STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURPHY, P.J., SAWYER AND BECKERING, J.J.

HONIGMAN, MILLER, SCHWARTZ AND COHN LLP,

Petitioner-Appellee,

Supreme Court No. 157522
Court of Appeals No.336175
MTT Document No. 16-000266

v.

CITY OF DETROIT,

Respondent-Appellant

BRIEF ON APPEAL BY CITY OF DETROIT, APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The court of appeals issued its published opinion on January 18, 2018. App 2a The City timely filed a motion for reconsideration on February 6, 2018, which was denied on March 1, 2018. App. 7a. The City timely filed its application for leave to appeal to this Court, and this Court thereafter issued its November 21, 2018 Order granting the City's application. App.1a.

STATEMENT OF QUESTION INVOLVED

The Honigman firm (Taxpayer) operates offices inside and outside the City of Detroit. The three factor formula used to apportion Taxpayer's income for purposes of the City income tax includes a revenue factor, the numerator of which is revenue derived from "services rendered in the city." The question here is this: When Taxpayer's legal professionals' bill clients for legal work performed in Taxpayer's Detroit office or another Detroit location such as Wayne County Circuit Court, is the resulting revenue derived from "services rendered in the city?"

The tax tribunal answered: Yes

Respondent-appellant City of Detroit answers: Yes

Petitioner-appellee Honigman, Miller, Schwartz and Cohn LLP answers: No, unless the client for whom the services are performed is physically located within the City.

The court of appeals answered: "No," and that "the relevant consideration is where the client receives the services."

STATEMENT OF THE CASE

The Honigman Firm (Taxpayer or Firm) operates offices inside and outside the City of Detroit. The Taxpayer is allowed to apportion its income for City of Detroit income tax purposes. MCL 141.620 et seq. App. 89a. The statutes employ a three-factor apportionment formula. The factors reflect the percentages that Taxpayer's Detroit payroll, property and revenue bear to Taxpayer's total payroll, property and revenue everywhere. The factors are added and divided by three to produce the final apportionment percentage. The Taxpayer's total net income is multiplied by that percentage to determine the income subject to Detroit tax.

The only dispute in this case is the calculation of the numerator of the revenue factor. The numerator is defined as: **"the gross revenue of the taxpayer derived from sales made and <u>services rendered in the city</u> * * *."** MCL 141.623, emphasis added. The denominator is the taxpayer's "total gross revenue from sales and services wherever made or rendered * * *." Id. During the years at issue, despite the fact that some 60% of its lawyers worked out of its Detroit office, Taxpayer calculated its revenue factor at roughly 9% - 11% - versus the City's calculation of roughly 50%. The total tax for the years in dispute is roughly $1 million.

The question is this: When one of Taxpayer's lawyers spends time in Taxpayer's Detroit office or another Detroit location such as Wayne County Circuit Court, conducting research, preparing a brief or purchase agreement, arguing a

motion, etc., and then bills the client for the time spent in Detroit rendering those service, is that revenue derived from "services rendered in the city?" The plain language of the statute confirms that the answer is "yes," and there is no need to resort to dictionaries or any other interpretative aids. Of course, to the extent one of Taxpayer's Detroit based (or other) lawyers renders services at one of Taxpayer's suburban offices, or any location outside the City, those would not be in-city services. The Taxpayer carefully tracked the precise location where its professionals rendered services.

The lower court, relying on a section of the statute dealing with sales of tangible goods, engrafted a physical delivery requirement for intangible legal services. The court held that "the relevant consideration is where the client **receives** the services." App.6a, emphasis added. The lower court rewrote the statute – from "services rendered in the city" to "services physically delivered within the city."

"Professionals provide services, not goods. The client pays for the professional's skill and expertise, not a physical product."[1] Where the lawyer's skill and expertise is applied in Detroit, in drafting a document, etc. those are services rendered in Detroit.

[1] MI Eth. Op. R-019 (August 4, 2000), app. 10a, holding that after termination of a lawyer-client relationship, the client generally has access to materials in the lawyer's file but may be required to pay the lawyer's costs of reviewing and copying the file materials.

