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STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Murphy, P.J., and Sawyer and Beckering, J.J.

HONIGMAN MILLER, SCHWARTZ AND COHN LLP,

Petitioner-Appellee.

v

CITY OF DETROIT,

Respondent-Appellant.

Supreme Court No. 157522
Court of Appeals No. 336175
MTT Docket No. 16-000202

BRIEF *AMICUS CURIAE* OF THE CITY OF GRAND RAPIDS

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STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING AMICUS BRIEF

The Court of Appeals issued its published decision January 18, 2018. Respondent-Appellee City of Detroit timely filed a motion for reconsideration under MCR 7.215(I) on February 5, 2018, which the Court of Appeals denied on March 1, 2018. Respondent-Appellant then filed its application for leave to appeal in this Court of April 10, 2018, less than 42 days after the Court of Appeals denied its motion for reconsideration and thus timely under MCR 7.305(C)(2). The Court has jurisdiction under MCR 7.303(B).

Amicus curiae the City of Grand Rapids is a Home Rule City chartered under the laws of this State. MCL 117.1, *et seq.* The Charter of the City of Grand Rapids creates a Department of Law of which the City Attorney is the head. City of Grand Rapids Charter, Title II, Sec 1(a); Title VI, Sec 7(a). The City Attorney is the legal advisor to the City and is authorized to appoint assistants within the Department of Law. *Id.*, Title VI, Sec. 7(b), 7(g). Under MCR 7.312(H)(2), the City of Grand Rapids, as a political subdivision of the state is entitled to file an *amicus curiae* brief through its authorized legal officers—here the Department of Law—without a motion. Because this case is at the application stage, the City of Grand Rapids' brief is not subject to the time limit of MCR 7.312(H)(3), but rather must only be filed "as soon as possible" and prior to the Court's decision on the application. MSC IOP 7.305(A)(9).

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STATEMENT OF QUESTIONS INVOLVED

I. Whether the Legislature can intend for synonymous terms to have the same meaning when used in the same Act.

Court of Appeals says:	No
Tax Tribunal says:	Yes
Petitioner-Appellee Honigman says:	No
Respondent-Appellant City of Detroit says:	Yes
Amicus Curiae City of Grand Rapids says:	Yes

II. Whether a provider of professional services who is geographically separated from the beneficiary of those services at the time of performance "renders" the service at the location of performance.

Court of Appeals says:	No
Tax Tribunal says:	Yes
Petitioner-Appellee Honigman says:	No
Respondent-Appellant City of Detroit says:	Yes
Amicus Curiae City of Grand Rapids says:	Yes

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STATUTES INVOLVED

MCL 141.601

This ordinance shall be known and may be cited as the "uniform city income tax ordinance".

MCL 141.604

(1) "City" means the city adopting the ordinance.

(2) "Compensation" means salary, pay or emolument given as compensation or wages for work done or services rendered, in cash or in kind, and includes but is not limited to the following: salaries, wages, bonuses, commissions, fees, tips, incentive payments, severance pay, vacation pay and sick pay.

(3) "Corporation" means a corporation or a joint stock association organized under the laws of the United States, this state, or any other state, territory, or foreign country or dependency.

MCL 141.620

The business allocation percentage method shall be used if such taxpayer is not granted approval to use the separate accounting method of allocation. The entire net profits of such taxpayer earned as a result of work done, services rendered or other business activity conducted in the city shall be ascertained by determining the total "in-city" percentages of property, payroll and sales. "In-city" percentages of property, payrolls and sales, separately computed, shall be determined in accordance with sections 21 to 24.

MCL 141.621

First, the taxpayer shall ascertain the percentage which the average net book value, of the tangible personal property owned and the real property, including leasehold improvements, owned or used by it in the business and situated within the city during the taxable period, is of the average net book value of all of such property, including leasehold improvements, owned or used by the taxpayer in the business during the same period wherever situated. Real property shall include real property rented or leased by the taxpayer and the value of such property shall be deemed to be 8 times the annual gross rental thereon. "Gross rental of real property" means the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer for the use or possession of real property and includes but is not limited to:

(a) An amount payable for the use or possession of real property or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

(b) An amount payable as additional rent or in lieu of rent such as interest, taxes, insurance, repairs or other amount required to be paid by the terms of a lease or other arrangement.

