] *Detroit v Michigan Bell Tel Co,* 374 Mich 543, 558; 132 NW2d 660 (1965).

[43] *Beznos v Dep't of Treasury (On Remand),* 224 Mich App 717, 722; 569 NW2d 908 (1997).

[44] MCL 333.1111(2).

[45] See *Connelly v Paul Ruddy's Equip Repair & Service Co,* 388 Mich 146, 151; 200 NW2d 70 (1972) ("The purpose of the Act was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas.").

that proof of medical malpractice " 'emanate[s] from sources of reliable character,' "[46] and is unrelated to protecting the health, safety, and welfare of the general public.

We thus fall back on the general rule set forth in MCL 8.3a that undefined, technical phrases are to be construed and understood according to their peculiar and appropriate meaning. We also keep in mind that if the Legislature had wanted to limit the definition of "board certified" in MCL 600.2169 only to certification by specific organizations it would have done so explicitly, as it did in MCL 333.2701(a).[47] Doing so, we adopt the definition of "board certified" set forth by the Appellate Division of the Supreme Court of New York,[48] which has defined that term as denoting "a credential bestowed by a national, independent medical board indicating proficiency in a medical specialty."[49]

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[46] *McDougall, supra*, 461 Mich at 36, quoting *McDougall, supra*, 218 Mich App at 518 (TAYLOR, P.J., dissenting).

[47] A further indication that the Legislature intended to limit the phrase "board certified" to certification by either the ABMS or the AOA *only* for the purposes of the Public Health Code is that it did not limit the phrase in either of the other two instances it has defined it. Specifically, in both MCL 500.2212a(4) of the Insurance Code and MCL 550.1402a(4) of the Nonprofit Health Care Corporation Reform Act, the Legislature defined "board certified" as certification by the ABMS or another "national health professional organization."

[48] The state of New York calls its equivalent to Michigan's circuit court (i.e., the trial court of general jurisdiction) the Supreme Court. The Appellate Division of the Supreme Court of New York is the equivalent of the Michigan Court of Appeals.

[49] *Rosenblum v New York State Workers' Compensation Bd,* 309 AD2d 120, 123; 764 NYS2d 82 (2003). This definition is consistent with how medical dictionaries define the phrase. See *Taber's Cyclopedic Medical Dictionary* (18th ed), defining "board certification," in part, as "a process that ensures that an individual has met standards beyond those of admission to licensure and has passed specialty examinations in the field."

As we did above with regard to the "specialty" versus "subspecialty" dispute, it is again necessary for us to resolve a question that arises in most cases as a result of nomenclature often used to distinguish between certifications offered for broad specialty areas and certifications offered for the narrower subspecialty areas. Specifically, certifications coinciding with the broader specialty areas are often referred to by parties and in case law as board certifications, while certifications coinciding with the narrower specialty areas are referred to as "certificates of special qualifications" or "certificates of added qualifications." The result is that in many cases, such as *Woodard*, plaintiffs will argue that certificates of special qualifications are not board certifications that need to be matched. We clarify, however, that under the above definition of the phrase "board certified," any difference between what are traditionally referred to as board certifications and what have commonly been called certificates of special qualifications is merely one of semantics. When a certificate of special qualifications is a credential bestowed by a national, independent medical board indicating proficiency in a medical specialty, it is itself a board certification that must be matched.

C. WHETHER ALL SPECIALTIES AND BOARD CERTIFICATIONS MUST BE MATCHED

Because many defendant doctors specialize in more than one area, or have become board-certified special-

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The justices in the lead opinion state that they find it "befuddling" that we have adopted the definition of "board certified" from *Rosenblum* without further explanation. However, we have explained, we believe, that we adopted the definition from *Rosenblum* because it is consistent with the technical, medical definition of the term as required by MCL 8.3a and, simultaneously, is consistent with our Legislature's intention that the phrase "board certified" not be limited only to credentials bestowed by certain national organizations.

ists in more than one area, the question often arises whether MCL 600.2169 requires that a proposed plaintiff's expert match *all* the defendant doctor's specialties and board certifications. In *Tate v Detroit Receiving Hosp*,[50] our Court of Appeals answered this question in the negative. Relying primarily on the statute's mandate that a proposed expert must " 'specialize[] *at the time of the occurrence that is the basis of the action*' " in the same specialty as the defendant doctor,[51] the *Tate* panel concluded that MCL 600.2169 "should be read so as to allow an expert to testify if that expert [specializes in or] is [a] board certified [specialist] in the same specialty being practiced by the [defendant] health professional *at the time* of the alleged malpractice."[52] While we generally agree with the result reached by the Court of Appeals in *Tate*, we disavow its rationale.

The primary flaw with the Court of Appeals holding in *Tate* is that it bases its conclusion regarding what expert testimony is required on the language of MCL 600.2169. By its plain terms, however, MCL 600.2169 *never* requires a plaintiff to introduce expert testimony with regard to the standard of care. Instead, it merely states that if a plaintiff needs to introduce expert testimony to establish the appropriate standard of care, the expert introduced must meet the requirements set forth in the statute. Thus, the issue whether a plaintiff needs to introduce expert testimony at all, and, if so, whether the plaintiff needs to introduce expert testimony concerning the standard of care applicable to all the defendant doctor's specialties and board certifications, depends not on MCL 600.2169, but on the spe-

[50] 249 Mich App 212; 642 NW2d 346 (2002).

[51] *Id.* at 218, quoting MCL 600.2169(1)(a) (emphasis added).

[52] *Id.* at 215 (emphasis in *Tate*).

cialties and board certifications that are put into issue by the parties during the pleading and discovery process. To illustrate this point, we provide the following hypothetical examples:

1. Assume a plaintiff sues a doctor who has five specialties, but asserts in the complaint and accompanying affidavit of merit that the defendant doctor should have met the standard of care coinciding with only one of the defendant doctor's specialties, and that the defendant doctor's other four specialties are irrelevant to establishing and understanding that standard of care. Further assume that, in the answer, the defendant doctor admits that the plaintiff has asserted the appropriate standard of care, further admits that the challenged actions did not conform to it, and only contests the amount of damages.[53] In this situation, the plaintiff need not present expert testimony regarding the standard of care at trial. The plaintiff need only offer evidence regarding damages. MCL 600.2169 is thus inapplicable. The result would be the same in a case where a plaintiff is able to successfully avail himself or herself of the doctrine of res ipsa loquitur.

2. Assume again that the plaintiff sues a doctor who has five specialties, and again asserts in the complaint and accompanying affidavit that the defendant doctor should have met the standard of care coinciding with only one of the defendant doctor's specialties, and that the defendant doctor's other four specialties are irrelevant to establishing and understanding that standard of care. This time, the defendant doctor admits in the

[53] Although we refer only to the defendant doctor's answer and affidavit of meritorious defense in these hypothetical examples, the parties can, of course, further refine which specialties and board certifications are at issue through subsequent discovery techniques such as depositions, requests for admissions, written interrogatories, and so forth.

answer and accompanying affidavit that the plaintiff has asserted the correct standard of care, but asserts that the challenged actions conformed to it. In this case, MCL 600.2169 applies because the plaintiff will need to introduce "expert testimony on the appropriate standard of practice or care" in order to prove that the defendant doctor's actions did not conform to it. However, because the defendant doctor has conceded that only one of the five specialties is germane to the appropriate standard of care, the plaintiff's proposed expert only has to comply with the mandates of MCL 600.2169 with regard to that one specialty.

3. Assume again that the plaintiff sues a doctor who has five specialties, and again asserts in the complaint and accompanying affidavit that the defendant doctor should have met the standard of care coinciding with only one of the defendant doctor's specialties, and that the defendant doctor's other four specialties are irrelevant to establishing and understanding that standard of care. Assume this time that the defendant doctor, instead of admitting that the plaintiff has asserted the appropriate standard of care, asserts that the standard of care coinciding with one of the other specialties is the one the defendant should have met. In this situation, unless the plaintiff agrees with the defendant, the plaintiff will need to present expert testimony concerning the standards of care applicable to two of the defendant doctor's five specialties—the one that the plaintiff asserts is applicable and the one that the defendant asserts is applicable. No testimony regarding the standard of care for the defendant doctor's other three specialties will be needed because the defendant has conceded that they do not apply.

In this third hypothetical, the plaintiff will need to present two types of expert testimony: testimony to prove that the standard of care asserted by the defendant doctor *does not* apply, and testimony to establish the standard of care the plaintiff believes is applicable and how the defendant breached it. This, of course, raises the question whether MCL 600.2169 requires the plaintiff to produce one expert qualified to offer testimony in both areas. We hold that it does not; rather, it allows a plaintiff to produce multiple experts, each matching the defendant doctor's credentials with regard to one specialty area, in order to fulfill the burden.[54] The reason is that MCL 600.2169(1)(b) requires a plaintiff's proposed expert to have devoted a majority of his or her professional time during the year immediately preceding the alleged malpractice to either the active clinical practice of, or the teaching of, the specialty about which the expert will testify. The statute does not impose a similar burden on the defendant doctor. Thus, while a defendant doctor can offer testimony regarding the appropriate standard of care for more than one specialty area, it would be impossible under the statute for a plaintiff to present one expert to likewise testify regarding the appropriate standard of care for more than one specialty area. It is a fundamental rule of statutory interpretation that statutes should be given a reasonable construction based on the legislative intent that can be inferred from their words.[55] A

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[54] We further note that this holding necessarily applies also to MCL 600.2912d(1). Thus, a plaintiff can, and in many cases will need to, utilize multiple experts at the affidavit of merit stage who the plaintiff reasonably believes collectively match all the defendant doctor's specialties.

[55] *Rakestraw v Gen Dynamics Land Systems, Inc,* 469 Mich 220, 224; 666 NW2d 199 (2003) ("In interpreting a statute, our obligation is to discern the legislative intent that may reasonably be inferred from the

construction of MCL 600.2169 that would render compliance impossible would not be reasonable.[56]

D. RESPONSE TO THE JUSTICE MARKMAN LEAD OPINION SIGNED BY JUSTICES CAVANAGH, KELLY, AND WEAVER, WHICH WE CONSIDER A DISSENT

The lead opinion's interpretation of MCL 600.2169(1), as we understand it, is that it represents a legislative determination that in all cases *only one* of the defendant doctor's specialties will be relevant to establishing the standard of care he or she should have met. Therefore, the justices in the lead opinion assert that the statute directs the trial court to determine, at the beginning stages of a lawsuit, exactly which specialty area the defendant doctor was practicing at the time of the alleged malpractice and to limit the expert testimony that may be presented to the jury only to testimony regarding the standard of care commensurate with that specialty area, or what the lead opinion terms the "relevant" specialty. However, the lead opinion's interpretation is not grounded in the statutory language. Furthermore, its effect is to allow the trial court in the name of culling out the irrelevant to really exercise a power of theory preclusion with regard to both plaintiffs and defendants heretofore unknown in

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words actually used in the statute."); see also *Massey v Mandell,* 462 Mich 375, 379-380; 614 NW2d 70 (2000).

[56] *West v Northern Tree Co*, 365 Mich 402, 406; 112 NW2d 423 (1961) ("The law should not be read to require the impossible."). The rule that a statute should not be construed as requiring the impossible is commonly referred to as the doctrine of *lex non intendit aliquid impossible,* which means that "[t]he law does not intend anything impossible. For otherwise the law should not be of any effect." Black's Law Dictionary (6th ed). It is based on the presumption that the Legislature intended for the laws it enacts to be effective, rather than rendered ineffective by a construction requiring a condition that is physically impossible to perform. *Chew Heong v United States*, 112 US 536, 554-555; 5 S Ct 255; 28 L Ed 770 (1884).

our jurisprudence. In doing so, it will deny in given cases either a plaintiff or a defendant doctor his or her constitutional right to have a jury determine factual matters, weigh evidence, and assess credibility. This result will collide with the due process right under our Constitution of a party to present the theories it has as long as there is sufficient evidence to support each theory.

The biggest problem with the lead opinion's interpretation of the statute is that it misunderstands completely the traditional roles played by the judge and jury in the trial process. Juries find facts so as to evaluate the theories of the parties. Judges, among other things, keep out evidence that is irrelevant to the proving of the theories. If the parties cannot produce evidence sufficient for a reasonable juror to decide the case on the basis of a certain theory, the jury is precluded by the judge from considering that theory. This preclusion however cannot come before proofs are presented or it is shown that there are no such facts by a properly pleaded motion for summary disposition or similar motion. A simple example to demonstrate this, albeit from another context, may be helpful. Let us assume that sometime after construction is completed a building collapses. In such a case, if the owner sues the architect on the theory of malpractice, the architect could defend by saying he or she was not the cause because he or she was not negligent but that the real cause was perhaps the negligence of the construction engineers, defectively manufactured materials, or even that there was an act of God, say, an earthquake. These alternative explanations, or theories, of how the building collapsed of course would either be factually supportable or not. If there was evidence to support them, they would be submitted to the jury for sorting out. This opportunity to support a party's theory with

evidence cannot be precluded at the initiation stage of the lawsuit. It only can be done by a motion asserting that there is no genuine issue of material fact pursuant to MCR 2.116(C)(10), or a similar type of pretrial motion, or at the close of a party's proofs at trial where insufficient facts have been submitted. In no case, however, could the theories be described, as the lead opinion does, as relevant or irrelevant. The theories only give alternative views regarding how things happened. The words, relevant or irrelevant, can only apply to the supporting evidence for the theories. In any case, to complete the example, under the lead opinion's thinking, in our hypothetical case a court could hold that the earthquake theory is irrelevant and preclude testimony on it immediately after the answer was filed and before there was any opportunity to even secure or present supporting facts.

The problem the hypothetical points out is the problem the lead opinion will create in medical malpractice cases also. For instance, if a doctor who specializes in cardiovascular surgery and nephrology[57] negligently inserts a pacemaker, the trial court should not be able to preclude either the plaintiff or the defendant from arguing that the defendant's specialty in nephrology was or was not implicated by the procedure as long as the parties can produce reliable[58] expert testimony to

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[57] Nephrology is a medical specialty involving the kidneys. *Merriam Webster's Medline Plus,* <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book= Medical&va=nephrology> (accessed April 20, 2006).

[58] As we outlined at the beginning of the analysis section, the requirements set fort in MCL 600.2169(1) are only *minimum* requirements. The reliability requirements of MCL 600.2955 and MRE 702 must also be considered. Thus, in order to present expert testimony that a particular specialty area is germane to establishing the appropriate standard of care, a party not only needs to establish that its proposed expert meets the credential and experience requirements of MCL 600.2169(1), but *also*

support their theories. If they do, they should be allowed to present their theories to the jury for it to make the factual determination of which specialty or specialties were implicated by the procedure. Yet, under the lead opinion's approach, if the trial judge determines after the defendant's answer is filed that one party's theory regarding which specialty explains the standard of care is "irrelevant," no proofs are allowed on it. Never, before today, has a theory in this or any other litigation of which we are aware been itself declared unpresentable without regard to the evidence to support it. What the lead opinion is doing is not a relevancy exercise. The only "relevancy" question for the trial court would be whether the proffered testimony has any tendency to make it more or less probable that the procedure the defendant doctor performed implicated one or more of his or her specialty areas. But this is not the decision the lead opinion wants the trial court to make. The lead opinion wants to let the trial court determine the factual question whether the pro-

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that the expert's opinion is based on proven theories and methodologies, i.e., that it is not based on "junk science." *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 779-783; 685 NW2d 391 (2004); see also MCL 600.2955; *Craig v Oakwood Hosp,* 471 Mich 67, 78-80; 684 NW2d 296 (2004). The lead opinion appears to overlook this fact and, thus, seems to think that under our analysis parties, particularly defendants, will be able to assert that any specialty is germane to establishing the standard of care.

The lead opinion responds to this by asserting that we are "confusing relevancy and reliability." *Ante* at 568 n 14. That is not the case. What we are stating is that a party must present reliable expert testimony to prove that a specialty area is germane to establishing the standard of care. The lead opinion dismisses this by asking why a party should have to introduce evidence concerning an irrelevant specialty. We would ask in response how exactly it is that a specialty area can be dismissed as irrelevant when reliable expert testimony has been presented that it was implicated by the procedure performed and, thus, is germane to understanding the standard of care the defendant doctor should have exercised.

cedure performed by the defendant doctor did, in fact, implicate one or more of the doctor's specialty areas. This *is not* a relevance question, no matter how adamant the lead opinion is in trying to characterize it as one. Rather, it is an exercise of explanatory theory preclusion.

By allowing such theory preclusion, the lead opinion's analysis allows in a medical malpractice case the trial court, rather than the jury, to determine the factual issue of which specialty or specialties the defendant doctor was practicing at the time of the alleged malpractice. *Ante* at 558-560. This plainly disrupts the historical dynamic of our trial process, whereby factual determinations are to be made by the jury.

The historical division of functions between the court and the jury needs no citation of authority. It is the province of the jury to determine questions of fact and assess the credibility of witnesses.[59]

Not only will the lead opinion's analysis take factual determinations out of the province of the jury, it will also foreclose the jury from assessing credibility and weighing evidence. A good example on the credibility issue can be seen in *Woodard*. Defendant Custer has argued throughout the proceedings in this case that the procedures he performed implicate the specialty of pediatric critical care. It is the case, however, that plaintiff's proffered expert, Anthony Casamassima,

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[59] *People v Lemmon*, 456 Mich 625, 636-637; 576 NW2d 129 (1998); see also *Page v Stanley,* 242 Mich 326, 330; 218 NW 673 (1928). That factual determinations are solely within the province of the jury is not only a matter of historical happenstance, it is also guaranteed by the Michigan Constitution. Specifically, Const 1963, art 1, § 14 provides that, when demanded, the defendant has a right to a jury trial. As we recently explained in *Phillips v Mirac, Inc,* 470 Mich 415, 426; 685 NW2d 174 (2004), this includes the right to have questions of fact decided by the jury.