Taxpayer's procedures make no attempt to determine where its clients "physically receive" legal services. Rather, Taxpayer computed an 11% revenue factor by including only certain revenue paid by clients who were physically located within the city (as defined by Taxpayer). Services rendered by a Firm attorney in Wayne County Circuit Court (Detroit), for a suburban client, would not be considered by Taxpayer as services rendered in the city.

The lower court ignored the most fundamental rules of statutory construction. "A statute's * * * words and phrases must be applied and interpreted according to their plain and ordinary meanings." *Pohutski v. City of Allen Park*, 465 Mich 675, 683 (2002). The controlling phrase here – services rendered in the city – is unambiguous, but the lower court did not even pause to consider its plain meaning. Instead, the court immediately resorted to use of interpretative aids which were neither relevant nor necessary. And those aids, when properly applied, fully support the City's position.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. The Taxpayer

The Taxpayer is a law firm organized as a limited liability partnership. Its headquarters is located at 2290 First National Building, Detroit, Michigan 48226. During the tax years at issue, it also maintained offices in Ann Arbor, Kalamazoo, Lansing, and in Oakland County.

The Taxpayer provided legal services through legal professionals who were either employees or partners (owners) of the limited partnership. During each of the years in question the Taxpayer employed more than 230 legal professionals, more than 50% of whom were located in Detroit.

B. The Taxpayer's computation of the revenue factor.

The Taxpayer's procedures were set forth in affidavits executed by two Taxpayer partners and filed with the Tax Tribunal. App. 12a, Weigel affidavit; app. 25a, Indenbaum affidavit.

The Taxpayer required each timekeeper to identify, for each time entry, the physical location at which the service was rendered. Weigel aff. App 13a, ¶9, (time reports include "a physical location code of the timekeeper * * *."). Tab A to Weigel's affidavit (app 18a) is an example of a memo issued by the Taxpayer annually to all timekeepers. The memo instructs all timekeepers "When entering your time, please be sure you use accurate location codes * * *. The location code

is important not only in determining the amount of your state and local taxes, but also the amount of [city] tax the Taxpayer pays on behalf of the partnership."

The memo identifies the location codes as follows: AA (Ann Arbor), DET (Detroit), LANS (Lansing), OCTY (Oakland County), KZOO (Kalamazoo), MI (Other: Michigan), and NMI (Other: Non-Michigan). So, for example, if an attorney based in Lansing appeared in Wayne County Circuit Court, that entry would show DET (Detroit) as the location. Those physical location codes identify where the services were rendered. But those codes do **not** determine whether the Taxpayer treats the revenue as in-city or out-of-city.

The affidavits explain that at the outset of an engagement, the Taxpayer creates a billing address for the client. The Taxpayer uses that address to establish a code identifying the client as located inside or outside of Detroit. Invoices are mailed to that address. If the "client location" is coded as outside Detroit, **all** revenue generated from that client is treated as out-of-city revenue. Indenbaum aff., app 26a,¶¶ 8, 12, 17 ("Revenue was considered in-city revenue where such revenue was received from a client located within the city limits."); Weigel aff., app 15a, ¶18 (same). The Taxpayer's lower court brief, citing those affidavits, stated "The Taxpayer calculated its in-city revenue by summing the gross revenue collected from clients located within the city." Taxpa**y**er's court of appeals' brief, February 10, 2017, p. 6.

Assume a Taxpayer lawyer prepared a brief while working in the Detroit office, or attended a motion hearing, for a case in Wayne County Circuit Court. The lawyer's time records will include the code "DET," meaning the services were rendered in Detroit. But if the client was coded as "out-of-city," none of the resulting revenue would be considered in-city revenue.[2]

C. The examination.

The City had never examined the Taxpayer's returns prior to this case, nor did the City ever approve the Taxpayer's reporting methodology. The City elected to examine the Taxpayer after reviewing the Taxpayer's returns showing a 9% - 11% revenue factor over five years. The City requested, and the Taxpayer provided,

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[2] The Taxpayer's affidavits do not explain how a client is determined to be in-city or out-of-city. The Taxpayer, citing attorney client privilege, declined to identify specific clients or their applicable street address that determined whether they were in or out-city. Weigel aff., app. 15a , ¶22. Many businesses have locations within and without Detroit – but the affidavits do not explain how the controlling location was determined.