MCL 141.622

Second, the taxpayer shall ascertain the percentage which the total compensation paid to employees for work done or for services performed within the city is of the total compensation paid to all the taxpayer's employees within and without the city during the period covered by the return. For allocation purposes, compensation shall be computed on the cash or accrual basis in accordance with the method used in computing the entire net income of the taxpayer.

If an employee performs services within and without the city, the following examples are not all inclusive but may serve as a guide for determining the amount to be treated as compensation for services performed within the city:

(a) In the case of an employee compensated on a time basis, the proportion of the total amount received by him which his working time within the city is of his total working time.

(b) In the case of an employee compensated directly on the volume of business secured by him, such as a salesman on a commission basis, the amount received by him for business attributable to his efforts in the city.

(c) In the case of an employee compensated on other results achieved, the proportion of the total compensation received which the value of his services within the city bears to the value of all his services.

MCL 141.623

Third, the taxpayer shall ascertain the percentage which the gross revenue of the taxpayer derived from sales made and services rendered in the city is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return.

(1) For the purposes of this section, "sales made in the city" means all sales where the goods, merchandise or property is received in the city by the purchaser, or a person or firm designated by him. In the case of delivery of goods in the city to a common or private carrier or by other means of transportation, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser.

The following examples are not all inclusive but may serve as a guide for determining sales made in the city:

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(a) Sales to a customer in the city with shipments to a destination within the city from a location in the city or an out-of-city location are considered sales made in the city.

(b) Sales to a customer in the city with shipments to a destination within the city directly from the taxpayer's in-city supplier or out-of-city supplier are considered sales made in the city.

(c) Sales to a customer in the city with shipments directly to the customer at his regularly maintained and established out-of-city location are considered out-of-city sales.

(d) Sales to an out-of-city customer with shipments or deliveries to the customer's location within the city are considered sales made in the city.

(e) Sales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales.

(2) In the case of public utilities, or businesses furnishing transportation services, "gross revenue" for the purposes of this section may be measured by such means as operating revenues, vehicle miles, revenue miles, passenger miles, ton miles, tonnage, or such other method as shall reasonably measure the proportion of gross revenue obtained in the city by such business.

(3) In case the business of the taxpayer involves substantial business activities other than sales of goods and services such other method or methods of allocation shall be employed as shall reasonably measure the proportion of gross revenue obtained in the city by such business.

MCL 141.665

An individual who is a resident of the city and received net profits from a business, profession or rental of real or tangible personal property, gains from the sale or exchange of real or tangible personal property, or salaries, wages, commissions or other compensation for work done or services performed or rendered, in each case outside the city, and is subject to and has paid an income tax on this income to another municipality, shall be allowed a credit against the city income tax for the amount paid to the other municipality. The credit shall not exceed the amount of taxes which would be assessed under this ordinance on the same amount of income of a nonresident.

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INTRODUCTION AND STATEMENT OF INTEREST

The City of Grand Rapids is concerned about the far reaching consequences of the Court of Appeals' erroneous construction of the business allocation percentage method of Uniform City Income Tax Ordinance ("the Act"). MCL 141.620 through MCL 141.624. The Court of Appeals' construction permits taxpayers in the twenty-two Michigan cities that impose an income tax to exclude from their in-city revenue any revenue generated by services that were performed in the city if the beneficiary of the services is located outside the city. This decision has the potential to deprive cities which have lawfully imposed an income tax from significant tax receipts on revenue that is generated by business activity within the city limits. At its core, the Court of Appeals' decisions allows large professional services businesses to reap the benefits of being located in some of the state's largest cities without paying their fair share of the tax burden for business activity that takes place within those cities.

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GROUNDS FOR GRANTING THE APPLICATION

A party seeking leave to appeal to this Court must "establish[] a ground for the application[.]" MCR 7.305(A)(1)(e). From among the grounds enumerated in MCR 7.305(B), this case presents the following bases for granting the application: (1) the issue has significant public interest and the case is against one the state's political subdivisions; and (2) the issue involves a legal principle of major significance to the state's jurisprudence.

The issues presented in this case are of significant public interest. The Court of Appeals presents as a hypothetical situation a lawyer located at an office in Detroit giving legal advice over the phone to a client sitting in Ann Arbor. Under the court's mistaken interpretation of the word "render" the lawyer is "rendering" her legal advice *in the City of Ann Arbor* and not the City of Detroit solely because of the client's physical location. This construction of the statute requires a lawyer—or any provider of professional services—to be aware of his clients' locations *at all times* because his tax liability is dependent on his clients' location when he performs services for them.