M.D., who specializes in general pediatrics, testified in his deposition that he performed the same procedures on infants the same age as Austin Woodard during his residency.[60] On the basis of this testimony, plaintiffs have asserted that although such procedures were performed by a critical care specialist in this case, they do not necessarily implicate the specialty of critical care medicine. Under our analysis of the statute, if plaintiffs had presented their own critical care specialist meeting the criteria of MCL 600.2169(1) to support proffered expert Casamassima's testimony that these procedures do not implicate the specialty of critical care, the testimony from all three doctors (Woodard, Casamassima, and plaintiff's critical care specialist) would be presented to the jury. The jury, after hearing this testimony, would evaluate the credibility of each doctor, determine how much weight should be given each doctor's testimony, and make a factual determination regarding the theories so as to determine whether the procedures performed by defendant Custer do, in fact, implicate the specialty of pediatric critical care and the standard of care commensurate with it or, rather, merely implicate the specialty of general pediatrics and its commensurate standard of care. This is the jury's traditional function.[61] The lead opinion, however, does

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[60] The following colloquy took place during Dr. Casamassima's deposition:

> *Q*. When is the last time you inserted a central venous line in a patient as old as Austin Woodard?
>
> *A*. During my residency.
>
> *Q*. Same question with regard to the arterial line.
>
> *A*. During my residency.

[61] *Lemmon, supra*; see also *Alley v Klotz,* 320 Mich 521, 532; 31 NW2d 816 (1948).

not even mention proffered expert Casamassima's testimony. Instead, it concludes without discussing it that Custer was "practicing pediatric critical care medicine . . . ." *Ante* at 576.[62] How do they know? To say it was one or the other specialty is not a determination concerning relevance but a choice of which it was after considering evidence.[63]

Even more troubling at a less theoretical plane than the theory-preclusion role that the lead opinion gives to the trial court is how this will be practically implemented. There are puzzling questions to which the lead opinion provides no answers. For example, consider the following difficulties. In the case where there are mul-

[62] The lead opinion attempts to support its conclusion that these procedures implicate the specialty of critical care medicine by stating that Custer performed them in the PICU while the infant patient was critically ill. The fact that a particular procedure is performed in a PICU on a critically ill patient, however, does not necessarily mean that *that* particular procedure implicates the specialty of critical care medicine. As an example, the mere fact that a critical care specialist practicing in a PICU inserts an IV into the arm of a critically ill patient does not in and of itself make the insertion of IVs a procedure implicating the doctor's specialty in critical care medicine.

[63] The lead opinion claims that it knows Custer was practicing pediatric critical care medicine "because all of the admissible evidence supports the trial court's finding that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice." *Ante* at 576 n 19. That is not the case because Cassamassima's testimony was admissible to prove that he, a specialist in general pediatric care, performed such procedures during his residency. From this testimony, and the context in which it was elicited, the jury could reasonably infer that it is relatively common for doctors who practice only general pediatric care to perform the procedures in this case and that a specialty in pediatric critical care is not required to understand the standard of care that should have been followed. The lead opinion, however, simply concludes without considering this testimony that these procedures require a specialty in pediatric critical care to perform and then, on the basis of that conclusion, asserts that Cassamassima's testimony is not admissible because it was not offered by a specialist in pediatric critical care.

tiple specialties claimed, the trial court would have to have a hearing very soon after the defendant's answer is filed so that the parties can get the decision by the judge of what the "relevant" specialty is so they can secure experts. Yet, at that point, there will be no depositions and probably not even reports, at least for the defendant doctor who just got sued. How is the trial judge to determine which specialties are "relevant" without expert testimony gained from depositions?[64] Moreover, reports, if there are any, are hearsay. How is that dealt with? Further, once the decision is made by the trial court, how does the loser proceed if that party, plaintiff or defendant or maybe even both, thinks the trial court got it wrong? Does he or she make an application for interlocutory leave to appeal in the Court of Appeals? Even if the Court of Appeals does grant the interlocutory leave to appeal, if the trial court's decision is affirmed and this Court will not

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[64] The justices in the lead opinion seem to believe that the trial court will simply be able to determine at the beginning stages of trial, without expert testimony, whether a particular procedure implicates a particular specialty. We find this curious given this Court's historical recognition that expert testimony is almost always needed to establish the standard of care in medical malpractice actions because it is something that is not within the common purview of jurors or the court. *Woodard I, supra,* 473 Mich at 6; *Bryant v Oakpointe Villa Nursing Centre, Inc,* 471 Mich 411, 422-423; 684 NW2d 864 (2004). The justices in the lead opinion respond by asserting that expert testimony probably will not be required in most cases. However, contrary to the lead opinion's belief, most cases probably will not be as simple as choosing between cardiovascular surgery and podiatry because most defendant doctors' specialties will be closely related. The lead opinion also accuses us of "ignoring the distinction between determining which specialty is relevant and determining the appropriate standard of care," *ante* at 569 n 15, and asserts that expert testimony will only be needed to determine the standard of care, not the specialty or specialty areas implicated by a procedure. How, exactly, will a trial judge with no medical training determine whether a particular procedure implicates such interrelated specialties as pediatric critical care medicine or neonatal-perinatal care medicine, or both.

review the case (which is very likely), does the loser then get to create a separate record in the trial court regarding his or her theory—the theory that the jury never heard?[65] If he or she is allowed a separate record (and how could he or she not be?), surely the opposing party will defend even on that separate record with their own experts. Where is the economy in this approach, which approach was, as advanced by the lead opinion, to stop the needless expense of having to secure "irrelevant" experts? Further, when the jury has heard only one theory regarding the standard of care and specialty at issue and an appeal of its decision is taken, is the earlier interlocutory holding (if there was one) res judicata? If it is not binding, or if there was no interlocutory appeal granted, how is the Court of Appeals, or eventually this Court, to analyze the factual dispute, at that stage or for that matter interlocutorily, with regard to the vying theories of "relevant specialties" and, thus, differing standards of care? Appellate courts will have no basis for a decision on that factual issue or issues. These conundrums all come from the fact that the justices in the lead opinion misunderstand what they are calling on judges to do.

At another level, constitutional rather than merely practical, the lead opinion's theory-preclusion approach

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[65] Strangely, the lead opinion asserts that a separate record will not be necessary because all the defendant doctor will have to do to preserve the issue is object on the ground that the plaintiff's expert does not specialize in the "relevant" specialty. *Ante* at 574-575. The lead opinion misses the point. The issue on appeal will not be whether the proposed expert specializes in the specialty area the trial court determined was the "relevant" one. Rather, the issue will be whether the trial court chose the correct specialty as the "relevant" one. There will be no way for an appellate court to assess that determination without a record being made containing expert testimony regarding which specialty areas were implicated by the procedure the defendant doctor performed, just as there is no way for a trial court to make the determination in the first instance without such a record.

denies a defendant doctor the right to procedural due process. This, of course, violates the United States Constitution and Michigan Constitution, which provide that no person (such as one being sued) shall be deprived of "life, liberty, or property, without due process of law."[66] Said simply, this means that the Court must allow the defendant doctor an effective opportunity to defend the action, which entitles the defendant to confront adverse witnesses, to call his or her own witnesses, and to present evidence and arguments.[67]

But the lead opinion's theory-preclusion analysis prevents a defendant doctor from arguing, and introducing evidence to prove, that more than one of his or her specialty areas is germane to establishing the appropriate standard of care. It also precludes the doctor from arguing that the plaintiff's proposed expert does not know what standard of care the defendant doctor should have followed because the proposed expert does not possess the same specialties and has not spent the requisite time practicing or teaching those specialties. Thus, the lead opinion's interpretation of the statute allows the trial court to prevent the defendant from introducing evidence, making arguments, and cross-examining witnesses, i.e., presenting a defense.

Further, the lead opinion's theory-preclusion analysis will also adversely affect plaintiffs. That is, the justices in the lead opinion appear to believe that it will always be defendants who assert that multiple specialties are germane to establishing the appropriate standard of care, perhaps as some sort of gaming tactic. See *Ante* at 568. We, however, do not believe that this will always be the case. For example, if a defendant doctor is

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[66] US Const, Am XIV, §1; Const 1963, art 1, § 17.

[67] *Bundo v Walled Lake*, 395 Mich 679, 696; 238 NW2d 154 (1976).

a specialist in two areas, a plaintiff may wish to argue that the combination of the defendant's specialization in both areas imposes a higher standard of care on the defendant than the standards of care applicable to the individual areas. Under our interpretation of the statute, the plaintiff is allowed to argue to the jury that the higher standard of care applies, as long as he or she can produce experts who satisfy the criteria of MCL 600.2169(1) for both areas. Under the lead opinion's interpretation of the statute, however, the plaintiff cannot present such an argument to the jury. Rather, the trial court would determine that only the standard of care applicable to one of the specialty areas is the "relevant" one, thereby precluding the plaintiff from arguing to the jury that the higher standard of care applies. Thus, the lead opinion's interpretation of the statute will not only deny defendants the right to present a complete defense, but will also limit the theories that plaintiffs can present to the jury. Do the justices in the lead opinion believe that this is without possible constitutional implications?

All of these problems with the lead opinion's analysis stem from the fact that the justices in the lead opinion repeat the same error made by the Court of Appeals in *Tate.* That is, they rely on MCL 600.2169(1) to answer the question of what expert testimony is needed. However, as we explained above, the statute was never intended to, and indeed does not, address that issue. Nowhere in MCL 600.2169(1) did the Legislature attempt to address *whether* a plaintiff needs to produce expert testimony with regard to a particular standard of care. Rather, as we explained in *McDougall,* the Legislature's purpose in enacting MCL 600.2169 was to ensure that *if* a plaintiff needs to produce expert testimony regarding a particular standard of care, that

expert testimony " 'emanate[s] from sources of reliable character . . . .' "[68]

In misinterpreting MCL 600.2169(1) as resolving the question *whether* expert testimony is needed with regard to a particular standard of care, the lead opinion first notes that the statute states that a proffered expert shall not testify regarding "the *appropriate* standard of practice or care" unless he or she satisfies the listed criteria. The lead opinion incorrectly construes this as a legislative determination that the plaintiff only has to produce expert testimony establishing the standard of care coinciding with what the lead opinion terms "the relevant" specialty area, i.e., the standard of care applicable to the specialty area that the defendant doctor was practicing at the time of the malpractice. We believe the lead opinion's construction is erroneous because expert testimony regarding "the *appropriate* standard of practice or care" *necessarily includes* testimony about whether a particular procedure implicates a certain specialty area and, therefore, the standard of care applicable to that specialty area.[69] In other words, what the statute clearly says is that a proffered expert cannot testify with regard to what specialty area the defendant doctor was practicing and the standard of care commen-

[68] *McDougall, supra* (TAYLOR, P.J., dissenting), 461 Mich at 36, quoting *McDougall*, 218 Mich App at 518.

[69] The word "appropriate," which can be defined by reference to an ordinary dictionary because it is a common, rather than technical, term, means "[s]uitable for a particular person, condition, occasion, or place; proper; fitting." *The American Heritage Dictionary: Second College Edition* (1982). We would also note that even if the statute used the term "relevant," as the lead opinion does, it still would encompass testimony regarding whether a particular procedure implicates a certain specialty area and, therefore, the standard of care applicable to that specialty area. This is because the word "relevant" means "[r]elated to the matter at hand; pertinent." *Id.*

surate with that specialty unless the proposed expert meets the requirements of MCL 600.2169(1).

We also disagree with the lead opinion's reliance on the use of terms such as "the same specialty," "that specialty," "a person," and "the person" in MCL 600.2169(1)(a) for the proposition that a plaintiff need only present expert testimony regarding the standard of care applicable to one of the defendant doctor's specialty areas. We agree with the lead opinion that these phrases are written in the singular. But our construction of the statute does not, as the lead opinion believes, require reading them in the plural. Said simply, the fact that the plaintiff may need to produce multiple experts concerning the applicability or nonapplicability of multiple standards of care does not change the fact that each proffered expert is "a person" who must match the defendant doctor's qualifications with respect to "that specialty" that he or she is called to testify about.[70]

The sum of all of this is that the lead opinion's interpretation of MCL 600.2169(1) does not follow from its plain language. It also allows the trial court to perform functions that are solely within the province of the jury, such as making credibility and factual determinations. Moreover, it effectively denies a defendant doctor his or her due process right to present a defense, and precludes plaintiffs from presenting supportable theories. We do not believe that such an interpretation of the statute is a reasonable one and we believe that it likely is an unconstitutional approach. Therefore, we cannot join it.

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[70] Contrary to Justice MARKMAN's assertion in his concurrence, this explains why our decision here is *not* inconsistent with this Court's holdings in *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000), or *Paige v City of Sterling Hts,* 476 Mich 495; 720 NW2d 219 (2006).

E. ANALYSIS OF THE EFFECT OF JUSTICE MARKMAN'S HAVING SIGNED BOTH THE LEAD OPINION AND HIS CONCURRENCE

We find Justice MARKMAN's interpretation of the statute perplexing. He purports to concur in the lead opinion's conclusion that MCL 600.2169(1) requires the trial court to choose one, and only one, specialty that is germane to establishing the appropriate standard of care and to preclude the parties from introducing expert testimony regarding other specialties claimed to be relevant. Inconsistently, he then argues in his concurrence that under MCL 600.2169(2) and (3) and MRE 702 the trial court may determine that *more than one* specialty is relevant and allow the parties to introduce expert testimony with regard to those other relevant specialties.[71] These positions are incompatible. Simply stated, the concurrence does not concur but disagrees. It should be a dissent. Because the concurrence, which must have been written after the lead opinion and thus is later in time, has been joined in part by the three justices signing this opinion, we believe it now becomes a de facto majority opinion.[72]

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[71] Furthermore, the lead opinion concludes that because there can only be one relevant specialty, plaintiffs are only required to produce one expert. But, Justice MARKMAN agrees with both the lead opinion and this opinion that the practice and teaching requirements in MCL 600.2169(1)(b) preclude any proffered expert from being able to testify about more than one specialty area. Thus, because he states in his concurrence that plaintiffs can be obligated to produce expert testimony regarding more than one specialty area, it logically follows that plaintiffs must be able to utilize more than one expert, just as we have concluded in this opinion. Justice MARKMAN does not concede this in his concurrence, but it is a necessary conclusion in order for his analysis to work.

[72] In his response to this opinion, Justice MARKMAN adamantly asserts that his concurrence is consistent with the lead opinion. In doing so, he states, "While the majority opinion holds that under § 2169(1) only the one most relevant specialty must match, this does not mean that a different provision of law cannot require that other relevant specialties be matched." *Ante* at 583. Justice MARKMAN apparently does not see the

IV. APPLICATION

A. *WOODARD v CUSTER*

It is undisputed that defendant Custer holds himself out as limiting his practice primarily to, and having advanced training in, the fields of pediatric critical care and neonatal-perinatal medicine. He therefore qualifies as a specialist in both of those areas.[73] Further, under the definition we have set forth above, Custer qualifies as a board-certified specialist in both of these areas. Plaintiffs' proposed expert, however, only qualifies as a board-certified expert in general pediatric care.

Throughout the proceedings in this case, Custer asserted that the specialty areas of pediatric critical care and neonatal-perinatal medicine were germane to establishing and understanding the standard of care that he should have followed when treating plaintiffs' son in the Pediatric Intensive Care Unit. Plaintiffs, however, failed to present experts qualified to testify

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inconsistency in arguing that there can only be one relevant specialty and, at the same time, arguing that there can be more than one. He also apparently does not realize that his argument that "different provision[s] of law" require more than one specialty to match defeats the lead opinion's argument that MCL 600.2169(1) mandates that there can be only one "relevant" specialty and, in the process, renders nugatory every word and clause of MCL 600.2169(1) that the lead opinion relies on for the conclusion that there can be only one "relevant" specialty. Furthermore, Justice MARKMAN fails to explain how it is reasonable to interpret MCL 600.2169(1) as mandating that there be only one relevant specialty but, simultaneously, saying that experts proffered to testify about other specialty areas must meet the requirements of MCL 600.2169(1). Justice MARKMAN states that our opinion "sows confusion," *Ante* at 554 n 1; *Ante* at 586, but we believe that it is *his* position that sows confusion.

[73] Although defendant Custer is board-certified in general pediatrics, he only holds himself out as a specialist in pediatric critical care and neonatal-perinatal medicine as the director of pediatric critical care medicine for the PICU. He therefore does not qualify as a specialist in general pediatrics.

that the specialties of pediatric critical care and neonatal-perinatal medicine were not relevant to establishing and understanding the standard of care that Custer should have met. Rather, their proposed expert was only qualified to testify regarding the standard of care coinciding with the specialty area they asserted was relevant, general pediatrics. Accordingly, because plaintiffs needed three expert witnesses and only presented one, they failed to present sufficient expert testimony to establish the appropriate standard of care. The trial court thus properly dismissed their lawsuit.

B. *HAMILTON v KULIGOWSKI*

Defendant Kuligowski holds himself out as limiting his practice primarily to, and having advanced training in, general internal medicine. He therefore qualifies as a specialist in that field.[74] Further, because it is undisputed that he has obtained board certification in general internal medicine, he qualifies as a board-certified specialist in that field.

Although he does not hold himself out as limiting his practice primarily to that field, plaintiff's proposed expert holds himself out as having advanced training or knowledge in general internal medicine. Further, he is board-certified in that field and therefore qualifies as a board-certified specialist in general internal medicine. Thus, were he only required to meet the requirements of MCL 600.2169(1)(a), plaintiff's proposed expert would be qualified to testify regarding the appropriate standard of care that Kuligowski should have met because plaintiff's proposed expert was a board-

[74] Although he testified that he mainly sees geriatric patients, Kuligowski does not hold himself out as limiting his practice to, or having advanced knowledge in, the treatment of geriatric patients and, therefore, does not also qualify as a specialist in geriatric internal medicine.

certified specialist in the same specialty as Kuligowski at the time of the alleged malpractice.

Plaintiff's difficulties, however, stem from the fact that her proposed expert also qualifies as a specialist in the field of infectious diseases, and admittedly spent a majority of his professional time during the year preceding the alleged malpractice in the active clinical practice of infectious diseases rather than general internal medicine. Thus, plaintiff's proposed expert fails to meet the requirements of MCL 600.2169(1)(b). Accordingly, the trial court properly granted Kuligowski's motion to strike plaintiff's proposed expert. Further, because the result was that plaintiff failed to present needed qualified expert testimony to support her lawsuit, the trial court correctly granted Kuligowski's motion for a directed verdict.