Moreover, it appears that the Taxpayer requires both of the following before revenue is considered in-City. First, the service must be rendered by an attorney while physically located in the City. Second, the client for whom the service is rendered must also be physically located in the City. The Taxpayer's affidavits are not clear on this point, but there would be no purpose in carefully tracking the physical location of the attorney performing the service, if the sole determining factor was whether the client was coded as in-City or out-City.

The City did not pursue discovery on these points, believing the phrase "services rendered in the city" is unambiguous.

schedules showing gross revenue collections based on the location where the services were rendered. Only the revenue factor was adjusted. The chart below shows (i) the property and payroll factors (upon which the parties' agreed) and (ii) the revenue factor as calculated by Taxpayer and by the City (all are %s).

	2010	**2011**	**2012**	**2013**	**2014**
Property Factor:	56.5	59.7	61.5	58.8	56.3
Payroll Factor:	71.6	70.9	68.7	65.6	64.9
Revenue Factor					
- Per Taxpayer	10.4	10.4	9.4	11.1	11.4
- Per City	51.1	53.5	51.8	50.1	49.0

SEE FOOTNOTE[3]

The City issued a proposed assessment of $1,095,753 in additional tax. The assessment became final on January 9, 2016. The Taxpayer thereafter filed its petition in the Michigan Tax Tribunal.

D. The Tax Tribunal proceedings.

The City and Taxpayer filed cross-motions for partial summary disposition on the construction of the revenue factor in MCL 141.623. On October 20, 2016, the Tribunal issued an order granting the City's motion and denying the Taxpayer's motion. App. 35a. The order held the statute was ambiguous but did not explain why. The order then held that the determination of where services are rendered in MCL 141.623 is governed by where the services are performed. App.39a, pp. 5-6.

[3] Firm partners receive compensation via distributions of profits. Those distributions are not included in the payroll factor. The payroll factor reflects wages paid to associate attorneys and support staff.

Following that order, the parties reached agreement on penalties and interest and entered a stipulation with the Tax Tribunal on December 1, 2016. App. 41a. Taxpayer timely appealed to the court of appeals.

E. The court of appeals proceedings.

The court of appeals, during oral argument, asked the Taxpayer's counsel how the Taxpayer would treat revenue arising from services rendered in the Wayne County Circuit Court (located in Detroit) for a client located outside of the City. App 46a, pp 4-6. The Taxpayer's counsel responded, contrary to the Taxpayer's affidavits, that such revenue would be considered "in-city" revenue:

> "THE COURT: What if you have a client in let's say Southfield, and you do legal work for that client, and then you file the case in the Third Circuit. Now, at that point, the rendering for that, where does that fit into that concept?
>
> "MR. PIRICH: Well, if you saw one of the affidavits that we did, we get strict admonitions from our administrative cohorts who tell us our entry of time has to reflect those kinds of nuances.
>
> **So if I'm in Wayne County Circuit Court and I'm performing service there, that is going to be within the City under Section 623. There is no question about that.** But if it's to Southfield and it is to the entity there, that is not covered by the City of Detroit income tax.
>
> "THE COURT: So how do you answer Judge Sawyer's question? If you give advice to a lawyer that is in Oakland, it's out of the city, but if you file a lawsuit in Wayne for that client, where was the service performed?
>
> "MR. PIRICH: We allocate the time depending upon where the rendering occurs. That is exactly what we do.

> "THE COURT: The rendering means what?
>
> "MR. PIRICH: Where it is actually received and, under the destination test definition, where it actually is received.
>
> "THE COURT: So in a lawsuit, if you write a complaint and you file it in Wayne, is that where the service is received?
>
> "MR. PIRICH: **If it is filed in Wayne, that would be in Wayne County and subject to if the City of Detroit that activity.**
>
> * * * * *
>
> "MR. PIRICH: * * * In the affidavits of Mr. Wigle and my partner Mr. Indenbaum, we clearly identify how we do it." App, 48a, emphasis added.