The issue is of equal public interest with respect to the accurate collection of taxes. The court's decision will make it nearly impossible for a city to audit accurately a business concern's tax return if it attributes revenue to services rendered outside the city on the basis of where its clients were located at the time they received the benefit of the services, and not the location of the person or persons who actually performed the services. Must a city income tax department seeking to verify the information in a tax return be required to track down all a firm's clients and interview them about their location on the days the taxpayer claims to have rendered services to them? Did the Legislature really intend for local taxing units to apply such a heavy hand in digging into the location of a business's clients?

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These major tax implications create a significant public interest in this Court's review and reversal of the Court of Appeals' unworkable rule.

The issues in this case are also of major significance to the state's jurisprudence. The opinion below dealt with a matter of first impression—whether the terms "services performed in" under the payroll factor MCL 141.622 have a different meaning than the term "services rendered" under the revenue factor of MCL 141.623. Because the statute is unambiguous, the court was required to give all the words their plain meaning. The court reasoned that because the Legislature chose to use different words in different sections—"services performed" and "services rendered"—it *must have* intended different meanings for those words.

This conclusion is at odds with the principles of statutory construction set forth in this Court's precedents, which stand for the proposition that when faced with similar terms in the same act, a court must engage in an analysis of the entire act, look at the context in which the terms are used throughout the act, look to the commonly accepted meanings of the terms, and make a reasoned determination if the Legislature intended the terms to have the same meaning. Because the Court of Appeals did not engage in this type of analysis, this Court's review is necessary to interpret correctly—for the first time—these provisions of the Act.

Moreover, the Court of Appeals' construction of the terms "services rendered" and "services performed" conflicts with the way in which those terms have been interpreted in prior decisions of this Court and the way in which the Legislature has used those terms in other acts. The Court of Appeals' decision, therefore, creates ambiguity in the application of

the Act and other Michigan laws where it did not previously exist and the Court's review is required to correct it.

One of the most important areas of ambiguity the decision creates is in Michigan courts' exercise of personal jurisdiction over out-of-state professional services providers. In the majority of jurisdictions, service rendered by an out-of-state professional to a resident of a state, by itself, is an insufficient contact to create personal jurisdiction over the professional, because services are directed toward a person in need and not a place. Therefore courts have concluded that tortious rendition of service is not a "portable tort." The Court of Appeals' decision turns this proposition on its head, concluding that service is rendered where the benefit is felt, namely the location of the client. This Court's review is necessary to ensure that Michigan courts do not exercise personal jurisdiction over out-of-state professional service providers in violation of the Due Process Clause.

STATEMENT OF FACTS

The City of Grand Rapids accepts Respondent-Appellant City of Detroit's statement of facts.

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ARGUMENT

I. The Court of Appeals' decision ignored this Court's precedents with respect to the interpretation of synonymous terms in a statute.

The principle purpose of statutory construction is to give effect to the intent of the Legislature. *Coldwater v Consumers Energy Co*, 500 Mich 158; 895 NW2d 154, 158 (2017); *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017); *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). When the language of the statute is unambiguous, the Court may not construe the statute to mean anything other than the plain meaning of the words the Legislature used. *Coldwater*, 895 NW2d at 158. For non-technical terms, words must be interpreted according to "the common and approved usage of the language." *McCormick*, 487 Mich at 191. A court may consult a dictionary to determine the meaning of words not specifically defined in the statute. *Id*.

In determining the meaning of unambiguous, but contested words, the words must be interpreted consistent with the context of their "placement and purpose in the statutory scheme," *id*., and the words must be "interpreted in accordance with the experience and understanding of those who would be expected to use and interpret the act." *Prod Credit Ass'ns of Lansing v Dept of Treasury*, 404 Mich 301, 312; 273 NW2d 10 (1978). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). In so doing, "the entire act must be read, and the interpretation to be given to a particular word in one section, arrived at after due

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consideration of every other section, so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922); *see also People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014).

A. On an issue of first impression, the Court of Appeals assumed that the Legislature intended "services rendered" and "services performed" to have different meanings without engaging in the reasoned analysis of the entire statute required by this Court's precedents.