V. CONCLUSION

The trial courts in both these cases properly held that plaintiffs' proposed experts were not qualified under MCL 600.2169 to testify regarding the appropriate standard of care that the defendant doctors should have met.

In *Woodard*, a majority of the Court of Appeals properly affirmed the trial court's determination that plaintiffs' proposed expert was not qualified. Thus, because plaintiffs failed to present expert testimony sufficient to support their claims, and because we have already held that the doctrine of res ipsa loquitur does not relieve plaintiffs of this burden,[75] we affirm the part of the judgment of the Court of Appeals that held that plaintiffs' expert was not qualified and remand the case

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[75] *Woodard I, supra,* 473 Mich at 9-10.

to the circuit court for reinstatement of the circuit court's order dismissing plaintiffs' claim with prejudice.

In *Hamilton*, the Court of Appeals improperly reversed the judgment of the circuit court and held that plaintiff's proposed expert was qualified under MCL 600.2169. We therefore reverse the judgment of the Court of Appeals and remand the case to the circuit court for reinstatement of the circuit court's order granting a directed verdict to defendant Kuligowski.

CORRIGAN and YOUNG, JJ., concurred with TAYLOR, C.J.

PEOPLE v PEALS

Docket No. 128376. Argued January 10, 2006 (Calendar No. 2). Decided July 31, 2006.

Darryl Peals was convicted by a jury in the Wayne Circuit Court, Craig S. Strong, J., of being a felon in possession of a firearm, MCL 750.224f(1); and possession of a firearm during the commission of a felony, MCL 750.227b. He appealed, alleging that the firearm found in his possession was in such poor condition that it was not a "firearm" as that term is defined in MCL 750.222(d). The Court of Appeals, FORT HOOD, P.J., and GRIFFIN and DONOFRIO, JJ., affirmed in an unpublished memorandum opinion, issued February 15, 2005 (Docket No. 251406). The Supreme Court granted the defendant's application for leave to appeal. 474 Mich 886 (2005).

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

The text of the statutory definition of a "firearm" in MCL 750.222(d) indicates that a weapon is a firearm if it is the type of weapon that was designed or intended to propel a dangerous projectile by an explosive, gas, or air. The statute plainly does not prescribe a requirement that the weapon be operable or reasonably or readily repairable. The design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a firearm. It is not disputed that the weapon in this case was the type of weapon that was designed to propel a dangerous projectile by an explosive, gas, or air. It thus qualifies as a firearm under the statutory definition for purposes of the offenses of felon in possession of a firearm and felony-firearm. The judgment of the Court of Appeals must be affirmed.

Justice WEAVER, concurring, agreed with the result of the majority opinion, but wrote separately to express concern that the majority's interpretation of the word "may" to exclude consideration of a weapon's operability and require only consideration of a weapon's design is both overinclusive and underinclusive. The phrase "may be propelled" does not require that the weapon be currently capable of propelling a dangerous projectile, only that a projectile potentially may be propelled from it at some time. The weapon found in the defendant's possession could have been

repaired to allow it to fire one round. This qualifies the weapon as a firearm. Justice WEAVER would hold that a weapon from which a dangerous projectile may be propelled, and which is not permanently inoperable, qualifies as a firearm under the definition. Rather than injecting a design component into, or excluding an operability component from, the definition, the facts of each case should be reviewed in light of the statutory language.

Affirmed.

Justice KELLY, dissenting, stated that the definition of "firearm" in MCL 750.222(d) requires that the weapon be operable or that it can be reasonably and readily repaired. The majority's decision adds to the statute a requirement that the weapon need only be designed to fire a projectile to be a firearm, a requirement not intended by the Legislature. This decision ignores both the rule of lenity and the constitutional requirement of fair warning about what the statute prohibits. The defendant was entitled to raise the defense of inoperability of the gun. The trial court's erroneous jury instructions denied him that defense and affected his substantial rights, requiring a reversal of the Court of Appeals judgment and a remand for a new trial.

Justice CAVANAGH concurred only in the result proposed by Justice KELLY.

CRIMINAL LAW — WORDS AND PHRASES — FIREARM.

For purposes of the offenses of felon in possession of a firearm and possession of a firearm during the commission of a felony, a weapon fits within the definition of a "firearm" if it is the type of weapon that was designed or intended to propel a dangerous projectile by an explosive, gas, or air; there is no operability requirement for the weapon; the design and construction of the weapon, rather than its state of operability, are the relevant factors in determining whether it is a firearm (MCL 750.222[d], 750.224f[1], 750.227b).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

Robert Tomak for the defendant.

CORRIGAN, J. We granted leave to appeal to consider whether the weapon at issue in this case constituted a "firearm" as defined in MCL 750.222(d), and thus whether defendant was properly convicted of being a felon in possession of a firearm, MCL 750.224f(1); and possession of a firearm during the commission of a felony, MCL 750.227b. We hold that the text of the statutory definition indicates that a weapon is a firearm if it is the type of weapon that was designed or intended to propel a dangerous projectile by an explosive, gas, or air. The definition describes the category of weapons that constitute a "firearm," but it does not prescribe a requirement that the weapon be "operable" or "reasonably or readily repairable." In other words, the design and construction of the weapon, rather than its state of operability, are relevant in determining whether it is a "firearm."

It is not disputed that the weapon in this case is the type of weapon that propels dangerous projectiles. It thus qualifies as a firearm under the statutory definition. We therefore affirm the judgment of the Court of Appeals and affirm defendant's convictions of felon in possession of a firearm and felony-firearm.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

A jury found defendant guilty of felon in possession of a firearm and felony-firearm. Testimony at trial explored the condition of the gun found in defendant's possession. Defendant testified that he found the gun lying in two pieces in the grass and that he picked up the pieces and put them in his pocket. Upon examining them later, he saw that there was damage and thought that the gun was inoperable.

The police officer who examined the gun when it was received into evidence testified that "the weapon did

not function as it was mechanically designed to function." It was missing the firing-pin assembly, part of the slide (and the part that remained was cracked), the magazine, and some springs. He further acknowledged that without the firing-pin assembly, "you cannot fire a bullet through that weapon."

When asked whether, despite the broken slide, a round could be fired from the gun if the missing springs as well as the firing pin were replaced, the officer responded:

> To the best of my knowledge the way this slide sits right now with the broken piece I don't even know that it would properly chamber around [sic]. The fact of the tension of the springs if it had all of the springs would probably not allow this slide to close completely anyway to actually fire it. If it had the proper stop but this portion here of the slide was broken you'd get one round off. But with the function of the weapon and the slide going to the rear and nothing to stop it that slide is going to come off . . . .

On further examination, the officer testified, "If this weapon fired a round with the springs and without having the ejector stop, you would loose [sic] the slide. It would eject completely to the rear and you wouldn't be able to get a second shot off."

Without objection, the trial court provided the following instruction to the jury regarding the operability of the gun:

> A handgun need not be currently operable in order to qualify as a firearm for purposes of the offenses of felon in possession of a firearm and possession of a firearm at the time of the commission or attempted commission of a felony.

When the jury requested further clarification of what constitutes a firearm, the court stated:

> A firearm includes any weapon from which a dangerous weapon [sic] can be shot or propelled by the use of explosive gas or air. A handgun need not be currently operable in order to be qualified as a firearm for the purposes of felon in possession of a firearm and possession of a firearm at the time of a commission or attempted commission of a felony.

Defendant did not object to this instruction.

The jury returned a verdict of guilty on both counts of felon in possession of a firearm and felony-firearm. The Court of Appeals affirmed defendant's convictions.[1]

II. STANDARD OF REVIEW

This case requires us to interpret the definition of "firearm" contained in MCL 750.222(d). We review de novo questions of statutory construction. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

III. ANALYSIS

Initially, we note that both offenses of which defendant stands convicted, felon in possession of a firearm and felony-firearm, require proof that the defendant possessed a "firearm." The Legislature has defined that term in MCL 750.222(d):

> "Firearm" means a weapon *from which a dangerous projectile may be propelled by an explosive, or by gas or air*. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber. [Emphasis added.]

On appeal, the sole challenge to defendant's convictions is that the weapon found in his possession was in such

[1] *People v Peals*, unpublished memorandum opinion of the Court of Appeals, issued February 15, 2005 (Docket No. 251406).

a state of disrepair that it could not constitute a "firearm" as defined in MCL 750.222(d).

It is readily apparent that the key question in construing MCL 750.222(d) is the meaning of the word "may" in the phrase, "a dangerous projectile *may* be propelled . . . ." Where, as here, a statute does not contain internal definitions of terms used in it, we give terms their ordinary meaning. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004). In such instances, it is often helpful to consult dictionary definitions. *Id. Random House Webster's College Dictionary* (1997) lists a number of definitions for "may" as an auxiliary verb:

> 1. (used to express possibility) . . . 2. (used to express opportunity or permission) . . . 3. (used to express contingency, esp. in clauses indicating condition, concession, purpose, result , etc.) . . . 4. (used to express wish or prayer) . . . 5. (used to express ability or power.) . . . .

Reviewing these definitions in the context of the statute, it seems that the third and fourth definitions are more compatible with the understanding that a weapon is a firearm if it was designed or intended to propel a dangerous projectile. The words "purpose," "wish," and "prayer" connote intention, aim, or planning. In other words, these definitions are consonant with the idea that a weapon is a firearm if that was the intent or design of its creator.

The first, second, and fifth definitions, meanwhile, seem more compatible with the understanding that a weapon is a firearm if it possesses the ability to propel a dangerous projectile. The words "opportunity," "possibility," "ability," and "power" connote capability or capacity. In other words, these definitions are consonant with the idea that a weapon is a firearm if it has the ability or power to fire a projectile.

Because both of these meanings are plausible given the use of "may" in the statute, we are required to make a determination as to which meaning is most representative of the Legislature's intent. As will be discussed below, we conclude that the offenses of which defendant was convicted do not require proof that the firearm was "operable" or "reasonably or readily operable." Rather, the statute requires only that the weapon be of a type that is designed or intended to propel a dangerous projectile.[2]

We reach this conclusion on the basis of several considerations. Initially, to the extent that the "may" clause serves as a restrictive clause, narrowing the class of "weapons" that are included within MCL 750.222(d), as we understand it to do,[3] we believe it is more reasonable to view this clause as differentiating between weapons generally and a specific subclass of weapons, rather than as differentiating between weapons generally and a specific subclass of weapons *and also* between weapons that are operable and weapons that are not.

Moreover, a definition of "may" that is focused on operability would produce results that we believe are unlikely to have been within the contemplation of the

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[2] Justice KELLY suggests that because we believe that there are two plausible meanings to the statute at issue we must construe it in favor of the defendant. *Post* at 676. We note, however, that penal laws "are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820). "The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend." *Id*. Because we believe that the words of the statute as a whole indicate an intent to include a broad definition, the rule of lenity does not force us to choose the stricter definition.

[3] Restrictive clauses are not set off by commas. Strunk & White, Elements of Style (3d ed) (New York: MacMillan Publishing Company, 1979), p 4.

Legislature in defining "firearm." Consider by way of illustration, a length of narrow metal pipe that could be considered a weapon, given its potential for bludgeoning. Were "may" not to encompass some design component, it is conceivable that even a simple pipe could constitute a "firearm," something that is difficult to reconcile with the fact that it is a "firearm" that is the object of the "may" clause.

Next, the "operability" definition of "may" would enable a felon to possibly avoid prosecution by the simple expedients of separating his firearm into separate parts, hiding a critical part of the firearm, or discarding the firearm immediately after being seen possessing it so that its level of operability could not be determined. Given the manifest purpose of the instant statute as reflected in its text, this would impede firearms prosecutions for reasons that seem altogether arbitrary and irrational.

It is also noteworthy that in several instances, the Legislature has defined "dangerous weapon" to include a "loaded or unloaded firearm, *whether operable or inoperable*." See, e.g., MCL 750.110a(1)(b)(*i*); MCL 600.606(2)(b)(*i*); MCL 766.14(4)(b)(*i*) (emphasis added). While these statutes do not fall within the "firearms" chapter of the Michigan Penal Code, they are instructive on the Legislature's understanding of what constitutes a "firearm." If, as the dissent posits, "firearm" included an operability requirement, defining "dangerous weapon" to include a firearm "*whether operable or inoperable*" would be redundant. "[T]his Court should interpret a statute to ensure that an interpretation of one provision does not render another superfluous in a substantial number of cases." *Western Michigan Univ Bd of Control v Michigan,* 455 Mich 531, 551-552; 565 NW2d 828 (1997).[4]

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[4] Justice KELLY takes the opposite approach, suggesting that if "firearm" does *not* include an operability requirement, defining "dangerous

Further, as between the absence of express language in the statute that either references an operability or a design requirement, we believe that the absence of the former is more telling in light of the very next sentence of MCL 750.222(d), which defines a "firearm" in further detail in terms of what it was "designed" and "manufactured" to do. Weapons from which a projectile "may" be propelled are a subclass of weapons generally; because the Legislature only excluded from that subclass weapons "designed and manufactured exclusively for propelling . . . BB's," necessarily those weapons remaining in the subclass were "designed and manufactured" to propel a "dangerous projectile" other than BB's. Because the Legislature chose to focus on design in limiting the subclass of weapons that constitute firearms, it is reasonable to conclude that the Legislature focused on design in creating that subclass in the first instance. Put differently, the Legislature's use of "designed and manufactured" in the second sentence of the statute is telling with regard to which definition of "may" it intended in the first sentence. It seems apparent that the design—and not the current

weapon" in MCL 750.110a to include a firearm "whether operable or inoperable" would be redundant. While at first blush, this may seem reasonable, we believe further consideration reveals ours to be the better analysis. As noted, MCL 750.110a(1)(b)(*i*) refers to a "loaded or unloaded firearm, whether operable or inoperable." If, as Justice KELLY suggests, our construction of "firearm" renders the phrase "whether operable or inoperable" redundant, we note that her construction renders *both* the phrases "loaded or unloaded" and "whether operable or inoperable" redundant. After all, under her operability definition of "firearm," an unloaded gun would not be able to propel a projectile (as it has none to propel), and would therefore technically be inoperable. In that sense, then, her definition of "firearm" would render multiple clauses of MCL 750.110a redundant. Even if we agreed with her—which we do not—that our interpretation of "firearm" created a redundancy in MCL 750.110a, such interpretation would still be the better of the two constructions because it would result in fewer redundancies.

operability—of a weapon was of paramount importance to the Legislature in defining what constitutes a "firearm."[5]

Although the defendant relies on *People v Hill*, 433 Mich 464, 472-473; 446 NW2d 140 (1989), the holding in *Hill*, according to the *Hill* Court itself, does not apply to the offenses in this case. In *Hill*, two defendants were charged with possession of the same short-barreled shotgun, MCL 750.224b. Each defendant had possessed one of the two component parts that constituted the short-barreled shotgun. This Court ruled that the charges could go forward because "the fact that a firearm is temporarily inoperable does not preclude prosecution for its possession where the statute expressly prohibits such possession." *Hill*, 433 Mich 466. This Court explained that "temporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms." *Id.* at 477. This Court then qualified its holding, however, by explaining that it did "not purport to interpret the concealed weapon statute or the felony-firearm statute." *Id.*, n 13. The felon-in-possession statute had not yet been enacted when *Hill* was decided. Thus, *Hill* is not instructive because its holding appears limited to the offense at issue in that case, possession of a short-barreled shotgun.

The narrow reach of *Hill* is further clarified by a long line of Court of Appeals decisions holding that the felony-firearm statute does *not* require proof of operability. Indeed, the *Hill* Court itself cited and discussed

[5] Contrary to Justice KELLY's assertion, we do not "ask[] the reader to ignore the difference[s] in these sentences." *Post* at 674. Rather, we ask the reader to view the statute logically as a cohesive whole and not to artificially separate its component sentences.

many of those cases, without disapproving their holdings in any respect. The *Hill* Court explained:

> [C]ourts have held that it is unnecessary to prove the operability of a weapon as an element of a prosecution of possession of a firearm during the commission of a felony because this would be " 'inconsistent with the legislative intent of discouraging the practice of carrying guns in circumstances where harm is apt to occur.' " *People v Jackson*, 108 Mich App 346, 350; 310 NW2d 238 (1981), citing with approval [*People v Gibson*, 94 Mich App 172, 177; 288 NW2d 366 (1979), rev'd on other grounds 411 Mich 993 (1981)]. [*Hill*, 433 Mich 475.]

The *Hill* Court further stated:

> Other panels holding that the operability of a firearm is not necessary for the prosecution of a felony-firearm charge include: *People v Garrett*, 161 Mich App 649; 411 NW2d 812 (1987), lv den 430 Mich 856 (1988); *People v Poindexter*, 138 Mich App 322; 361 NW2d 346 (1984); *People v Brooks*, 135 Mich App 193; 353 NW2d 118 (1984); *People v Broach*, 126 Mich App 711; 337 NW2d 642 (1983). [*Hill*, 433 Mich 475 n 9.]

In short, it is telling that (1) the *Hill* Court cited and discussed a long line of Court of Appeals case law holding that operability is *not* a requirement of a felony-firearm prosecution, (2) the *Hill* Court did *not* express any disapproval of the Court of Appeals decisions, and (3) the *Hill* Court expressly stated that it was *not* purporting to interpret the concealed weapons statute or the felony-firearm statute. *Hill* by its own terms does not support its expansion to the offenses of felony-firearm and felon in possession of a firearm. *Hill* thus provides no basis to reject the Court of Appeals longstanding view that proof of operability is not required.