Shortly thereafter, the Taxpayer's counsel again reassured the Court that revenue generated from services rendered in Wayne County Circuit Court, for an out-of-city client, would be included in "in-city" revenue pursuant to the referenced affidavits. App 43a.

The City's counsel was shocked to hear counsel's false "rendering" argument that contradicted the Taxpayer's own affidavits and appellate briefs. The City's counsel tried three times to alert the court but on each occasion the court turned to a different subject. App 59a ("Mr. Pirich said something to the effect that if a service is rendered for a Wayne County Circuit Court case, that would somehow be captured as a service rendered in Detroit. There is nothing in the affidavits to support that."); app. 62a ("They [the Taxpayer] do not keep track of whether a pleading is going to Wayne County Circuit Court or Oakland County Circuit Court. They keep

track of where the lawyer performs his service, which is exactly consistent with the phrase "services rendered in Detroit.")

The court issued its published opinion eight days after oral argument. App. 2a. The City timely filed a motion for reconsideration discussing, *inter alia*, the inconsistency between the Taxpayer's actual practice and its "delivery" argument. The Taxpayer did not attempt to explain its counsel's misrepresentations, rather, the Taxpayer argued that the City had not met its burden for reconsideration. The court denied the motion without comment. App 7a.

ARGUMENT

I. STANDARD OF REVIEW.

This case involves an issue of statutory construction, which this Court reviews *de novo*. *Wexford Medical Group v. Cadillac*, 474 Mich 192, 202 (2006).

II. STATUTORY FRAMEWORK.

A. The Uniform City Income Tax Act.

Michigan adopted the Uniform City Income Tax Act in 1964 P.A. 284; MCL 141.601 *et seq.* The City of Detroit then adopted an Ordinance incorporating the provisions of the state law. Consistent with the lower court's opinion, this brief cites to the state statute and not the City ordinance.

B. Taxation of unincorporated businesses

Taxpayer is a partnership - an unincorporated business. MCL 141.615 provides that an unincorporated business is not itself liable for City income tax. Rather, "[T]he persons carrying on the unincorporated business, profession or other activity are liable for income tax only in their separate and individual capacities." The individual owners of the Taxpayer (its partners) are liable for Detroit tax on their respective shares of the Taxpayer's net income apportioned to Detroit under the three-factor formula discussed below.[4]

C. Election to pay taxes of owners.

MCL 141.617 permits an electing partnership (or other unincorporated business) to pay the tax due with respect to each owner's share of the net profit. For the tax years here, the Taxpayer exercised that election. Taxpayer filed returns and paid tax on behalf of its partners. Hence its status here as the Taxpayer.

D. Determining business activity allocated to Detroit.

A taxpayer that conducts business both within and without the city of Detroit is entitled to allocate its net profit. The parties here do not dispute that the business allocation formula, sometimes referred to as the "three-factor" formula, applies to this case. MCL 141.620-24, app 89a. The three factors of the formula can be summarized as follows:

[4] Individuals who are not City residents pay income tax at a rate 50% of City residents (1.2% versus 2.4%). The difference is not relevant to the issue in this case.

First, the Detroit percentage of the taxpayer's property is determined by dividing taxpayer's in-city property by property located within or without the City. MCL 141.621. Second, the Detroit percentage of taxpayer's compensation to employees is determined by dividing compensation paid to employees in Detroit by compensation paid to employees within or without the City. MCL 141.622.

Third, the Detroit percentage of gross revenue derived from "sales made and services rendered in the city" must be ascertained. MCL 141.623. The Legislature properly believed the phrase "services rendered in the city" was unambiguous and, therefore, provided no further definition or explanation of the phrase. The statute does, however, provide a number of examples to assist in determining **which sales of tangible goods** are considered "in-city":

> "**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 purchaser, or a person or Taxpayer 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.

(a) Sales to a customer in the city with shipments to 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." Emphasis added.

Finally, the property, compensation and revenue factor percentages are added and divided by three to obtain the average. That fraction is multiplied against the Taxpayer's net profit to determine the in-city taxable income. MCL 141.624.