In its published opinion below, the Court of Appeals abandoned many of these principles to conclude that simply because the Legislature chose to use two different words in the same statute, it therefore *must have been* the Legislature's intent to give those words different meanings. The court cited this Court's opinion in *United States Fidelity & Guarantee Company v Michigan Catastrophic Claims Association*, 484 Mich 1; 795 NW2d 101 (2009), in support of this proposition. However, the Court of Appeals failed to engage in the reasoned analysis employed by this Court in *United States Fidelity*—and employed by the cases applying its holding[1]—to determine whether "services rendered" and "services performed" should be given separate meanings. Nor did the Court of Appeals look to the whole of the Act to determine how the Legislature intended "services rendered" and "services performed" to be understood, resulting in an *inharmonious* enactment.

Rather, the Court of Appeals woodenly applied a construction to the statute that, if upheld, would compel lower courts and subsequent panels of the Court of Appeals to conclude that any use of a synonym by the Legislature evinces an intent to give the synonyms separate and distinct meanings. Not only does such a rule hobble the Legislature's ability to

[1] *Denton v Dept Of Treasury*, 317 Mich App 303, 312; 894 NW2d 694 (2016); *People v Carruthers*, 301 Mich App 590, 605; 837 NW2d 16 (2013); *People v Light*, 290 Mich App 717, 722-723; 803 NW2d 720 (2010).

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draft clear and understandable legislation in plain English, it conflicts with previous holdings of this Court that the Legislature can use synonyms to convey the same meaning within the same enactment without rendering the words surplusage or nugatory.

This is not to say that the words the Legislature choses are not of primary importance when a court is called on to interpret a statute. To the contrary, under this Court's jurisprudence, it is imperative that a court review the entirety of a legislative act to determine whether synonymous terms are meant to convey the same or dissimilar meanings. Rather, this case is a good vehicle for this Court to explicitly hold that the Legislature can use synonyms for style and clarity without intending to ascribe different meanings to those words. This Court's review is necessary to clarify this important issue of state jurisprudence.

B. The Legislature can intend for synonyms to have the same meaning without rendering the words surplusage or nugatory

Precedent demonstrates that the Legislature can intend to use synonyms in a statute to have the same meaning. In *People v Greene*, 255 Mich App 426; 661 NW2d 616 (2003), the Court of Appeals interpreted a statute criminalizing "impeding, inferring with, preventing, or obstructing" a witness's ability to testify. *Id*. at 439. The court first noted that the words at issue were synonyms in everyday speech, and that their relevant dictionary were very similar. *Id*. at 439-440. The court reasoned that the differences in the definitions were the degree to which a person tampered with a witness's ability to testify. *Id*. at 440. The court concluded, therefore, not that the Legislature intended the words to have different meanings, but that it intended to criminalize witness tampering, no matter the degree, and used synonyms to cover the spectrum of behavior. *Id*.

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In *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), this Court interpreted a statute that made it a crime to "keep or maintain" a vehicle used for storing or selling drugs. At issue was whether the Legislature intended the words "keep" and "maintain" to have the same meaning. The majority looked to the dictionary definitions of these common words, and determined that they were synonyms. *Id*. at 153. The dissent argued that the disjunctive "or" was dispositive evidence of the Legislature's intent to give the words separate meanings. *Id*. 161-162 (Corrigan, J., dissenting). The majority, however, held that "the fact that these two terms are separated by the word 'or' does not give us authority to give these two terms distinct meanings when they are commonly understood to have the same meaning." *Id*. at 154. This Court reasoned, therefore, that because both "keep" and "maintain" connote a continuity of possession and dominion, the Legislature intended the words to have the same meaning. *Id*.

In contrast, this Court held that "insurance coverages" and "insurance benefits" have *different* meanings, even though the terms are very similar. *United States Fidelity*, 484 Mich at 14. In reaching its conclusion, this Court reasoned, "When the Legislature uses different words, the words are *generally intended* to connote different meanings. Simply put, 'the use of different terms within similar statutes *generally implies* that different meanings were intended.'" *Id*., quoting 2A Singer & Singer, Sutherland Statutory Construction, (7th ed), § 46:6, p 252 (emphasis added). Looking to the language the Legislature employed in the statute, this Court noted that the word "benefits" was specifically and narrowly defined, while the word "coverages" was not. *Id*. at 14-15. Conversely, the dictionary definition of "coverages" was very broad, and modifiers the Legislature had used in the context of regulating "coverages" evinced an intent to define "coverages" very broadly. *Id*. at 15-16. On this basis,

this Court held that the Legislature intended the terms to have different meanings. *Id*. at 17-18. This Court did not, however, hold that the Legislature can never use synonyms to connote the same meaning.