Moreover, after the *Hill* decision, the Court of Appeals has continued to hold that proof of operability is

not required in felony-firearm cases. In *People v Thompson*, 189 Mich App 85; 472 NW2d 11 (1991), the defendant argued that his felony-firearm conviction could not stand because the hammer of his handgun was broken, thus rendering it inoperable. The Court of Appeals rejected the defendant's argument: "Operability is not and has never been an element of felony-firearm. *People v Poindexter*, 138 Mich App 322, 333; 361 NW2d 346 (1984); see also *People v Garrett*, 161 Mich App 649, 653; 411 NW2d 812 (1987), and *People v Pierce*, 119 Mich App 780; 327 NW2d 359 (1982)." *Thompson*, 189 Mich App 86. The *Thompson* Court noted that "[i]t has long been the practice of this Court to apply a reasonable interpretation of the felony-firearm statute in order to sustain the deterrent effect intended by the Legislature. See [*Hill*, 435 Mich 473-477]." *Thompson*, 189 Mich App 86-87.

In addition, the Court of Appeals has held, after *Hill*, that proof of operability is not required to establish the offense of felon in possession of a firearm. In *People v Brown*, 249 Mich App 382; 642 NW2d 382 (2002), the Court of Appeals noted that various meanings had been accorded to the term "firearm," depending on the offense with which the defendant had been charged. In the context of the concealed weapons statute, MCL 750.227, the Court of Appeals had held that an inoperable handgun was not a "firearm." See *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992), *People v Gardner*, 194 Mich App 652, 654; 487 NW2d 515 (1992), and *People v Huizenga*, 176 Mich App 800, 804-805; 439 NW2d 922 (1989). But in the context of the felony-firearm statute, the *Brown* Court noted that Court of Appeals case law does not require proof of operability. See *Thompson*, *supra*; *Garrett*, *supra*; and *Poindexter*, *supra*. The *Brown* Court concluded "that the *Thompson*

analysis, first applied to felony-firearm cases, should also be applied to felon in possession cases." *Brown*, 249 Mich App 384-385.

To support its conclusion, the *Brown* Court took note of MCL 750.2, which provides that the "rule that a penal statute is to be strictly construed shall not apply" to the provisions of the Michigan Penal Code, which "shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law." Turning to the definition of "firearm" in MCL 750.222(d), which provides that a "firearm" is "a weapon from which a dangerous projectile *may be* propelled" (emphasis added), the *Brown* Court concluded "that a handgun that is designed to expel a dangerous projectile, and that could do so but for a missing firing pin and spring, qualifies under MCL 750.222(b) as a weapon from which a dangerous projectile *may* be propelled." *Brown*, 249 Mich App 386.

> The statutory language is broad and is clearly intended to keep any and all handguns out of the hands of convicted felons. In our opinion, a handgun need not be currently operable in order to qualify as a "firearm" for purposes of the felon in possession statute. If that were the case, then convicted felons could legitimately purchase, sell, receive, and distribute handguns on a regular basis, as long as the firing pins had been temporarily removed from those handguns. We cannot conclude that the Legislature intended such a result when it drafted the felon in possession statute. [*Id*.]

The *Brown* Court further rejected the defendant's argument that this Court's decision in *Hill* mandated a holding that an inoperable handgun was not a "firearm" for purposes of the felon in possession statute:

> We conclude that our holding in the instant case is consistent with the *Hill* decision, in which the Court noted the "legislative intent to distinguish the firearm from other

> potentially dangerous weapons," and cited appellate decisions which "found the operability of a gun to be irrelevant for a conviction [because] a contrary result would thwart the deterrent purpose" of the laws concerning the use and possession of firearms. [*Hill,* 433 Mich] 476, quoting *People v Boswell*, 95 Mich App 405, 408-409; 291 NW2d 57 (1980). [*Brown*, 249 Mich 387.]

In short, the *Brown* Court explained why its holding was *consistent* with *Hill*. We find no basis in *Hill* to question the *Brown* Court's analysis or the Court of Appeals longstanding interpretation of "firearm."

Of the long line of cases left undisturbed by *Hill*, a case that offers particularly useful analysis is *Boswell*, *supra*. In that case, the defendant pleaded guilty of armed robbery, MCL 750.529; and felony-firearm. On appeal, he argued that the gun used in the robbery was temporarily inoperable because it was "jammed" and thus was not a "firearm" under the definition contained in MCL 8.3t. MCL 8.3t defines "firearm" in a manner that is very similar to the definition contained in MCL 750.222(d). Specifically, MCL 8.3t provides that a "firearm" is "any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air."

The *Boswell* Court explained its interpretation of the statutory definition:

> We believe the statute demonstrates a legislative intent *to distinguish the firearm from other potentially dangerous weapons by describing its general construction and manner of use*. The gun used in the instant case clearly falls within the above definition. Furthermore, this Court found the operability of a gun to be irrelevant for a conviction under MCL 750.227; MSA 28.424, carrying a concealed weapon,

> in *People v Clark*, 24 Mich App 440; 180 NW2d 342 (1970), and *People v Jiminez*, 27 Mich App 633; 183 NW2d 853 (1970). The same reasoning is equally apt here, and a contrary result would thwart the deterrent purpose of the felony-firearm statute. [*Boswell*, 95 Mich App 409 (emphasis added).]

The *Boswell* analysis is useful in analyzing the text of the provision at issue here, MCL 750.222(d). The statute defines a "firearm" as "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air." This language serves to *distinguish* firearms, which are a particular type of weapon, from weapons generally. A firearm is designed and used to expel dangerous projectiles by an explosive, gas, or air. By contrast, other weapons, such as knives and clubs, are not designed or used in this manner. It is the design and construction of a firearm, rather than its current state of operability, that distinguish it from other weapons.

We decline to insert an operability requirement into the statute. We can find no basis to conclude that the phrase "may be propelled" somehow requires that the weapon be reasonably and readily operable. The statute simply does not contain any language supporting such a rule. In short, the statutory definition of "firearm" is *descriptive*. It describes the type of weapon that constitutes a "firearm," so as to distinguish it from other types of weapons. It does *not* require the current operability of the weapon.

This conclusion is supported by definitions of other terms contained in MCL 750.222. The surrounding provisions use the term "firearm" as a predicate or base term to define specific *types* of firearms. Thus, the term "firearm" is used to define the terms "pistol," MCL 750.222(e); "shotgun," MCL 750.222(h); and "rifle," MCL 750.222(j). This use of "firearm" to define *other*,

more specific types of firearms explains why the Legislature used general language to describe the manner of use or operation of a "firearm," i.e., that it is "a weapon from which a dangerous projectile may be propelled," so that the Legislature could then use this general descriptive term to define more specific types of firearms. We are bound to accord this clear meaning to the statutory text rather than invent an operability requirement that simply is not there.[6]

Our conclusion is further supported by a key difference between the language used to define "firearm" in MCL 750.222(d) and the language used in another definition of that term in MCL 752.841. The latter statutory definition applies to offenses that prescribe the duties of a person who discharges a firearm and

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[6] Although it is not necessary to our analysis, we note that the New Jersey Supreme Court has construed very similar statutory language as not requiring proof of operability. In *State v Gantt*, 101 NJ 573; 503 A2d 849 (1986), the court interpreted a statutory definition of "firearm" that referred to " 'any gun, device or instrument in the nature of a weapon *from which may be fired or ejected* any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances.' " *Id*. at 582 (emphasis added). The New Jersey Supreme Court held that the statutory phrase " 'from which may be fired' " did not require proof of operability. Rather, the Court concluded that the statute merely required proof that the weapon was originally *designed* to deliver a lethal force.

See also *Williams v State*, 61 Ga 417, 418 (1878):

> An object once a pistol does not cease to be by becoming temporarily inefficient. Its order and condition may vary from time to time, without changing its essential nature or character. Its machinery may be more or less perfect; at one time it may be loaded, at another empty; it may be capped or uncapped; it may be easy to discharge or difficult to discharge, or not capable, for the time, of being discharged at all; still, while it retains the general characteristics and appearance of a pistol, it is a pistol, and so in common speech would it be denominated.

thereby injures another person. For purposes of those offenses, MCL 752.841 defines the word "firearm" as "any weapon or device from which *is* propelled any missile, projectile, bullet, shot, pellet or other mass by means of explosives, compressed air or gas or by means of springs, levers or other mechanical device." (Emphasis added.) MCL 752.841 makes clear that the Legislature knows how to define a "firearm" as a weapon from which a projectile "*is* propelled." We believe that the Legislature would not have used the phrase "*may* be propelled" in MCL 750.222(d) to require operability when it could have instead used the phrase "is propelled" as it did in MCL 752.841.

Therefore, because we can find no textual support for an operability requirement, we must adhere to the Legislature's judgment not to adopt such a rule.[7]

Moreover, were we to extend *Hill's* operability requirement to the crimes of felon in possession and felony-firearm, it could well encourage defendants to discard or secrete their weapons in order to impede the prosecution from being able to prove that the weapon could reasonably and readily be made to fire, or to separate their weapons into multiple parts for the same

[7] While the statute does not contain an operability requirement, it is possible that a firearm could be so substantially redesigned or altered that it would cease to be a "firearm" under the statutory definition. It would no longer be a weapon whose design was such that a dangerous projectile "may be propelled" by an explosive, gas, or air. For example, an antique cannon plugged with cement on display in a park would not constitute a "firearm" under MCL 750.222(d). That is because the cannon has been converted into an ornamental display, and it is no longer the type of weapon that is used or designed to propel dangerous projectiles by an explosive or by gas or air. We emphasize, however, that the operability of the weapon is not the statutory test; rather, the question is whether the weapon has been so substantially redesigned or altered that it no longer falls within the category of weapons described in MCL 750.222(d).

purpose. After disposing of or hiding the weapon, the defendant or—if the defendant did not wish to testify—a defense witness could simply take the stand and testify that the gun was inoperable, and the prosecution would then have no means to establish the contrary beyond a reasonable doubt. *Id.*[8]

Indeed, our Court of Appeals made this very point in *Pierce*, 119 Mich App 782-783:

> If the prosecution must prove operability, a defendant could not be convicted of felony-firearm if the gun is never recovered even if the victim testifies that he saw the gun. A prime concern behind the felony-firearm statute is to protect the victim. The victim is no less frightened if the gun (most likely unknown to him) just happens to be inoperable. The state clearly intends to protect such a victim. [Citation omitted.]

An extratextual operability requirement would also undermine the legislative intent to deter the possession of firearms by convicted felons and by persons committing felonies. That a gun is inoperable does not alleviate the extreme danger posed by its possession in these circumstances.

In short, expanding an operability requirement to the offenses of felony-firearm and felon in possession of a firearm would defeat the fundamental legislative interest in deterring the possession of firearms.[9]

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[8] See also *State v Gantt*, 101 NJ 586 (stating that an operability requirement "would invariably invite assertions of inoperability by defendants hopeful of gaining some advantage in the murky waters of law characteristic of rebuttable presumptions and shifting burdens of proof").

[9] In an appropriate case, this Court's holding in *Hill* may require reexamination. We decline to overrule *Hill* in this case because: (1) the defendant in *Hill* was convicted of an offense, possession of a short-barreled shotgun, that is not at issue here; (2) the definition of "firearm" construed in *Hill*, while very similar to the definition here, is located in

Whether operable or not, firearms pose a grave danger to members of the public when they are possessed by convicted felons or persons committing felonies.

IV. RESPONSE TO THE DISSENT

In her dissent, Justice KELLY articulates her preferred interpretation of the statutory definition of "firearm" as containing an operability requirement. Justice KELLY then asserts that because the majority does not adopt her interpretation, we have somehow abandoned our judicial philosophy of applying the plain meaning of a statutory text. *Post* at 669. She further contends that we have violated our " 'plain text philosophy,' " *post* at 671, because, unlike Justice KELLY, we have not focused our analysis on a *federal* statute that has no application to this case.

It should go without saying that our judicial philosophy does not require every member of this Court to agree with Justice KELLY's interpretation of a text. It is therefore unfortunate that Justice KELLY has resorted to the classic logical fallacy of a false choice: she seems to contend that we must either (1) agree with her interpretation of the text or (2) abandon our entire philosophy. We decline to dignify this argumentative sleight of hand by further responding to it, other than to emphasize that we have endeavored to apply the text as written and that we stand by our interpretative analysis as set forth above.

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a different statutory section, MCL 8.3t; (3) the *Hill* Court narrowed its holding considerably by declining to construe the term "firearm" for other firearms offenses; and (4) the *Hill* Court discussed the Court of Appeals longstanding construction of the term "firearm" in the felony-firearm context without expressing any disapproval of that construction. Nonetheless, we recognize that an argument can be made that the term "firearm" should have the same meaning for different offenses, and we will consider this issue further when and if it arises in an appropriate case.

Justice KELLY also argues that the rule of lenity and the constitutional principle of fair warning require us to construe the statute in favor of the defendant. Yet Justice KELLY herself has recently acknowledged in another case that "fair warning is given only if *an ambiguity* in a criminal statute is construed to apply to conduct that the statute clearly designates as criminal." *People v Yamat*, 475 Mich 49, 66; 714 NW2d 335 (2006) (KELLY, J., dissenting), citing *United States v Lanier*, 520 US 259, 266; 117 S Ct 1219; 137 L Ed 2d 432 (1997). Despite her recent observation in *Yamat*, Justice KELLY here has failed to identify an ambiguity in the statutory definition of "firearm."

As discussed, we believe the statutory definition of "firearm" is clear. MCL 750.222(d) plainly provides that a weapon is a firearm if it is the type of weapon that propels dangerous projectiles by an explosive or by gas or air. Moreover, as noted earlier, the existing Court of Appeals case law provides that inoperability is not a defense to either felony-firearm or felon in possession of a firearm. See *Thompson* and *Brown* and the cases they cite.

Amazingly, Justice KELLY relies for her fair warning argument on *Hill*, in which this Court (1) addressed an offense, possession of a short-barreled shotgun, *that is not at issue in this case*, (2) expressly declined to extend its holding to felony-firearm, and (3) acknowledged the Court of Appeals longstanding interpretation of the felony-firearm statute as not containing an inoperability defense. Justice KELLY's fair warning argument thus collapses of its own weight in light of her reliance on *Hill*.

V. CONCLUSION

The presence of the word "may" in MCL 750.222(d) indicates the Legislature's intention that a weapon be

considered a firearm if it was designed or intended to propel a dangerous projectile by means of an explosive, gas, or air. In the absence of a legislative enactment of an operability requirement, we hold that there is no operability requirement for the offenses of felony-firearm and felon in possession of a firearm. Because there is no dispute that the weapon possessed by defendant in this case was the type of weapon that was designed to propel a dangerous projectile by an explosive, gas, or air, we affirm the judgment of the Court of Appeals and affirm defendant's convictions of felony-firearm and felon in possession of a firearm.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*concurring*). I concur in the result of the majority opinion that affirms defendant's convictions of felon in possession of a firearm, MCL 750.224f(1); and possession of a firearm during the commission of a felony, MCL 750.227b.

Both convictions in this case involve the statutory definition of "firearm," MCL 750.222(d). MCL 750.222(d) defines "firearm" as "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber."

I write separately because the majority's interpretation of the word "may" to exclude consideration of a weapon's operability and require only consideration of a weapon's design is both overinclusive and underinclusive.

A fair reading of the phrase "may be propelled" does not require that the weapon be currently capable of propelling a dangerous projectile. It only requires that a projectile could be propelled from the weapon at some time. Thus, contrary to the majority's suggestion, *ante* at 643, a "simple pipe" could qualify as a firearm under the plain terms of the statute. A simple pipe can in fact be made to propel a dangerous projectile with, for example, air. That does not mean that any felon caught carrying a simple pipe should be charged with felony-firearm. But if the felon is carrying the components of a functional blow gun or pipe gun, the simple pipe might be capable of propelling a dangerous projectile. I would not summarily exclude such weapons from the definition of "firearm."

I would hold that a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air, and which is not permanently inoperable, qualifies as a firearm under MCL 750.222(d). Rather than injecting a design component into, or excluding an operability component from, the definition of "firearm," I would continue to review the facts of each case in light of the clear language of the statutory definition of "firearm."

The testimony presented suggested that the weapon found in defendant's possession could have been repaired to allow it to fire one round. The officer who examined the gun when it was received in evidence testified, "If it had the proper stop but this portion here of the slide was broken you'd get one round off." While there was extensive testimony regarding the weapon's state of disrepair, there was no testimony at trial to contradict the potential that replacing some pieces may have allowed the weapon to fire.

Thus, the evidence presented at trial qualifies the weapon found in defendant's possession as a "firearm"

under MCL 750.222(d). For that reason, I would affirm the judgment of the Court of Appeals that affirmed the defendant's jury convictions.

KELLY, J. (*dissenting*). This case calls on us to determine the meaning of "firearm" as defined in MCL 750.222(d). The majority has given it a meaning not supported by the text of the statute, rendering the statute constitutionally infirm. As the majority now construes it, the statute violates the rule of lenity and the requirements of fair warning. Because of these errors, I must dissent. I would reverse the judgment of the Court of Appeals and remand the case for a new trial.

RELEVANT FACTUAL BACKGROUND

Defendant spotted pieces of metal lying in the grass. On closer inspection, he noted that they were parts of a handgun. He pieced them together but testified that the mechanism could not be made to operate as a firearm. He stated that he decided to keep it in hopes of selling it later as scrap metal, which he collected and sold occasionally for extra money. Defendant testified that he would not have picked up a real gun.

Twenty minutes after defendant picked up the handgun parts, police officers stopped the car in which defendant was a passenger for a traffic violation. When asked, defendant informed an officer that he had the scrap-metal gun in his pocket. He told the officer that it did not work. After arresting him, the officer inspected the gun. She noticed that it had sustained significant damage and had no ammunition clip. She described its slide as "raggedy." When the officer again examined the gun at the precinct, she removed the safety, and the gun fell apart in her hands. She and her partner laughed at its poor condition.

The officer in charge of the case forwarded the gun to the firearm identification and explosive disposal unit for testing. Tests determined that the gun would not fire in the condition that it was in. The firing-pin assembly was entirely missing. The magazine was missing. And the top portion of the slide was cracked and missing.

Despite these facts, the prosecution charged defendant with being a felon in possession of a firearm (felon in possession)[1] and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm).[2] At trial, attention focused on the operability of the scrap-metal gun.