In this case—a published case on an issue of first impression—the Court of Appeals did not engage in the reasoned analysis demonstrated in these cases required to determine if the Legislature intended the terms "services performed" and "services rendered" to have the same meaning. Rather, in one sentience, the court summarily held, "because § 22 looks to where the work is done or performed, then the Legislature *likely intended* that the term 'services rendered' in § 23 to have a different meaning." *Honigman Miller Schwartz & Cohn LLP v Detroit*, 322 Mich App 667, ___ NW2d ___, slip op, at *2 (2018) (emphasis added).[2] The court went on to construct different meanings for those terms.

The Court failed to analyze the whole of the statute to reach an interpretation resulting in a harmonious and consistent enactment as a whole. Indeed, variations of the terms "services rendered" appear nine times and variations of the terms "services performed" appear ten times in the Act. The Court of Appeals failed, however, to consider whether its construction of the term "services rendered" could be applied consistently throughout the Act.

The Court of Appeals interpreted this Court's opinion in *United States Fidelity* to conclude that the Legislature's use of synonyms created a presumption that different meanings were intended. This Court's review is necessary to clarify its holding in *United States Fidelity* and to instruct lower courts that determining whether the Legislature intended synonyms to have different meanings requires reasoned analysis of the terms at issue, their commonly accepted meanings, and their use within the statute.

[2] The court further justified its differentiation of the terms by analysis of the Legislature's examples of where a "sale" is made.

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C. Prior judicial interpretations of "services rendered" and "services performed" and the use of those terms in the entirety of the Uniform City Income Tax Ordinance demonstrate an intent for the terms to be interpreted as synonymous.

"Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *McCormick*, 487 Mich at 192, quoting *People v Powell,* 280 Mich 699, 703; 274 NW 372 (1937). The Act was enacted in 1964. Long before that, courts of this state, including this Court, had used the terms "services performed" and "services rendered" interchangeably to refer to the service one party provides to another, whether in the context of a familial relationship, professional services, or services under contract.[3] The Legislature was therefore presumed to know not only that "services rendered" and "services performed" have similar meanings, but that courts consider the terms to have *the same meaning*. This presumption is borne out in the Legislature's interchangeable use of the terms in a variety of other statutes. *See* MCL 38.1364(5), 339.1217, 500.618, 500.2239, 500.3475, 550.1401a, 550.1416d(2)(b).

The Legislature used the terms synonymously throughout the Act itself, most prominently in MCL 141.665, "An individual who is a resident of the city and received … compensation for … services performed or rendered …" Like the criminal statute at issue in *Thompson*, the disjunctive "or" does not mean the Legislature intended these terms to have distinct meanings. The most relevant dictionary definitions of "perform" and "render" are, respectively, "carry out; do," and, "to do (a service) for another." *Merriam-Webster's Collegiate Dictionary* (10th ed). The dictionary's inclusion of the qualifier "(a service)" in this definition

[3] *Matter of Weaver's Estate*, 119 Mich App 796, 799; 327 NW2d 366 (1982); *Riverview v Trenton*, 359 Mich 98, 107; 101 NW2d 352 (1960); *DeCaire v Bishop's Estate*, 330 Mich 378, 384; 47 NW2d 601 (1951); *McGaughan v W Bloomfield Twp*, 268 Mich 553, 556; 256 NW 545 (1934); *Bunde v Bunde's Estate*, 214 Mich 469, 470, 472-473; 183 NW 16 (1921); *Snyder v Neal*, 129 Mich 692, 693-694; 89 NW 588 (1902); *Plummer v Twp of Edwards*, 87 Mich 621, 621-622; 49 NW 876 (1891); *Withey v Osceola Circuit Judge*, 108 Mich 168, 168-169; 65 NW 668 (1895).

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of "render" makes it a far more reliable indicator of the Legislature's intent than the definition on which the Court of Appeals relied. Like the definitions of "keep" and "maintain"—both of which included an element of continuity in possession or dominion—the definitions of "perform" and "render" both contain an element of *doing*. Combined with the term services in their respective past tenses, "services performed" and "services rendered" both connote doing a task on behalf of another.

The intent for this meaning to be read into both terms is most apparent in MCL 141.665, but is also evidenced throughout the Act. For instance, the Act defines "compensation" as "salary, pay or emolument given as compensation or wages for work done or services *rendered*." MCL 141.604. In one of the provisions at issue in this case, the Act states, in the pertinent part

> the taxpayer shall ascertain the … *compensation* paid to employees *for work done or for services performed* within the city …[MCL 141.622 (emphasis added).]

Inserting the Legislature's definition of "compensation" into § 22, it reads

> the taxpayer shall ascertain the … salary, pay or emolument given as compensation or wages *for work done or services rendered* paid to employees *for work done or for services performed* within the city …

The parallelism provided by using the Legislature's own definition of compensation makes clear the Legislature's intent for "services rendered" and "services performed" to have the same meaning.

This Court's review is required because the decision of the Court of Appeals not only subverts the intent of the Legislature to use "rendered" and "performed" as synonyms, it does so by ignoring prior decisions of this Court that have established that in the context of describing the "doing" of services, "rendered" and "performed" are interchangeable terms.

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II. The Court of Appeals' decision leaves unclear where services are rendered for the purposes of income tax apportionment and exercise of personal jurisdiction over out-of-state professional service providers.

The Court of Appeals held that to determine where services are rendered "the relevant consideration … is where the service is delivered to the client, not where the attorney performs the service." *Honigman*, slip op, at *4. "Thus, for purposes of § 23, where a service is provided to a client outside the city of Detroit it is to be considered an 'out-of-city' service while services provided to a client in the city of Detroit is to be considered an 'in-city' service." *Id.*

Relying on the examples of where sales are made in MCL 141.623, the court gave its own examples of where a lawyer renders service under its holding. Reasoning that "a lawyer's time and advice can result in a tangible item" the court stated a lawyer's time could "result in the drafting of a will, a complaint, a contract, a brief, etc." which could be "delivered to the client in a difference location than where the lawyer performs the drafting." *Id.* The court also explained that during a phone conversation between a lawyer in Detroit and a client in Ann Arbor, the lawyer's advice would be "rendered" in Ann Arbor. *Id.*

The court's holding and examples introduce significant ambiguities to the Act that require this Court's review and reversal. Say a Detroit law firm's client has offices in Detroit and in Ann Arbor. The firm is engaged to draft a contract, and a lawyer in the Detroit office spends 10 hours doing so, understanding that he the firm will deliver the contract to the client by courier at its Detroit office. If things go according to this plan, under the court's holding, the service would be "rendered" in Detroit.

But say that after the contract is drafted, the client states it would prefer the contract be delivered to its Ann Arbor office. Does this sudden change mean the service has been retroactively deemed to be "rendered" in Ann Arbor? What if preparation of the contract involved multiple phone conversations with the client's office in Detroit? How much of that time would be attributable to Detroit? Does the firm need to know the location of each of its clients at all times? The Court of Appeals' decision fails to give guidance that would adequately resolve this questions.

The answer, however, is found both in authority from the Michigan Court of Appeals and from courts across the country. In the majority of jurisdictions, for both taxation and professional liability purposes, services are rendered at the location of the professional who renders the service, not at the location of the beneficiary of the services. This Court should grant review to explicitly adopt this as the rule of this State.

A. Courts outside of Michigan have uniformly held that professional services performed outside a taxing jurisdiction are rendered at the place of performance rather than at the location of the beneficiary of the services.

At all levels of government, taxing authorities offer their residents an exclusion of income earned or revenue generated outside the authority's jurisdiction. The issue that can arise in these cases is determining whether certain income or revenue was generated within or without the taxing jurisdiction. With respect to personal, professional services, the question narrows further to where the services were rendered when the professional is located within the taxing jurisdiction and the beneficiary of the services is located outside the taxing jurisdiction (or vice versa). A majority of state and federal courts to consider this question

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have determined that personal, professional services are rendered at the place of performance, and not at the location of the beneficiary. This Court should grant the application to adopt this rule for Michigan.