A police officer reiterated that many pieces were missing from the gun, including the firing-pin assembly, the magazine, some springs, and part of the slide. He also noted that what remained of the slide was cracked. He concluded that the gun would not function as it was designed to function. When specifically asked whether, if the missing firing-pin assembly and springs were replaced, the gun could be made to fire, the officer equivocated. Because of the broken slide, he stated that he did not know if the gun could ever chamber a round and that the slide likely could never close properly. The officer stated that, if someone could get a round off, the gun certainly could not fire a second shot.

At the close of trial, the judge instructed the jury that a handgun need not be currently operable in order to qualify as a firearm. When asked for clarification on this point, the judge reiterated that a handgun need not be currently operable to be qualified as a firearm for purposes of felon in possession and felony-firearm. The jury returned a guilty verdict on both counts.

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[1] MCL 750.224f.

[2] MCL 750.227b.

Defendant appealed to the Court of Appeals, which decided the case without oral argument. It stated that current inoperability of a firearm is not a defense to felon in possession or felony-firearm. And it concluded that, on the basis of its reading of the facts, the evidence did not show that the gun was unusable as a firearm. The Court of Appeals affirmed both convictions. *People v Peals*, unpublished memorandum opinion of the Court of Appeals, issued February 15, 2005 (Docket No. 251406). We granted leave to appeal. 474 Mich 886 (2005).

PEOPLE v HILL[3]

Neither the felon-in-possession statute nor the felony-firearm statute defines the term "firearm," but it is defined elsewhere in the Michigan Penal Code. MCL 750.222(d) provides: " 'Firearm' means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber." Although this Court has not before been asked to determine the meaning of MCL 750.222(d), we did discuss a strikingly similar statute in *People v Hill*.

The two defendants in *Hill* faced the charge of possession of a short-barreled shotgun. MCL 750.224b. Each possessed separate parts that together made one shotgun. *Hill*, 433 Mich 466. To determine the meaning of the term "shotgun," the Court turned to the definition of "firearm." MCL 750.222 did not contain a definition of "firearm" at that time. Therefore, the Court referred to MCL 8.3t, which provides:

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[3] 433 Mich 464; 446 NW2d 140 (1989).

> The word "firearm," except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air.

The Court stated that the words of a statute should be read in the way that best harmonizes with the ends the Legislature sought to achieve. *Hill*, 433 Mich 474 n 8. The following purpose was noted for the firearm laws:

> "Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and *being ready for offense or defense in case of conflict with another*, and to outlaw instruments ordinarily used for criminal and improper purposes. . . . The statutes should receive a reasonable construction in accord with the purpose of the legislature and in the light of the evil to be remedied, and they should be construed with the thought in mind that they are aimed at persons of criminal instincts and for the prevention of crime . . . .
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> * * *
>
> "A deadly weapon does not cease to be such by *becoming temporarily inefficient*, nor is its essential character changed by dismemberment if the parts, *with reasonable preparation, may be easily assembled so as to be effective*." [*Id*. at 473, quoting 94 CJS, Weapons, § 2, pp 479-480, and § 6, p 489 (emphasis added).]

Hill reasoned that, to effectuate this intent, the statute should not be limited to the narrowest of circumstances. Therefore, the Court concluded that a temporarily inoperable shotgun remains within the meaning of the term "firearm." This is because the temporarily inoperable shotgun maintains its "man-killing" status.

Id. at 477. The Court concluded: "Thus, temporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms." *Id*.

The majority claims that *Hill* is "not instructive" because the *Hill* Court did not purport to interpret the concealed weapons and felony-firearm statutes. *Ante* at 645. I disagree. Whereas it is true that *Hill* is not controlling in this case, it is certainly instructive. MCL 8.3t and MCL 750.222(d) are nearly identical. The central components of the definitions, "[a or any] weapon from which a dangerous projectile may be propelled," are *identical*. It is the words "may be propelled" that are the central focus of the case before us. At the very least, the interpretation of the identical words in a related statute should provide the Court guidance in reaching a conclusion in this case. The majority's contentions to the contrary are puzzling.[4]

This Court should grant *Hill* its appropriate value as strongly influential precedent and reach the same conclusion as *Hill* did. That is, a weapon qualifies as a firearm only if it can be made operable within a reasonable time. This is true because the general intent behind the felon-in-possession statute and the felony-firearm statute is the same as the intent for the statute concerning possession of a short-barreled shotgun. *Hill* noted as much. "Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and *being ready for offense or defense in case of conflict with another* . . . ." *Hill*, 433 Mich 473 (emphasis added; citation omitted).

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[4] Almost simultaneously with this decision, the majority specifically stated that "absolutely identical phrases in our statutes" should have identical meanings. *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006).

A person carrying a gun that cannot be reasonably and readily repaired is not "ready for offense or defense in case of conflict." Instead, that person is similarly situated to someone carrying a stick, a club, or a piece of metal. A person carrying a piece of iron rebar could not be convicted of felon in possession or felony-firearm, regardless of his or her intended use for that rebar. There is no reason to treat a person carrying a hunk of scrap metal that formerly functioned as a firearm any differently. Neither can be used to shoot someone, which is the man-killing status intrinsic in a firearm and which is what the Legislature intended to regulate.[5]

The majority claims that, unless it reads a "design" requirement into the statute, a piece of pipe could constitute a firearm. *Ante* at 643. But, under the majority's interpretation of MCL 750.222(d), a piece of pipe that had once been part of a gun, for instance the barrel of a shotgun, would also constitute a firearm. This would be true even if there is no significant difference between the two pipes. The majority asserts that it makes little sense to rule that a piece of pipe constitutes a firearm. I question then, what sense would there be in finding that a former gun barrel constitutes a firearm? I submit that there is no sense in the majority's design requirement and that the Legislature never intended it to exist.

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[5] The majority claims that the inoperability of a firearm does not alleviate the extreme danger posed by its possession. This statement clearly is not true. Given that such a gun cannot be made to fire within a reasonable time, it does not pose the danger the Legislature sought to regulate. Allowing for an inoperability defense is the only way to effectuate the intent of the Legislature, which was to regulate the killing ability of firearms. An inoperable firearm no longer has that killing ability. The majority provides no basis for its assertion that the Legislature intended the statutes in question to protect people from a gun that could not fire.

In addition to adding a "design" requirement to the language of MCL 750.222(d), the majority has added a "redesign" defense to the crime. *Ante* at 652 n 7. It has been obliged to do so to avoid an absurd result. If it did not, certain people would be guilty of felon in possession by sitting near or leaning on a plugged cannon on display in a park.

But in fabricating its "redesign" defense, the majority has reverted to a defense based on operability, albeit one available only in special circumstances. Consider the cannon in the park. The sole "redesign" that has occurred and that is relevant is that which has rendered the cannon incapable of firing a projectile. The majority offers no explanation or support from the text of the statute for reading into the statute this redesign/limited operability defense. By contrast, *Hill* offers ample support for allowing all defendants to raise an inoperability defense when appropriate.

The majority's discussion of the cannon in the park implies that a firearm can be "redesigned" to no longer constitute a firearm. But the majority fails to indicate at what point a "redesigning" occurs. And it fails to explain why a "redesigning" did not occur when the gun in this case was extensively damaged. At the very least, under the majority's ruling, the question of whether the scrap-metal gun was sufficiently "redesigned" should be a question of fact for the jury. The majority should explain what has justified it to take this question from the jury. Why has the case not been remanded for a new trial?

Today's interpretation of MCL 750.222(d) raises more questions than it answers. Instead of raising unanswered questions by inventing a new redesign/partial operability defense as the majority has done, I would continue to follow the well-reasoned rule of law articulated in *Hill*.

There is strong evidence that defendant, when arrested, carried no more than pieces of scrap metal that were once parts of a firearm. If this is true, they do not meet the definition of "firearm" in MCL 750.222(d). If the gun could not reasonably and readily be repaired, its essential character had changed. If it could not " 'be easily assembled so as to be effective,' " it would no longer be a firearm. See *Hill*, 433 Mich 473 (citation omitted).

Whether a gun is more than temporarily inoperable and therefore not a firearm is a question of fact that should be left to the jury. *People v Gardner*, 194 Mich App 652, 655; 487 NW2d 515 (1992); see also *Hill*, 433 Mich 480. In this case, the trial court instructed the jury that a handgun need not be currently operable to qualify as a firearm. This instruction was insufficient to meet the requirements of MCL 750.222(d) and *Hill*. Anything more than temporary inoperability is a defense to a crime involving a firearm.[6]

Defendant did not object to the trial court's instruction and did not ask for an instruction on inoperability.[7]

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[6] The majority contends that allowing an inoperability defense will encourage suspects to discard or secrete their weapons. A desire to hide a weapon exists in every case. Rare indeed is a felon who would gladly turn his or her weapon over to the police after having used it to commit a crime.

If the majority is implying that a felon is encouraged to disable his or her weapon by my interpretation, I would state that there is no suggestion in the case before us that defendant disabled a firearm. I note that any proof that a defendant disabled a weapon would indicate that it was reasonably and readily repairable at the time of the crime.

[7] The standard criminal jury instructions provide such an instruction. CJI2d 11.6 states: "It is not against this law to carry a gun that is so [out of repair / taken apart with parts missing / welded together / plugged up] that it is totally unusable as a firearm and cannot be easily made operable."

However, the jury was improperly instructed, and the error constituted plain error requiring reversal. There are three requirements under the plain error rule: (1) the error must have occurred, (2) it must have been clear or obvious, and (3) it must have adversely affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is required if the error resulted in the conviction of an actually innocent defendant or gravely and adversely affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

In this case, it is clear and obvious that the trial court failed to give an instruction on the defense of inoperability of the firearm. This adversely affected defendant's substantial right to a properly instructed jury and his substantial right to present a defense. Instructions to a jury must include material issues, defenses, or theories as long as there is evidence to support them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). In this case, the operability of the firearm was crucial. Whether defendant possessed an actual firearm or a hunk of scrap metal was the central question. Because an instruction on this important issue was omitted, the jury instructions were inadequate to protect defendant's substantial right to a properly instructed jury. *Id*.

It is basic law that a defendant must be allowed to confront the charges against him or her and defend against them. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). In not instructing the jury on the inoperability of a firearm here, the court robbed defen-

dant of his ability to fully defend against the state's accusation that he possessed a firearm. Therefore, he was not allowed to present an appropriate defense. Given that this raises due process questions, the failure adversely affected defendant's substantial rights.

This plain error requires reversal. It meets both of the possible reasons for reversal articulated in *Carines*. First, because there was significant evidence that defendant possessed mere scrap metal, there is a legitimate chance that defendant is actually innocent. Second, failure to instruct the jury on the issue that was central to the case robbed defendant of his defense. Because this raises due process concerns, the error affects the fairness and the public reputation of the proceedings. Under such circumstances, defendant is entitled to a remand for a new trial. *Carines*, 460 Mich 763.

THE MEANING THE MAJORITY READS INTO MCL 750.222(d)
IS NOT SUPPORTED BY ITS TEXT

As indicated before, MCL 750.222(d) provides, in part: " 'Firearm' means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air." The majority seizes on the phrase "may be propelled" as distinguishing firearms from other weapons. It concludes that "may be propelled" refers to the design and manner of use of the weapon. To reach the majority's conclusion requires reading the word "may" to mean "designed to." The majority reads the statute as if it states: " 'Firearm' means a weapon from which a dangerous projectile is designed to be propelled . . . ."

None of the common definitions of "may" supports such a reading. The *Random House Webster's College Dictionary*[8] (2001) defines "may" as an auxiliary verb:

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[8] There was no change in the dictionary's treatment of "may" between the 1997 edition used by the majority and the 2001 edition.

> 1. (used to express possibility): *It may rain. You may have been right*. 2. (used to express opportunity or permission): *You may enter*. 3. (used to express contingency, esp. in clauses indicating condition concession, purpose, results, etc.): *strange as it may seem*; *Let us concur so that we may live in peace*. 4. (used to express wish or prayer): *Long may you live*! 5. *Archaic.* (used to express ability or power) — ***Idiom***. 6. **be that as it may,** whether or not that is true. [Emphasis in original.]

The word "design" or "designed" is never used in these definitions. Nor can "designed" be read into them. It is simply not there.

The majority contends that the third and fourth definitions of "may" are consistent with a "design" requirement. Even a casual reading of these definitions will show the reader that this is untrue. Moreover, it should be noted that the majority did not include the sentences offered by the dictionary as typical examples of usage of the word. An attempt to place "designed" into the dictionary's sentences will show that "design" cannot replace "may." The examples from the third definition would read: "*strange as it [designed] seem*; *Let us concur so that we [designed] live in peace*." The example from the fourth definition would read: "*Long [designed] you live*!"

This demonstrates how untenable and extraordinary the majority's claims regarding the meaning of "may" are. I have not selected sentences that illustrate usages of "may" that are particularly inapplicable. If sentences using all possible dictionary usages were included here, it would become apparent that none fits the majority's reading of "may." The sensible conclusion must be that the majority's reading of "may" to mean "designed" is not plausible.

The majority has frequently claimed that it does no more than read the text of a statute in order to interpret

it.[9] But here it appears to abandon that philosophy. It adds meaning to the statute that the Legislature chose not to give and that no dictionary furnishes.

The majority claims that no language in the statute supports an operability requirement. But, in fact, the very first definition of "may" supports an inoperability defense. "May" is used to express possibility. *Random House Webster's College Dictionary* (2001). Using this definition of "may" in MCL 750.222(d), we find that, to be a firearm, a weapon must possess the possibility of propelling a dangerous projectile. Such a possibility is realized only when the weapon is reasonably and readily made to fire. Therefore, in contrast to the majority's "design" requirement, the text of MCL 750.222(d) actually supports an operability requirement.

It is only by ignoring the text of the statute and through a tortured definition of the word "may" that the majority reaches its result. In reality, the majority is interpreting the law to read like what it wishes the Legislature had written. Yet it is well settled that, when construing a statute, a reviewing court is supposed to assume that the words chosen by the Legislature are intentional. We should not speculate that the Legislature inadvertently used one word or phrase when it intended another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).

The Legislature certainly could have written the language "designed to be propelled" into MCL 750.222(d) had it wished to do so. 18 USC 921(a)(3) provides an example in which Congress did just that:

> The term "firearm" means (A) any weapon (including a starter gun) which will or *is designed to* or may readily be converted to expel a projectile by the action of an explosive;

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[9] I encourage readers to compare the majority's rationale in this case to the rhetoric it used in *Paige,* 476 Mich 495.

> (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. [Emphasis added.]

The majority reads MCL 750.222(d) as having almost the same breadth as 18 USC 921(a)(3). This is inappropriate. 18 USC 921(a)(3) has been in effect since at least 1968. Had the Michigan Legislature intended to enact a statute similar to 18 USC 921(a)(3), it could have copied the language from the federal statute. But it chose not to do so. Its choice should be respected.

Moreover, the Michigan Legislature has fully demonstrated its familiarity with 18 USC 921(a)(3). It wrote MCL 380.1311, which concerns the expulsion and suspension of students. Contained in the statute is a definition of "firearm." It provides: " 'Firearm' means that term as defined in section 921 of title 18 of the United States Code, 18 USC 921." MCL 380.1311(11)(d). The Legislature chose this definition of "firearm" for MCL 380.1311(11)(d) but not for MCL 750.222(d), a fact that severely undermines the majority's argument in this case.

We have recognized that "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 510 NW2d 76 (1993). But the majority does just that, today. In MCL 380.1311(11)(d), the Legislature used the term "designed" by adopting the definition contained in 18 USC 921(a)(3). In MCL 750.222(d), the Legislature chose not to use that definition or the word "designed." The majority assumes that this choice was a mistake by the Legislature and reads "designed" into MCL 750.222(d). This is contrary to well-

established rules for interpreting a statute and violates the majority's claimed "plain text philosophy."

The majority characterizes 18 USC 921(a)(3) as irrelevant. But that it is relevant becomes apparent when we consider that the Michigan Legislature specifically adopted the language of 18 USC 921(a)(3) as its own in MCL 380.1311(11)(d). The majority has not and cannot explain what renders MCL 380.1311(11)(d) irrelevant. It has become part of Michigan law. Well-established rules of statutory construction require that we pay respect to legislative enactments. The Michigan Legislature included a "design" requirement in MCL 380.1311(11)(d). It did not include it in MCL 750.222(d). We cannot assume that the Legislature omitted from one statute through inadvertence the language it placed in another. *Farrington*, 442 Mich 210. I respect its choice. The majority does not.

I would respect the difference between MCL 750.222(d) and MCL 380.1311(11)(d). And I would not read the definitions to be equivalent. Because the Legislature chose to leave "designed" out of MCL 750.222(d), we should do likewise. To fail to do so is to ignore the Legislature's choice.

Instead of focusing on the Legislature's choice of words in MCL 380.1311(11)(d), the majority relies in its analysis on the wording of other statutes that define "dangerous weapon." For instance, the home invasion statute, MCL 750.110a(1)(b), provides:

> "Dangerous weapon" means 1 or more of the following:
>
> (*i*) *A loaded or unloaded firearm, whether operable or inoperable.*
>
> (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

> (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.
>
> (*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*). [Emphasis added.]

See also MCL 600.606 and MCL 766.14.

In the home invasion statute, the Legislature obviously wished to classify as dangerous more than just firearms. It wanted to prohibit someone from perpetrating a home invasion using any weapon that could threaten harm to the occupants. Hence, it included both operable firearms and inoperable firearms. Although an inoperable firearm cannot fire a shot, it can be used to threaten and intimidate a person during a home invasion. Therefore, the inclusion of inoperable firearms in MCL 750.110a is wholly consistent with *Hill's* interpretation of MCL 750.222(d) and with the intent *Hill* recognized in criminal statutes involving firearms. *Hill*, 433 Mich 473.

By contrast, the majority's definition of the word "firearm" is inconsistent with MCL 750.110a(1)(b), MCL 600.606(2)(b), and MCL 766.14(4)(b). The majority reads "firearm" to include inoperable firearms. This definition of "firearm" renders the specific inclusion of inoperable firearms in MCL 750.110a(1)(b), MCL 600.606(2)(b), and MCL 766.14(4)(b) unnecessary, repetitive, and nugatory. If the Legislature intended the word "firearm" to include both operable and inoperable firearms, it would not have added the term "inoperable" to these statutes.