In *Dillin v Commisioner of Internal Revenue*, 56 TC 228 (1971), the United States Tax Court was called to determine whether a professional had received "[c]ompensation for labor or personal services performed in the United States" when doing work ancillary to the task he was hired to do while he was physically outside the United States. The court stated its task was to decide whether the plaintiff "*performed* the services for which he was compensated in the United States or in Argentina." *Id*. at 243-244. In so-doing, the court held, "The source of income is determined by the situs of the services *rendered*, not by the location of the payor, the residence of the taxpayer, the place of contracting, or the place of payment." *Id*. The court's holding illustrates that for the purposes of allocating income for taxation, the United States considers services to be *rendered* at the place in which the services are *performed*, irrespective of the location of the beneficiary of the services.

Several state courts have addressed this issue, coming to the same conclusion. In *Schmidt v Indiana Department of State Revenue*, 81 NE3d 701 (Ind TC, 2017),[4] the Indiana Tax Court was called to interpret the provision of state law defining "adjusted gross income derived from sources within Indiana" as *inter alia*, "compensation for labor or services rendered within this state." *Id*. at 706. The plaintiff had sold his business and retired, but was retained by the new owner to help manage the transition. *Id*. The plaintiff moved to Florida, but provided mentorship and advice over the phone to executives located in Indiana. *Id*. at 706-707. The court interpreted the statutory phrase at issue to mean that the services must

[4] The Indiana Tax Court is a specialty appellate court of the State of Indiana. Appeals from the Indiana Tax Court are by right to the state supreme court. Ind Code Ann 33-26-6-7.

actually be performed by the taxpayer in the state of Indiana for the services to be "rendered" within the state. *Id*. at 711-712. The court concluded that the plaintiff

> rendered services for [the Indiana company] from outside the state *by telephone* and *did not perform any personal services while physically located* in Indiana. Accordingly, the Department's reasoning that [the plaintiff] received Indiana source income because he performed services for an Indiana company is incorrect because he was not physically present in Indiana as required by the plain meaning of the imposition statute. [*Id*. at 712 (emphasis added).]

Two cases from the state of New York illustrate the same point. In *Churchill v Gallman*, 326 NYS2d 917; 38 AD2d 631 (1971), the plaintiff sought to exclude from his in-state income commissions received for services in the state of New York for a client whose offices were located out-of-state because, the plaintiff argued, the compensation was attributable to business transacted without the state. *Id*. at 918. The court disagreed, reasoning, "[a]lthough petitioner's main client was an out-of-State company, the *services rendered* relative to advertising campaigns and continuous service in the nature of advice and proposals were *performed* in the New York City office." *Id*., emphasis added.

Likewise in *Gleason v New York State Tax Commission*, 429 NYS2d 314; 76 AD2d 1035 (1980), the plaintiff was an accountant who conducted his business in an office in New Jersey. He disputed taxation in New York for accounting services he provided to two taverns located in Manhattan. *Id*. at 315. The court agreed, concluding, "all the services performed were *performed* in New Jersey, the law is clear that compensation for personal services *rendered* by a nonresident individual wholly without this State is not included in New York State income." *Id.*

In *Lockwood Greene Engineers, Inc v South Carolina Tax Commission*, 293 SC 447; 361 SE2d 346 (1987), the South Carolina Supreme Court considered whether the revenue paid for the

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professional services of engineers working in South Carolina for an out-of-state client was income attributable to South Carolina or to the other state. *Id*. at 449. The court reasoned that a "client pays an engineering firm for the expertise and time of its employees. Therefore, an engineering firm's business carried on in a state is reasonably measured by the *services rendered* by its personnel in the state." *Id*. The court went on to hold that the proper measure of business activity in the state for professional services was for the services actually performed by the engineers in the state of South Carolina, irrespective of the client's location. *Id*.

Counsel for *amicus curiae* the City of Grand Rapids was unable to find a case from any jurisdiction reaching a contrary conclusion. This Court, however, has never been called upon to address squarely this question. Although there are factual questions as to Honigman's actual billing and accounting practices when it comes to its out-of-city clients, this case is a good vehicle for the Court to resolve the question because it is purely one of law.

As the opinions of United States Tax Court, and the courts of Indiana, New York, and South Carolina, not only are the terms "services rendered" and "services performed" commonly used as interchangeable synonyms, the most sensible interpretation of where services are rendered is the location of the professional providing the services, not the location of the beneficiary of those services. This Court should grant review and explicitly adopt this rule for Michigan.

B. Courts outside of Michigan have routinely declined to exercise personal jurisdiction over professional service providers whose only contact with the forum state is rendering service to a resident of the forum state.

Courts have also considered where professional services are "rendered" for the purpose of determining whether an out-of-state service provider is amenable to the court's exercise

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of personal jurisdiction over him or her. The leading case in this area is *Gelineau v New York University Hospital*, 375 F Supp 661 (DNJ, 1974). In that case the court held, "[w]hen one seeks out services which are personal in nature, such as those rendered by attorneys … he must realize that the services are not directed to impact on any particular place, but are directed to the needy person himself." *Id.* at 667. Further, "the residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location." *Id*.

In a pre-1991 case, the Michigan Court of Appeals explicitly adopted this holding, concluding that Michigan courts could not exercise personal jurisdiction over an Indiana doctor who rendered treatment to a Michigan resident in Indiana, even though the doctor sent documents related to treatment and medical advice to the patient's doctor and in Michigan. *Woodward v Keenan*, 79 Mich App 543, 544-548; 261 NW2d 80 (1977). The Ninth Circuit Court of Appeals follows a similar rule, holding that tortious rendition of personal service is not a portable tort, because the service is directed to the beneficiary and not the beneficiary's location. *Wright v Yackley*, 459 F2d 287, 289-291 (CA 9, 1972).[5]

The Supreme Court of Indiana reached a similar conclusion on the basis of the principle that legal services are rendered at the attorney's location and not the client's. In *Boyer v Smith*, 42 NE3d 505 (Ind, 2015), a Kentucky attorney represented a client whose residence was in Indiana in Kentucky federal court. *Id*. at 511-512. The representation required the attorney to travel to Indiana only to attend a deposition. *Id*. The court concluded, "Her 'suit-related conduct' of representing [the client] in federal court in Kentucky created no contact

[5] *Gelineau* has been followed in other jurisdictions. *See Tarango v Pastrana,* 94 NM 727, 729-730; 616 P2d 440 (1980); *Glover v Wagner*, 462 F Supp 308, 310-312 (D Neb, 1978); *McAndrew v Burnett*, 374 F Supp 460, 463 (MD Pa, 1974).

or connection within Indiana other than the fact *that a plaintiff resided here*." *Id*. at 512 (emphasis added). The court concluded that such contact was insufficient to give it personal jurisdiction over the Kentucky attorney. *Id*. Implicit in the court's reasoning is that although the attorney was rendering legal services—including attending a deposition—for a client in the state of Indiana, the legal services were rendered at the location of the attorney.

As in the out-of-state cases determining that professional services are rendered at the place of performance for purposes of determining where revenue is generated, these cases show that for purposes of determining whether a professional has sufficient minimum contacts with a state to justify exercise of personal jurisdiction the location where the services *are performed* is determinative, not the location of the beneficiary of those services.

The Court of Appeals' holding in the present case conflicts with this well-reasoned rule, which was the holding of its own, pre-1991 case. Although at first blush, the lower court's holding in this case has limited application to city income taxes, its impact has the potential to have far-reaching consequences, including the exercise of personal jurisdiction over out-of-state professionals whose only contact with Michigan is the fact that their clients are domiciled here. This Court's review is necessary to ensure that Michigan courts do not exercise jurisdiction in such cases, violating traditional notions of fair play and substantial justice in contravention of the Due Process Clause.

CONCLUSION

A multi-office law firm employing 352 attorneys, 175 of whom work from the firm's Detroit office,[6] should not be able to avoid roughly $1 million in tax liability because some

[6] Honigman, *Professionals*, <https://www.honigman.com/attorneys.html> (accessed July 3, 2018).

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of its clients happen to have mailing addresses outside of the City of Detroit. But that is exactly the outcome mandated by the Court of Appeal's holding in this case, a holding based on a flawed application of the principles of statutory interpretation promulgated in this Court's precedents. This flawed application will not only result in a loss of revenue for Detroit, but also for the twenty-one other Michigan cities that collect an income tax. And, as explained above, the Court of Appeal's flawed construction of the term "services rendered" will also have implications beyond the realm of taxation.

For these reasons, *amicus curiae* the City of Grand Rapids respectfully requests that the Court grant leave, reverse the Court of Appeals, and reinstate the consent judgment entered in the Tax Tribunal. Alternatively, the City of Grand Rapids asks that the Court peremptorily reverse.

Respectfully submitted,

CITY OF GRAND RAPIDS, *a Michigan municipal corporation*

Dated: July 11, 2018

By: */s/ Elliot J. Gruszka*

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