The use of "inoperable" in MCL 750.110a demonstrates that the Legislature knew how to write statutes to include inoperable firearms. But, when it wrote MCL 750.222(d), it decided not to do so. Again, the majority

ignores that the Legislature made this choice. Rather, it replaces the words of the statute with its own. In so doing, it creates judicially a legislative policy preference, something the majority has repeatedly claimed to abhor.[10]

The majority all but concedes that its interpretation of "firearm" renders part of MCL 750.110a(1)(b) redundant. But it claims that my interpretation would render the statute more redundant. The claim is misleading. Under *Hill*, a firearm is only a firearm if it can propel a qualifying projectile. If the Legislature wished to include inoperable firearms in the statute, it should have said so. In MCL 750.110a(1)(b), the Legislature had that intention, and it specifically included inoperable firearms. Far from making this portion of the statute redundant, my interpretation gives it meaning.

The majority also contends that the *Hill* definition of "firearm" would not include an unloaded gun. This is simply not the case. *Hill* stated: "[T]emporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms." *Hill*, 433 Mich 477. An unloaded firearm can be made operable within a reasonable time simply by loading it with bullets. Accordingly, an unloaded firearm falls under both the definition of "firearm" created by the majority in this case and the definition created by the Legislature and recognized in *Hill*.

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[10] See *Rory v Continental Ins Co*, 473 Mich 457, 470-471; 703 NW2d 23 (2005); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591-592; 702 NW2d 539 (2005); *Henry v Dow Chemical Co*, 473 Mich 63, 88 n 16; 701 NW2d 684 (2005); *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 161, 164; 680 NW2d 840 (2004); *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003); *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002); *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001); *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

Inexplicably, also, the majority contends that the use of the phrase "designed and manufactured" in the second sentence of MCL 750.222(d)[11] supports its claims that "may" means "designed" in the first sentence. The fact that the Legislature used "designed" in the very next sentence after it decided to use "may" demonstrates that this choice was no accident. It again demonstrates that, when it enacted MCL 750.222(d), the Legislature knew how to create a "design" requirement. It did not do so in the first sentence. The majority asks the reader to ignore the difference in these sentences. To read "designed" into the first sentence defies legal precedent, logic, and common sense.

I agree with the majority that MCL 750.222(d) is intended to describe what weapons constitute firearms. The statute distinguishes firearms from other weapons by focusing on their capacity to propel a dangerous projectile. Therefore, the operability of the firearm is what distinguishes it from other weapons. *Hill* recognized this distinction. Without the possibility of propelling a projectile, a gun does not significantly differ as a weapon from a club. The majority's interpretation eliminates the distinction the Legislature sought to create.[12]

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[11] The second sentence reads: "Firearm does not include a smooth bore rifle or handgun *designed and manufactured* exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber." MCL 750.222(d) (emphasis added).

[12] The majority contends that the most reasonable assumption is that the "may" clause is intended to differentiate only between types of weapons. It believes that one should not assume that it is intended to differentiate between types of weapons *and also* to differentiate between inoperable and operable weapons. It offers no legal support or other explanation for its preference. My conclusion is that the majority's reading makes little sense given the context of the clause. It is with respect to the operability of a weapon that the Legislature differentiates among weapons. A firearm is a firearm and not a club only when it has

The majority attempts to bolster its additions to the language of MCL 750.222(d) by referencing MCL 752.841. MCL 752.841 contains the definition of a "firearm" for the death or injuries from firearms act, MCL 752.841 to MCL 752.845. MCL 752.841 provides: "For the purposes of this act the word 'firearm' shall mean any weapon or device from which *is propelled* any missile, projectile, bullet, shot, pellet or other mass by means of explosives, compressed air or gas or by means of springs, levers or other mechanical device." (Emphasis added.) The majority contends that the Legislature uses the phrase "is propelled" when it wants to include an operability requirement.

This contention is strained. MCL 752.841 uses the "is propelled" language because a gun must actually be fired to fall within the act's definition of "firearm." This is in contrast to the statutes prohibiting felony-firearm, felon in possession, carrying a concealed weapon, and possession of a short-barreled shotgun, which do not require that the weapon actually be operated. Under these crimes, a defendant is equally guilty regardless of whether the firearm is discharged. These are possession crimes. Hence, the Legislature used "may be propelled" in MCL 750.222(d). Had it wanted these crimes to punish the use of a weapon, it would have used the language "is propelled" that it used in MCL 752.841.

Far from supporting the majority's interpretation, the difference between MCL 752.841 and MCL 750.222(d) demonstrates that *Hill* came to the correct conclusion regarding the meaning of "may be propelled." This difference shows how far the majority is reaching to invent the "design" requirement that it

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the ability to propel a projectile. In reality, the majority is indicating that it is uncomfortable with the means the Legislature chose to distinguish between types of weapons.

relies on. Simply put, the majority has departed from its claimed textualist "philosophy" and added to the language of the statute something that is not there.

THE RULE OF LENITY

The majority claims that its interpretation is the correct reading of MCL 750.222(d). This is despite the fact that *Hill* reached a different conclusion when confronted with the same "may be propelled" language. And it is despite the fact that the majority recognizes a long split of authority on this subject in the Court of Appeals. The majority admits that several Court of Appeals cases have found an inoperability defense to carrying a concealed weapon. In addition, it concedes that there is more than one plausible meaning to the statute. In ignoring the legal authority to the contrary, the language of the statute, and the other plausible meanings of the language, the majority violates the rule of lenity.

Courts have long held that any ambiguity regarding the scope of criminal statutes must be resolved in favor of lenity. *Huddleston v United States*, 415 US 814, 830-831; 94 S Ct 1262; 39 L Ed 2d 782 (1974), quoting *Rewis v United States*, 401 US 808, 812; 91 S Ct 1056; 28 L Ed 2d 493 (1971). That is, if a criminal statute is open to more than one legitimate interpretation, it should be construed strictly. This means that the statute should be construed in favor of the defendant. *United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820). The rule of lenity is important in criminal cases because it provides constitutional fair warning. It does this by making clear what the law intends to do if someone crosses a certain line and where that line is drawn. *United States v Lanier*, 520 US 259, 265; 117 S Ct 1219; 137 L Ed 2d 432 (1997).

I do not believe that the majority has put forth a legitimate interpretation of MCL 750.222(d). But even if it had, I would reach the conclusion that inoperability is a defense to felon in possession and felony-firearm.[13] This is because then the rule of lenity would require us to construe MCL 750.222(d) in favor of defendant. The rule favors the result reached in *Hill*. Therefore, if one could read MCL 750.222(d) to offer an inoperability defense or not to offer it, the constitution requires that the Court chose the former. *Wiltberger*, 18 US (5 Wheat) 95. The majority ignores the rule of lenity and does not interpret the statute consistently with its actual language. This is constitutionally impermissible.

The majority concedes in its opinion that it finds two possible ways to read the statute.[14] It states: "[B]oth of these meanings are plausible given the use of 'may' in the statute . . . ." *Ante* at 642. Because the majority recognizes that it is choosing between two reasonable interpretations of the statute, it must realize that the constitution requires it to follow the rule of lenity. *Wiltberger*, 18 US (5 Wheat) 95. But it does not do so.

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[13] The majority accuses me of resorting to the rule of lenity without finding an ambiguity. It misses my point. My discussion of the rule of lenity is premised on an alternative argument. If the majority had put forth a legitimate interpretation of MCL 750.222(d), the statute would be ambiguous. This is because the language would be susceptible to more than one interpretation and reasonable minds could differ with respect to its meaning. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW 2d 164 (1999). In such a situation, the rule of lenity would apply. And it would require the statute to be interpreted favoring defendant. *Wiltberger*, 18 US (5 Wheat) 95. Of the two interpretations presented, the one put forth in *Hill* favors defendant. Therefore, the rule of lenity requires that we apply the *Hill* interpretation. Significantly, that interpretation is the one that actually matches the language chosen by the Legislature.

[14] I reiterate that I do not believe that there are two legitimate interpretations of MCL 750.222(d). This is because the majority's proposed interpretation creating a "design" requirement is not supported by the language of the statute.

Rather than choose the interpretation that favors defendant, it chose the one that disfavors him. This not only further demonstrates that the majority's interpretation is legally incorrect, it renders the opinion constitutionally suspect. The majority ignores both the words of the statute and the constitutional requirements placed on it in interpreting those words.

The majority states that it "believe[s] that the words of the statute as a whole indicate an intent to include a broad definition . . . ." *Ante* at 642 n 2. But this is a policy choice. The statement that a broader rather than a narrower interpretation of the statute was intended violates the rule of lenity, as articulated by the United States Supreme Court.

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [*United States v Universal CIT Credit Corp*, 344 US 218, 221-222; 73 S Ct 227; 97 L Ed 260 (1952).]

In this case, there is not even an "ambiguous implication" on which the majority can rest its decision. As such, the choice it makes between the two plausible meanings it recognizes does not survive the constitutional protections afforded by the rule of lenity.

The rules of lenity and fair warning are especially important in this case in light of *Hill*. *Hill* offered the only interpretation from this Court of the language "may be propelled." It should have influenced defendant's understanding of what constitutes a firearm. Arguably, *Hill* set the line that divides innocent behavior from criminal behavior. In this case, defendant could not have known that holding a piece of scrap metal

would subject him to prosecution for felon in possession and felony-firearm. For that reason, defendant's constitutional right to fair warning was violated. *Lanier*, 520 US 265.[15]

Because the rules of lenity and fair warning favor an inoperability defense, such a defense is constitutionally required. Accordingly, this case should be remanded for a new trial. At trial, the court should allow defendant to argue to the jury that the weapon was not operable and could not reasonably and readily be repaired within a reasonable time. Any other outcome raises serious constitutional concerns.

CONCLUSION

Contrary to the majority's contention, this Court's decision in *Hill* provides significant guidance on how to properly interpret MCL 750.222(d). *Hill* dealt with a nearly identical statute and, in fact, construed the identical phrase "may be propelled" that this case

[15] The majority finds it incredible that I refer to *Hill* in this section of my argument. It is true that *Hill* did not purport to interpret the felony-firearm statute. But it is also true that *Hill* is precedent from this Court interpreting the exact language we discussed in this case. On the same date it issued this opinion, the majority stated that "absolutely identical phrases in our statutes" should have identical meanings. *Paige*, 476 Mich 520. It made this statement repeatedly and emphatically. For example, it wrote in *Paige*:

> When identical words in the law, lying within a similar statutory context, mean something altogether different, we do believe that there is a "practical workability" problem, not in the sense that a court of law cannot render some decision—no opinion of this Court is "unworkable" in that sense—but in the sense that the law is made a mockery, meaning one thing in one paragraph and something else in the next. [*Id*., 510-511.]

It is unclear to me why the majority felt so strongly about this point in *Paige* but not in this case.

scrutinizes. The majority's decision to ignore *Hill's* guiding precedent is seriously erroneous.

Ignoring *Hill*, the majority creates a new "design" requirement for MCL 750.222(d). It is unsupported by the text of the statute. And it reads into the statute something that previously was not there and was not intended by the Legislature.[16] The majority's decision to change the words of the statute violates both the rule of lenity and the constitutional requirement of fair warning.

Defendant was entitled to an inoperability defense. The trial court's instructions denied him that defense, and they failed to properly inform the jury of the central issue in the case. This amounted to plain error requiring reversal. Therefore, I would remand the case for a new trial.

CAVANAGH, J. I concur only in the result proposed by Justice KELLY.

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[16] The members of the majority accuse me of falling into the trap of the false choice fallacy by concluding that they are paying mere lip service to their claimed philosophy. "The logical fallacy of false choice is a correlative-based fallacy in which options are presented as being exclusive when they may not be. It is often used to obscure the likelihood of one option or to reframe an argument on the user's terms." False Choice, Wikipedia <http://en.wikipedia.org/wiki/False_choice> (accessed July 7, 2006).

It is not I who commits this fallacy here. I do not argue simply that the majority errs because it disagrees with my interpretation. I argue that the majority is not true to its "plain language" philosophy; it ignores the words of the statute and adds a "design" requirement that the Legislature chose not to add. Ironically, it is the majority that commits the fallacy of the false choice. It argues that one must agree with its reading of the statute or commit a logical fallacy. Perhaps it does this only "to reframe an argument on the user's terms." *Id*. This seems the true "argumentative sleight of hand . . . ." *Ante* at 654.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal July 28, 2006:

MILLER v CHAPMAN CONTRACTING, No. 130808. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the Oakland Circuit Court and the Court of Appeals correctly determined that plaintiff's motion to amend was futile. The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 256676.

Summary Disposition July 28, 2006:

PEOPLE v PIPKINS, No. 130530. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Muskegon Circuit Court's September 22, 2005, order denying defendant's motion for appointment of new appellate counsel. We remand this case to the Muskegon Circuit Court for a determination of whether defendant is indigent and, if so, for the appointment of appellate counsel. *Halbert v Michigan,* 545 US 605 (2005).

Appellate defense counsel's March 2, 2005, motion to withdraw as appellate counsel and for substitute counsel represented that defendant had requested his withdrawal and that he and defendant differed over pursuit of a frivolous appellate issue, but it did not represent that counsel believed that no nonfrivolous issues existed to pursue on appeal. Rather, the motion suggested that nonfrivolous, preserved appellate issues existed by stating:

> [Defendant] made a motion to withdraw his plea at his sentencing, which was denied by the Court. At sentencing, trial counsel objected to the scoring of some disputed guidelines; some objections were granted and others were denied. As such, *this case could have proceeded to the Court of Appeals on the denial of the motion to withdraw and on the guidelines issue but for this new issue over the habitual offender notice*. Yet now, appellate counsel is confronted with a client who refuses to dismiss the appeal, insists on raising [another] issue which appellate counsel finds meritless and Defendant rejects appellate counsel. [Emphasis supplied.]

Thus, the March 14, 2005, circuit court order that granted counsel's motion to withdraw but denied his and defendant's pro se requests for substitute appellate counsel could not have been premised on any sustainable finding that all potential appellate issues were frivolous. An indigent defendant was not then entitled to appointed appellate counsel, except in specified circumstances inapplicable here. MCR 6.302(B)(6), 466 Mich lxxxiv-lxxxv (2002); MCR 6.425(E)-(F), 461 Mich cci-cciii (2000); and MCL 770.3a(1)-(2). Therefore, the September 22, 2005, circuit court order improperly denied defendant's post-*Halbert* motion for appointed appellate counsel by erroneously finding that "[o]n March 14, 2005, the Court granted appellate counsel's motion to withdraw on the ground that he did not want to file a frivolous appeal and defendant demanded substitute appellate counsel." Even if the March 14, 2005, order was sustainable under then-extant authority, *Halbert* abrogated that authority and defendant was thus deprived of his right to appointed appellate counsel to pursue the nonfrivolous issues identified in former appointed appellate counsel's withdrawal motion.

Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, as, at the time defendant was denied counsel, he was entitled to file pleadings within 12 months of sentencing rather than six months. See the former versions of MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. We do not retain jurisdiction. Court of Appeals No. 266136.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the majority's decision to remand the case for appointment of substitute appellate counsel. When the court appointed appellate counsel, defendant received that which is required by *Halbert v Michigan*, 545 US 605 (2005). *Halbert* does not require that the court appoint a second appellate attorney because defendant disliked the first. Indigent defendants who receive appointed counsel do not have the right to counsel of their choice. This Court should refrain from recognizing a right that simply does not exist.

The trial court appointed Steve Ramey as appellate defense counsel after defendant pleaded no contest to a charge of third-degree criminal sexual conduct, MCL 750.520d(1)(a), as a fourth-offense habitual offender. Defendant wished to appeal the sentence enhancement, believing that it was flawed. The felony information listed a 1993 conviction that defendant claimed had never occurred. Because the 1993 conviction was irrelevant, given defendant's three other uncontested felonies, Ramey, in the exercise of his professional judgment, declined to raise the sentence enhancement as an appellate issue. Defendant then insisted that Ramey withdraw from representing him.

Ramey moved to withdraw and also sought the appointment of substitute appellate counsel. Within the week, defendant also moved pro se for Ramey's removal and for appointment of substitute appellate counsel under *Halbert*. The trial court granted Ramey's motion to withdraw, but denied Ramey's and defendant's motions for appointment

of substitute appellate counsel. The court also stated that it had not considered the 1993 conviction when imposing the sentence enhancement.

In *Halbert*, the Supreme Court held that "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert*, *supra* at 610. As *Halbert* required, the trial court here provided defendant with appointed appellate counsel.

The majority has fundamentally misconstrued *Halbert*. It does not grant an indigent defendant the right to appointed appellate counsel *of his choosing*. This notion is wholly unsupported by *Halbert* and contrary to a subsequent Supreme Court opinion. *Halbert* said nothing about a right to more than one appointed appellate counsel. And the Supreme Court has since reiterated that "an element of [the Sixth Amendment right to counsel] is the right of a defendant *who does not require appointed counsel* to choose who will represent him." *United States v Gonzalez-Lopez*, __US__; 126 S Ct 2557, 2561 (2006), citing *Wheat v United States*, 486 US 153, 159 (1988) (emphasis added). The Supreme Court has thus clarified that the right to counsel of choice does not extend to indigent defendants with appointed counsel.

The trial court here provided defendant with appointed appellate counsel to assist in seeking access to first-tier review. *Halbert*'s requirements were thereby met. Defendant, acting of his own volition, then sought counsel's withdrawal. The trial court correctly ruled that "there is no rule in state or federal law which mandates the appointment of two or more appellate counsel to represent an indigent defendant at public expense." I would therefore deny defendant's application for leave to appeal in this Court, because *Halbert* does not entitle an indigent defendant to appointed appellate counsel of his choosing.

Leave to Appeal Denied July 28, 2006:

In re CAMP (DEPARTMENT OF HUMAN SERVICES V JOHN), No. 131464. The motion to consolidate is denied. Court of Appeals No. 265301.

In re TACK (DEPARTMENT OF HUMAN SERVICES V KOTEL), No. 131652; Court of Appeals No. 267852.

Summary Dispositions July 31, 2006:

MCLAREN REGIONAL MEDICAL CENTER V CITY OF OWOSSO, No. 127118. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of our decision in *Wexford Med Group v City of Cadillac*, 474 Mich 192 (2006). On remand, the Court of Appeals shall reconsider petitioners' claim that they are entitled to an exemption under MCL 211.7o (charitable institution) or to an exemption

under MCL 211.7r (hospital or public health institution). We do not retain jurisdiction. Court of Appeals No. 244386.

PEOPLE V HARRIS, No. 130200. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Clinton Circuit Court for a determination of whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within twelve months of the date of the circuit court's order appointing counsel, as, at the time defendant was denied counsel, he was entitled to file pleadings within 12 months of sentencing rather than six. See the 2004 versions of MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may include among the issues raised, but is not required to include, those issues raised by defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 264460.

KAKISH V DOMINION OF CANADA GENERAL INSURANCE COMPANY, No. 130730. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the issues whether the Ingham Circuit Court could exercise ancillary jurisdiction over plaintiffs' claim for uninsured/unidentified motorist benefits and whether the applicable insurance contract required plaintiffs to bring any lawsuit in an Ontario court. Court of Appeals No. 260963.

CAVANAGH, J., did not participate.

Leave to Appeal Denied July 31, 2006:

SAMOSIUK V SAMOSIUK, No. 129424; Court of Appeals No. 260612.

SABOL V AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, No. 129696; Court of Appeals No. 260751.

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION V GERRISH TOWNSHIP, No. 129989; Court of Appeals No. 262494.

ACEMCO, INCORPORATED V OLYMPIC STEEL LAFAYETTE, INC, No. 130047; Court of Appeals No. 256638.

WILCOX V ELK RAPIDS TOWNSHIP, No. 130249; Court of Appeals No. 261139.

BROWN V PAROLE BOARD, No. 130319. The motion for entry of default is denied. Court of Appeals No. 261811.

TUGGLE V DEPARTMENT OF STATE POLICE, No. 130349; reported below: 269 Mich App 657.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE V HARRIS, No. 130396; Court of Appeals No. 265920.

In re CONTEMPT OF BRUE (PEOPLE V PIRRONE), No. 130418; Court of Appeals No. 254716.

PEOPLE V LAWRENCE, No. 130430; Court of Appeals No. 255574.

PEOPLE V BALDWIN, No. 130472; Court of Appeals No. 266478.

PEOPLE V HOPE, No. 130483; Court of Appeals No. 257400.

PEOPLE V HOLM, No. 130487; Court of Appeals No. 256985.

PEOPLE V VALENCIA, No. 130494; Court of Appeals No. 257986.

PEOPLE V LORENZO SANDERS, No. 130500; Court of Appeals No. 257401.

PEOPLE V VANDERWIEL, No. 130501. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263492.

PEOPLE V BRIAN JOHNSON, No. 130511; Court of Appeals No. 253692.

PEOPLE V CLARK, No. 130527; Court of Appeals No. 256193.

PEOPLE V LEONARD, No. 130550; Court of Appeals No. 254492.

PEOPLE V GRIMES, No. 130551. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262556.

PEOPLE V SUMERLIN, No. 130563; Court of Appeals No. 256192.

PEOPLE V LANGO, No. 130567; Court of Appeals No. 258096.

PEOPLE V PARRISH, No. 130572; Court of Appeals No. 266905.

6700 LIMITED V CITY OF STERLING HEIGHTS, No. 130573; Court of Appeals No. 264821.

PEOPLE V JEROME SMITH, No. 130578; Court of Appeals No. 257983.

PEOPLE V WILEY, No. 130596; Court of Appeals No. 266871.

MENDOLA V HARVEY, No. 130614; Court of Appeals No. 255697.

In re HENDERSON (HENDERSON V GENESEE CIRCUIT JUDGE), No. 130616; Court of Appeals No. 266984.

PEOPLE V EARL, No. 130632; Court of Appeals No. 267273.

PEOPLE V SWAIZEY, No. 130651; Court of Appeals No. 254802.

PEOPLE V MICHAEL JONES, No. 130661; Court of Appeals No. 253146.

PEOPLE V IRWIN, No. 130662; Court of Appeals No. 257405.

PEOPLE V GALLOWAY, No. 130676. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263487.

PEOPLE V MCCREARY, No. 130687. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263452.

PEOPLE V SUTTON, No. 130688; Court of Appeals No. 256284.

PEOPLE V BOYER, No. 130692. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262087.

PEOPLE V MORALES, No. 130693. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262925.

PEOPLE V DUNN, No. 130708; Court of Appeals No. 266527.

PEOPLE V VALLANCE, No. 130710. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263158.

PEOPLE V MILLISOR, No. 130711; Court of Appeals No. 266009.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissent in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE V SAEED, No. 130712; Court of Appeals No. 267826.

PEOPLE V HESS, No. 130716. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263608.

PEOPLE V STEWART, No. 130717; Court of Appeals No. 262841.

PEOPLE V RODRIGUEZ, No. 130719. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262838.

PEOPLE V WILLIAMS, No. 130722; Court of Appeals No. 257404.

PEOPLE V DANNELLE FISHER, No. 130723. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264625.

PEOPLE V MCCORMACK, No. 130724. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264726.

PEOPLE V BOBBY FISHER, No. 130725. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262946.

PEOPLE V GRAHAM, No. 130729; Court of Appeals No. 267430.

PEOPLE V LANCE, No. 130731; Court of Appeals No. 266412.

PEOPLE V BOULDING, No. 130735; Court of Appeals No. 256836.

PEOPLE V BILLINGSLEY, No. 130737; Court of Appeals No. 267669.

PEOPLE V NOBLE, No. 130738; Court of Appeals No. 266142.

PEOPLE V MCELHANEY, No. 130740. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265543.

PEOPLE V INMAN, No. 130743. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267722.

PEOPLE V WATSON, No. 130744; Court of Appeals No. 257260.

PEOPLE V BENJAMIN MARTINEZ, No. 130750; Court of Appeals No. 267380.

PEOPLE V MARSHALL, No. 130758. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262516.

PEOPLE V REAMSMA, No. 130759. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264258.

PEOPLE V CASTRO, No. 130761; Court of Appeals No. 257849.

PEOPLE V SEWELL, No. 130766. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263709.

PEOPLE V GREENBERG, No. 130767. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267776.

PEOPLE V ADAMS, No. 130771. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263142.

PEOPLE V RAY, No. 130779; Court of Appeals No. 263449.

PEOPLE V MCDONALD, No. 130780; Court of Appeals No. 262482.

PEOPLE V CHARLES ROSS, No. 130785. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263805.

PEOPLE V ERICK JOHNSON, No. 130786; Court of Appeals No. 257145.

PEOPLE V GREENE, No. 130787; Court of Appeals No. 255968.

PEOPLE V ROBINSON, No. 130793; Court of Appeals No. 255672.

PEOPLE V GEORGE, No. 130795; Court of Appeals No. 264969.

PEOPLE V BANNASCH, No. 130818; Court of Appeals No. 257077.

PEOPLE V FRANKIE HALL, No. 130822. The motion to remand is denied. Court of Appeals No. 268198.

MILLER V BOTSFORD HOSPITAL, No. 130829; Court of Appeals No. 265980.

PEOPLE V HILMON, No. 130830; Court of Appeals No. 258097.

PEOPLE V LISTON, No. 130831; Court of Appeals No. 267913.

PEOPLE V WILKINSON, No. 130832; Court of Appeals No. 267733.

PEOPLE V LOGAN, No. 130833; Court of Appeals No. 267668.

PEOPLE V DANIEL, No. 130837; Court of Appeals No. 257658.

PEOPLE V KOURAIMI, No. 130838; Court of Appeals No. 267431.

In re WALKER (PEOPLE V WALKER), No. 130840; Court of Appeals No. 258129.

PEOPLE V TOWNSEND, No. 130842; Court of Appeals No. 252371.

MIDLAND COGENERATION VENTURE V CITY OF MIDLAND, Nos. 130843-130845; Court of Appeals Nos. 254636, 254745, 255066.

DARITY V CITY OF FLAT ROCK, No. 130848; Court of Appeals No. 256481.

PEOPLE V BARTON, No. 130866; Court of Appeals No. 265746.

SCHIEFLER V WARNER, NORCROSS & JUDD, No. 130868. We are not persuaded that the questions presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 262425.

JOSEPH V DENNY'S, INC, No. 130871; Court of Appeals No. 257651.

BONDIE V SALTSMAN, No. 130873. We are not persuaded that the questions presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals. Court of Appeals No. 257218.

PARKER V E CONRAD TRUCKING, INC, No. 130878; Court of Appeals No. 258037.

PEOPLE V KULP, No. 130880; Court of Appeals No. 268471.

PEOPLE V WILLIS, No. 130882; Court of Appeals No. 268161.

PEOPLE V DAVID, No. 130884; Court of Appeals No. 257332.

PEOPLE V JAMES ALAN GREER, No. 130890; Court of Appeals No. 257269.

PEOPLE V CHRISTOPHER OWENS, No. 130891; Court of Appeals No. 267937.

PEOPLE v RITCHIE, No. 130894; Court of Appeals No. 267608.

ALLAN v ALLAN, No. 130902; Court of Appeals No. 259126.

PEOPLE v CASE, No. 130906; Court of Appeals No. 268128.

PEOPLE v REED, No. 130910; Court of Appeals No. 268387.

PEOPLE v ANDERSON, No. 130938; Court of Appeals No. 268376.

PEOPLE v TEICHOW, No. 130939; Court of Appeals No. 257098.

THOMAS v DEPARTMENT OF CORRECTIONS, No. 130945; Court of Appeals No. 267858.

JANUSZ v STERLING MILLWORK, INC, No. 130946; Court of Appeals No. 258018.

STEVENSON v BLUE CROSS BLUE SHIELD, No. 130951; Court of Appeals No. 255973.

PEOPLE v HELMKA, No. 130953; Court of Appeals No. 267828.

HAUT v STANDISH-STERLING COMMUNITY SCHOOL DISTRICT, No. 130955; Court of Appeals No. 264244.

PEOPLE v SCOTT, No. 130960; Court of Appeals No. 268120.

PEOPLE v MADDOX, No. 130963; Court of Appeals No. 268013.

MOORE v EGAN, No. 130965; Court of Appeals No. 262390.

ALLEN v DAIMLERCHRYSLER CORPORATION, No. 130969; Court of Appeals No. 265427.

JEN-KEL CONSTRUCTION CO, INC v CITY OF HOLLAND, No. 130971; Court of Appeals No. 257856.

PHILLIPS v CASCADE ENGINEERING, INC, No. 130972; Court of Appeals No. 266740.

LYON FINANCIAL SERVICES, INC v EAGLE TRANSPORT SERVICES, INC, No. 130975; Court of Appeals No. 265387.

PEOPLE v WALDEN, No. 130976; Court of Appeals No. 254386.

PEOPLE v WILSON, No. 130977; Court of Appeals No. 267118.

PEOPLE v BULLOCK, No. 130985; Court of Appeals No. 258579.

PEOPLE v MAPLES, No. 130987, Court of Appeals No. 268554.

PEOPLE v CARTER, No. 130994; Court of Appeals No. 267935.

FATA v ROSCOMMON COUNTY ROAD COMMISSION, No. 130996; Court of Appeals No. 257936.

PEOPLE v MALKOWSKI, No. 131016; Court of Appeals No. 268058.

PEOPLE V WILKINS, No. 131018; Court of Appeals No. 268156.

PEOPLE V CHRISTMAS, No. 131032; Court of Appeals No. 258629.

CUMMINGS V MICHIGAN PAPERBOARD CORPORATION, No. 131033; Court of Appeals No. 266703.

AFSCME COUNCIL 25 v CITY OF HIGHLAND PARK, No. 131037; Court of Appeals No. 257680.

ALLSTATE INSURANCE COMPANY V CLARENDON NATIONAL INSURANCE COMPANY, No. 131040; Court of Appeals No. 258665.

RICHARDSON V FLAGSTAR BANK, FSB, No. 131042; Court of Appeals No. 264547.

FOUNTAIN V ARROW UNIFORM RENTAL, No. 131043; Court of Appeals No. 266583.

PEOPLE V SIMMONS, No. 131045; Court of Appeals No. 258964.

PEOPLE V CURTIS, No. 131052. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 265248.

PEOPLE V AVERY, No. 131056; Court of Appeals No. 267813.

PEOPLE V MOORE, No. 131059; Court of Appeals No. 258739.

STREETS V CWC TEXTRON, INC, No. 131062; Court of Appeals No. 266741.

PEOPLE V EDGE, No. 131075. Because defendant's application for leave to appeal was timely filed in the Court of Appeals pursuant to MCR 7.205(F)(3), the Court of Appeals erroneously relied on MCR 6.508(D) to deny defendant's application. Court of Appeals No. 268088.

PEOPLE V WASHINGTON, No. 131078; Court of Appeals No. 259433.

PEOPLE V WHITLOCK, No. 131092; Court of Appeals No. 259080.

PEOPLE V HOSKINS, No. 131093; Court of Appeals No. 259305.

PITSCH V COUNTRY FRESH, INC, No. 131098; Court of Appeals No. 267109.

PEOPLE V JERRY STEPHENS, No. 131119; Court of Appeals No. 268468.

PEOPLE V PETTY, No. 131138; Court of Appeals No. 267064.

CURBELO V AUTO-OWNERS INSURANCE COMPANY, No. 131166; Court of Appeals No. 264928.

PEOPLE V CLINTON, No. 131243; Court of Appeals No. 258438.

MAYS V DEPARTMENT OF CORRECTIONS, No. 131311; Court of Appeals No. 266358.

Reconsideration Denied July 31, 2006:

ZERRENNER V ZERRENNER, No. 127273. Summary disposition entered at 474 Mich 1103. Court of Appeals No. 246321.

PEOPLE V WRIGHT, No. 128424. Leave to appeal denied at 474 Mich 1138. Court of Appeals No. 259880.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

MARKMAN, J. I would grant the motion for reconsideration and grant defendant's application for leave to appeal for the reasons set forth in *People v Wright*, 474 Mich 1138 (2006).

L & R HOMES, INC V JACK CHRISTENSON ROCHESTER, INC, No. 128719. Leave to appeal denied at 475 Mich 853. Court of Appeals No. 250483.

FOREMAN V FOREMAN, No. 128874. Leave to appeal denied at 475 Mich 863. Reported below: 266 Mich App 132.

MARKMAN, J. I would grant the motion for reconsideration and grant defendant's application for the reasons set forth in *Foreman v Foreman*, 475 Mich 863, 864 (2006).

TINGLEY V WARDROP, Nos. 128901, 128907, 128909. Summary disposition entered at 474 Mich 1104. Reported below: 266 Mich App 233.

CAVANAGH and KELLY, JJ. We would grant the motion for reconsideration.

WEAVER, J. (*dissenting*). For the reasons stated in my dissent to the order in this matter, which issued April 7, 2006, I would grant reconsideration and deny leave to appeal. 474 Mich 1104 (2006) (WEAVER, J., dissenting).

ENTERPRISE RENT A CAR V VALLERY, No. 129537. Leave to appeal denied at 474 Mich 1134. Court of Appeals No. 260617.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE V STEINER, No. 129952. Leave to appeal denied at 475 Mich 859. Court of Appeals No. 263217.

CAVANAGH and KELLY, JJ. We would grant the motion for reconsideration.

PEOPLE V HITCHCOCK, No. 130026. Leave to appeal denied 475 Mich 867. Court of Appeals No. 259351.

PEOPLE V SHISLER, No. 130098. Leave to appeal denied at 474 Mich 1126. Court of Appeals No. 256122.

PEOPLE V DORTCH, No. 130115. Leave to appeal denied at 475 Mich 867. Court of Appeals No. 265871.

OCWEN FEDERAL BANK, FSB v INTERNATIONAL CHRISTIAN MUSIC MINISTRY, INC, No. 130217. Leave to appeal denied at 474 Mich 1127. Court of Appeals No. 249081.

PEOPLE V CENSKE, No. 130432. The motion to remand for an evidentiary hearing is denied. Leave to appeal denied at 475 Mich 870. Court of Appeals No. 254237.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal August 11, 2006:

HUNTSMAN V GERRISH TOWNSHIP, No. 130068. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 262216.

Leave to Appeal Denied August 11, 2006:

HILTON V WEST BLOOMFIELD CHARTER TOWNSHIP, No. 130760; Court of Appeals No. 257185.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal. I write separately only to note that the district court's order in *West Bloomfield Twp v Charles Hilton* (48th District Court Docket No. 98 WB29458C CM) is not altogether clear as to its purpose. However, because we must presume that the court acted in a constitutional manner, I presume that the district court did not purport to exercise an executive branch function through this order by commanding the township to file a nuisance abatement action in circuit court. Rather, I presume that the district court merely intended to communicate to the township that, if it intended to file such an action, it would have to be filed in the circuit court.

In re WARD (DEPARTMENT OF HUMAN SERVICES V PUFFER), No. 131661; Court of Appeals No. 266967.

In re BLALOCK (DEPARTMENT OF HUMAN SERVICES V BLALOCK), No. 131662; Court of Appeals No. 266106.

Appeal Dismissed August 25, 2006:

VAN TIL V ENVIRONMENTAL RESOURCES MANAGEMENT, INC, No. 128283. The clerk of the Court having received a Notice of Death of the plaintiff, and no motion for substitution having been received within 91 days after filing and service of the notice, defendant's motion to dismiss is granted. MCR 2.202(A)(1)(b). Court of Appeals No. 250539.

Interlocutory Appeal

Leave to Appeal Denied August 25, 2006:

MAKAREWICZ V FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 131785; Court of Appeals No. 269317.

Summary Disposition August 29, 2006:

PEOPLE V FREEMAN, No. 130851. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for resentencing. The Court of Appeals determined that the defendant's sentencing guidelines were misscored and that the applicable guidelines range was lower than the one within which the defendant was originally sentenced. Under these circumstances, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). On remand, the court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Court of Appeals No. 258261.

Leave to Appeal Denied August 29, 2006:

PEOPLE V BARTHOLOMEW, No. 128524; Court of Appeals No. 259196.

PEOPLE V DEWALD, No. 129032; reported below: 267 Mich App 365.
CAVANAGH, J. I would grant leave to appeal.

PEOPLE V POOLE, No. 130315; Court of Appeals No. 244023.

WILLEMS V MERIDIAN CHARTER TOWNSHIP, No. 130347; Court of Appeals No. 262161.

PEOPLE V BAUDER, No. 130407; reported below: 269 Mich App 174.

PEOPLE V LEWIS, No. 130409; Court of Appeals No. 257196.

PEOPLE V BANFIELD, No. 130465; Court of Appeals No. 256560.

PEOPLE V FLORES, No. 130539; Court of Appeals No. 266835.

PEOPLE V CONERLY, No. 130586; Court of Appeals No. 267123.

RODRIGUEZ V FARMERS INSURANCE EXCHANGE and SAFECO INSURANCE V RODRIGUEZ, Nos. 130620, 130621; Court of Appeals Nos. 262443, 262444.

PEOPLE V RUMPH, No. 130628; Court of Appeals No. 257354.

PEOPLE V LARRY JACKSON, JR, No. 130648; Court of Appeals No. 258195.

KLOBERDANZ V SWAN VALLEY SCHOOL DISTRICT, No. 130694; Court of Appeals No. 256208.

PEOPLE V MIDDLEBROOKS, No. 130728. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262813.

PEOPLE V CROSSLEY, No. 130776; Court of Appeals No. 257160.

PEOPLE V MILLER, No. 130777; Court of Appeals No. 267670.

PEOPLE V GRAY, No. 130781. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264015.

PEOPLE V HALE, No. 130796. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263293.

PEOPLE V FLOYD, No. 130797. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264947.

PEOPLE V NELSON, No. 130799. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264459.

PEOPLE V DWAYNE EDWARDS, No. 130801. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266041.

PEOPLE V BOOTH, No. 130806; Court of Appeals No. 267911.

PEOPLE V ZIKE, No. 130811; Court of Appeals No. 257587.

PEOPLE V LOMNICKI, No. 130813. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263650.

PEOPLE V BELANGER, No. 130814; Court of Appeals No. 256450.

PEOPLE V INGLESIAS, No. 130834. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264167.

ALBER V ALBER, No. 130846; Court of Appeals No. 257624.

PEOPLE V COGER, No. 130853. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263565.

PEOPLE V HARRINGTON, No. 130854; Court of Appeals No. 256063.

PEOPLE V HODGE, No. 130856. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263716.

PEOPLE V MILES, No. 130861. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267779.

PEOPLE V BOUT, No. 130864. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263253.

WENGEL V WENGEL, No. 130887; reported below at: 270 Mich App 86.

ENGLISH V HIMMEL-THOMPSON, No. 130889; Court of Appeals No. 255956.

PEOPLE V WHITE, No. 130895. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 267843.

HARRIS V DEPARTMENT OF CORRECTIONS, No. 130903; Court of Appeals No. 264220.

PEOPLE V PORTER, No. 130905. Because defendant's application for leave to appeal was timely filed in the Court of Appeals pursuant to MCR 7.205(F)(3), and the Court of Appeals does not explain why it treated defendant's application as an appeal from an order denying relief from judgment, it appears that the Court of Appeals erroneously relied on MCR 6.508(D) to deny defendant's application. Court of Appeals No. 267405.

PEOPLE V KELLOM, No. 130915; Court of Appeals No. 258197.

ROSS V AUTO CLUB GROUP, No. 130917; reported below: 269 Mich App 356.

PEOPLE V VICTORIA JONES, Nos. 130919, 130922; Court of Appeals Nos. 257458, 261414.

COLVIN V DEPARTMENT OF CORRECTIONS, No. 130920; Court of Appeals No. 268157.

PEOPLE V DAMOND ROSS, No. 130933; Court of Appeals No. 257074.

PEOPLE V HOFFMAN, No. 130936; Court of Appeals No. 255959.

VAWTER V MACOMB CIRCUIT COURT, No. 130954; Court of Appeals No. 268201.

PEOPLE V FOSTER, No. 131000. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264647.

PEOPLE V ORTEGA, No. 131002; Court of Appeals No. 267912.

PEOPLE V RINARD, No. 131006. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 264976.

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DIVELY V WILLIAM BEAUMONT HOSPITAL, No. 131302; Court of Appeals No. 242288 (on remand).

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PEOPLE V STACEY HALL, No. 131318; Court of Appeals No. 259188.

PEOPLE V ANTOINE OWENS, No. 131319; Court of Appeals No. 268739.
KELLY, J. I would grant leave to appeal for the reasons given in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE V HANSERD, No. 131322; Court of Appeals No. 259868.

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In re CONTEMPT OF MURDOCK (AMERICAN AXLE & MANUFACTURING V MURDOCK), Nos. 131664, 131665; Court of Appeals Nos. 262786, 265111.

Reconsiderations Denied August 29, 2006:

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN V KOCH, No. 129324. Leave to appeal denied at 475 Mich 883. Court of Appeals No. 252659.

WEAVER and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

CLARK HILL, PLC v KATZ, No. 129815. Leave to appeal denied at 475 Mich 866. Court of Appeals No. 261480.

PEOPLE V ABRAMCZYK, No. 130019. The motion for reconsideration of this Court's order of June 26, 2006, is considered, and it is denied, because it does not appear that the order was entered erroneously. See *People v Doby*, 474 Mich 955 (2005). Leave to appeal denied at 475 Mich 884. Court of Appeals No. 253449.

PEOPLE V HAWKE, No. 130053. Leave to appeal denied at 475 Mich 867. Court of Appeals No. 260334.

MOSZYK V CITY OF BAY CITY, No. 130444. Leave to appeal denied at 475 Mich 870. Court of Appeals No. 252273.

PEOPLE V BAEZ, No. 130514. Leave to appeal denied at 475 Mich 871. Court of Appeals No. 256121.

PEOPLE V BERRYMAN, No. 130608. Leave to appeal denied at 475 Mich 887. Court of Appeals No. 262187.

PEOPLE V NOEL, No. 130612. Leave to appeal denied at 475 Mich 872. Court of Appeals No. 266880.

PEOPLE V ALFRED, No. 130639. Leave to appeal denied at 475 Mich 887. Court of Appeals No. 262812.

PEOPLE V CARVIN, No. 130647. Leave to appeal denied at 475 Mich 887. Court of Appeals No. 258796.

PEOPLE v JACK HALL, No. 130679. Leave to appeal denied at 475 Mich 888. Court of Appeals No. 263457.

L D'AGOSTINI & SONS v DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, No. 130697. Leave to appeal denied at 475 Mich 888. Court of Appeals No. 263994.

GALINDO v MOLITOR, No. 130718. Summary disposition entered at 475 Mich 882. Court of Appeals No. 256489.

WEAVER, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

ROBINS v EPI PRINTERS, INC, No. 130762. Leave to appeal denied at 475 Mich 889. Court of Appeals No. 258270.

CLANTON v WAYNE CIRCUIT JUDGE, No. 130768. Leave to appeal denied at 475 Mich 873. Court of Appeals No. 266447.

Special Orders

SPECIAL ORDERS

In this section are 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.

Opinion Amended August 21, 2006:

46TH CIRCUIT TRIAL COURT V CRAWFORD COUNTY, No. 128788. On order of the Court, on the Court's own motion, the opinion of July 28, 2006, reported at 476 Mich 131, is amended as follows:

On page 27 of the slip opinion, the third sentence of the first full paragraph which currently reads:

"Where the total or line item appropriation is insufficient, the court must go back to the county board of commissioners to seek an additional appropriation."

is inconsistent with Administrative Order No. 1998-5. AO 1998-5 states that a trial court may not move funds between line items absent the prior approval of the funding unit in only two situations, in order to: (a) create new personnel positions or to supplement existing wage scales or benefits; or (b) reclassify an employee to a higher level of an existing category. For all other transfers between line items, AO 1998-5 merely requires courts to "notify the funding unit . . . of transfers between lines within 10 business days of the transfer." Thus, the common understanding of the AO has been that a court may transfer funds between line items, thereby exceeding the amount appropriated within one of the lines, absent prior approval of the funding unit—subject to the two exceptions above—as long as it gives notice within 10 days and does not exceed the total appropriation.

Accordingly, the third sentence of the first full paragraph on page 27 of the slip opinion is corrected to read as follows:

"Where the total or line item appropriation is insufficient, the court must follow the procedures set forth in AO 1998-5."

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ATTORNEY DISCIPLINE BOARD

1. The Attorney Discipline Board has no authority to declare a Michigan Rule of Professional Conduct unconstitutional. *Grievance Administrator v Fieger*, 476 Mich 231.

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1. Michigan Rules of Professional Conduct 3.5(c), which provides that a lawyer shall not engage in undignified or discourteous conduct toward a tribunal, and 6.5(a), which provides that a lawyer shall treat with courtesy and respect all persons involved in the legal process, are not restricted in their application to comments made in a courtroom or its immediate environs. *Grievance Administrator v Fieger*, 476 Mich 231.

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COURTS

1. The judiciary's "inherent power" to compel funding is an extraordinary power and is derived from the division of governmental powers set forth in the Michigan Constitution; in litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is "reasonable and necessary" to allow that court to function serviceably in carrying out its constitutional responsibilities; a court deciding an inherent powers claim must set forth both findings of fact specifically identifying those judicial functions that will be in jeopardy if the appropriation requested is denied and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131.
2. An appropriation is "necessary" when it affects the court's ability to function "serviceably" in carrying out its constitutional responsibilities. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131.

CRIMINAL LAW

3. Although the police have a duty to honor the defendant's right to present a defense, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20, they have no duty under the state or federal constitutions to assist a defendant in developing potentially exculpatory evidence. *People v Anstey*, 476 Mich 436.
4. The police have no duty under the state or federal constitutions, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20, to perform any chemical tests or to assist a defendant in obtaining an independent chemical test for intoxication; the police have no constitutional duty to take affirmative action to transport the defendant from the place of his or her incarceration to a hospital of the defendant's choice for an independent test requested by the defendant. *People v Anstey*, 476 Mich 436.

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1. The Constitution imposes a duty on a county to appropriate funds "reasonable and necessary" to enable a court to function serviceably in carrying out its constitutional responsibilities; because a county has a preexisting constitutional duty to fund the court, the county cannot be compelled under contract law to appropriate "reasonable and necessary" funds to enable the court to function serviceably in carrying out its constitutional responsibilities. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131.

TRIALS

2. Trial courts possess the inherent authority to sanction litigants and their counsel, including the authority to dismiss an action; courts have express authority to direct and control the proceedings before them (MCL 600.611; MCR 2.504[B][1]). *Maldonado v Ford Motor Co*, 476 Mich 372.
3. A trial court may direct a litigant and its counsel to refrain from publicizing information about another litigant that has been ruled inadmissible as impermissible other-acts evidence and as being more prejudicial than probative; such a restriction is narrowly tailored and necessary to protect potential jurors from the substantial likelihood of prejudice and to preserve the right to a fair trial by impartial jurors, and it does not violate the First Amendment. *Maldonado v Ford Motor Co*, 476 Mich 372.

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See, also, CONSTITUTIONAL LAW 3, 4

OPERATING MOTOR VEHICLE WHILE INTOXICATED

1. Dismissal of the charges against a defendant or suppression of the results of a police-administered chemical test of the defendant's body alcohol level is not proper when the defendant has been denied the statutory right to an independent chemical test as provided under MCL 257.625a(6)(d); a trial court that determines that the defendant was deprived of a reasonable opportunity for an independent chemical test under § 625a(6)(d) may instruct the jury that the defendant's statutory right

was violated and that the jury may decide what significance to attach to this fact. *People v Anstey*, 476 Mich 436.

WORDS AND PHRASES

2. For purposes of the offenses of felon in possession of a firearm and possession of a firearm during the commission of a felony, a weapon fits within the definition of a "firearm" if it is the type of weapon that was designed or intended to propel a dangerous projectile by an explosive, gas, or air; there is no operability requirement for the weapon; the design and construction of the weapon, rather than its state of operability, are the relevant factors in determining whether it is a firearm (MCL 750.222[d], 750.224f[1], 750.227b). *People v Peals*, 476 Mich 636.

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CODE OF JUDICIAL CONDUCT

1. In determining whether a judge's acceptance of a particular gift is permitted "ordinary social hospitality" for purposes of Canon 5(C)(4)(b) of the Code of Judicial Conduct, the judge's conduct must be viewed objectively; the relevant inquiry is how a reasonable observer would view the gift. *In re Haley*, 476 Mich 180.
2. Social hospitality for purposes of Canon 5(C)(4)(b) of the Code of Judicial Conduct, which permits judges to accept gifts of ordinary social hospitality, requires a social context; a judge's acceptance of a gift in open court in the course of executing judicial duties does not occur in a social context and is prohibited by Canon 5(C). *In re Haley*, 476 Mich 180.
3. The more general "appearance of impropriety" standard of Canon 2 does not govern an act of judicial conduct when a specific canon or court rule controls and explicitly either authorizes or prohibits that act; where there is no specific canon or court rule that pertains to a particular act, the "appearance of impropriety" standard of Canon 2 may be used to determine whether a judge engaged in an act of misconduct. *In re Haley*, 476 Mich 180.

LIMITATION OF ACTIONS

CLASS ACTIONS

1. A complaint asserting a class action tolls the period of limitations for a class member's claim that arises out of the same factual and legal nexus if the defendant has notice of the class member's claim and the number and generic identities of the potential plaintiffs (MCR 3.501[F]). *Cowles v Bank West*, 476 Mich 1.

INSURANCE

2. The minority/insanity tolling provision in MCL 600.5851(1) of the Revised Judicature Act does not operate to toll the rule in MCL 500.3145(1) of the

no-fault automobile insurance act that limits the recovery of personal protection insurance benefits in an action to losses incurred during the year preceding commencement of the action. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55.

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EXPERT WITNESSES

1. A "specialty" for purposes of the statute governing expert witnesses in medical malpractice actions is a particular branch of medicine or surgery in which one can potentially become board-certified; a "subspecialty" is a "specialty" within the meaning of the statute (MCL 600. 2169[1]). *Woodard v Custer*, 476 Mich 545.
2. If the defendant physician in a medical malpractice action is a specialist and the defendant physician was practicing that specialty at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must have specialized in the same specialty as the defendant physician at the time of the occurrence that is the basis for the action; if the defendant physician specializes in a subspecialty and was practicing that subspecialty at the time of the alleged malpractice, the plaintiff's expert must have specialized in the same subspecialty (MCL 600.2169[1]). *Woodard v Custer*, 476 Mich 545.
3. To be "board certified" means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications; a certificate of special qualifications is a board certificate (MCL 600.2169[1][a]). *Woodard v Custer*, 476 Mich 545.
4. If the defendant physician in a medical malpractice action is a specialist who is board-certified and the defendant

physician was practicing that specialty at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must be a specialist who is board-certified in the same specialty (MCL 600.2169[1][a]). *Woodard v Custer*, 476 Mich 545.

5. If the defendant physician in a medical malpractice action has a certificate of special qualifications in the specialty that the defendant physician was practicing at the time of the alleged malpractice, the plaintiff's expert witness on the standard of practice or care must have the same certificate of special qualifications (MCL 600.2169[1][a]). *Woodard v Custer*, 476 Mich 545.
6. If the defendant physician specializes in several specialties, the plaintiff's expert witness on the standard of practice or care must have specialized in the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice, i.e., the one most relevant specialty; irrelevant specialties do not have to match (MCL 600.2169[1][a]). *Woodard v Custer*, 476 Mich 545.
7. If the defendant physician in a medical malpractice action is board-certified in several specialties, the plaintiff's expert witness on the standard of practice or care must be board-certified in the specialty that the defendant physician was engaged in during the course of the alleged malpractice, i.e., the one most relevant specialty; irrelevant board certificates do not have to match (MCL 600.2169[1][a]). *Woodard v Custer*, 476 Mich 545.
8. If the defendant physician in a medical malpractice action is a specialist, the plaintiff's expert witness on the standard of practice or care must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty (MCL 600.2169[1][b]). *Woodard v Custer*, 476 Mich 545.
9. If the defendant physician in a medical malpractice action specializes in a subspecialty, the plaintiff's expert witness on the standard of practice or care must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching

the subspecialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant subspecialty (MCL 600.2169[1][b]). *Woodard v Custer*, 476 Mich 545.

10. Although an expert may be qualified to testify under MCL 600.2169(1), the trial court may still disqualify the expert after examining the expert in view of the other considerations listed in MCL 600.2169(2), MCL 600.2955, and MRE 702. *Woodard v Custer*, 476 Mich 545.

WORDS AND PHRASES—*See*

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WORKERS' COMPENSATION

DEATH DEPENDENCY BENEFITS

1. The phrase "the proximate cause" as used in MCL 418.375(2) refers to the sole proximate cause; in order for an employer to be liable for death benefits under the statute, the deceased employee's work-related injury must have been the one most immediate, efficient, and direct cause preceding the death. *Paige v City of Sterling Heights*, 476 Mich 495.
2. The determination under MCL 418.375(2) whether an employee who suffered a work-related injury that was the proximate cause of the employee's death left dependents that were wholly or partly dependent on the employee for support must be made pursuant to MCL 418.341 by looking at the circumstances at the time of the work-related injury, not at the time of death. *Paige v City of Sterling Heights*, 476 Mich 495.
3. The conclusive presumption of whole dependency for support upon a deceased employee applies to a child who was under the age of 16 at the time of the employee's death; where a child is over the age of 16 at the time of the employee's death, the issue whether the child was actually dependent, in whole or in part, at the time of the work-related injury that was the proximate cause of the death is a question of fact (MCL 418.331[b], 418.375[2]). *Paige v City of Sterling Heights*, 476 Mich 495.