III. "SERVICES RENDERED IN THE CITY" IS SYNONYMOUS WITH SERVICES PERFORMED IN THE CITY.

A. The key phrase "services rendered in the city" is unambiguous.

This Court has instructed that courts should not "hasten" to find ambiguity, thereby enabling "bypass [of] traditional approaches to [statutory] interpretation * * *." *Mayor of City of Lansing v MPSC*, 470 Mich 154, 164, 165 (2004). The traditional approach to construing a statute is to simply read the words. "A statute's * * * words and phrases must be applied and interpreted according to their plain and

ordinary meanings." *Pohutski v. City of Allen Park*, 465 Mich 675, 683 (2002). The critical phrase here is clear on its face. When one of Taxpayer's lawyers exercises her professional skill in Detroit in preparing a brief or other document in Detroit, and Taxpayer bills the client for that service in Detroit, the bill is for "services rendered in Detroit."

B. Dictionary definitions fully support the City's position.

Because the phrase "services rendered in the city" is unambiguous it is improper to resort to interpretive aids. Nevertheless, the lower court adopted Taxpayer's reliance on the following Webster's 1969 dictionary entry:

> Render – " * * * **1a** : to melt down: fry **b** : to treat so as to convert into fats and oil or fertilizer **2a to transmit to another: DELIVER [the next six definitions are irrelevant and omitted] * * * 3d <u>to do (a service) for another</u>** [**the next eight definitions are irrelevant and omitted**]." App 67a, emphasis added.

It is true that one of sixteen definitions of the word "render" states "to transmit to another: deliver." But that definition does not support the Taxpayer's or lower court's misuse of the word "render" to mean **physical delivery.** The statement "I will deliver the signed contract to your Southfield office" cannot be rewritten as "I will render the signed contract to your Southfield office."

To the extent other dictionaries include "deliver" as one definition of "render," they use it in the following context: **render a verdict or render a judgment.** App 71a, 72a, 73a, 75a. That usage is irrelevant here.

Moreover, the statute (MCL 141.623) does not use the word "rendered" in a vacuum. "[A] statute's * * * words and **phrases** must be applied and interpreted according to their plain and ordinary meanings." *Pohutski v. City of Allen Park*, 465 Mich 675, 683 (2002), emphasis added. Here, the controlling statutory phrase is "services rendered in the city." The only relevant Webster's definition of render, namely, the only definition that includes "services," is "**to do (a service) for another**."

Although argued by the City, the lower court offered no explanation why it chose to disregard the controlling phrase. Every definition of the word render or rendered, when used in conjunction with the word "services," means to perform services. That includes the Webster's dictionary cited by court and also includes, for example:

- The first relevant definition of render in Black's Law Dictionary is to "perform * * * services." App 69a.
- The first relevant definition of render in the Oxford American Dictionary is "do a service." App 71a.
- The first relevant definition of render in the Meriam-Webster on-line dictionary is "do a service." App 73a.
- The first synonym of rendered in Thesaurus.com is "performed." App 74a.

- Google's first relevant definition of render is "provide a service." App 75a. **Google (and several other of the cited resources) also observes that render can denote "delivery" but in the following context: "deliver (a verdict or judgment.)"**
- BusinessDictionary.com defines "services rendered" as "completion of service requested by the client resulting in payment request." App 76a.
- Macmilliandictionary.com defines "for services rendered" as "in exchange for work that you have done for someone." App 77a.

C. MCL 141.622's use of the phrase "services performed" by employees, versus MCL 141.623's use of the phrase "services rendered" to clients, does not support the lower court's decision.

MCL 141.622, the compensation factor of the three-factor formula, refers to "services performed" by employees. MCL 141.623, the revenue factor, refers to "services rendered" by non-employee service providers such as Taxpayer. The Tribunal properly held the difference to be "nothing more than the syntax of the English language." App 39a. The Tribunal made the cogent observation that employees are generally described as "performing" services for their employers, while service providers, like lawyers, "render service" to a client. Id.

Any lawyer who has ever sent an invoice for legal services is intimately familiar with the phrase "for services rendered." It is a somewhat more elegant way to say "for services performed." Indeed, Indenbaum's affidavit appends a "typical"

Honigman client invoice. App 30a. It states "For professional services **rendered** through August 16, 2016." Emphasis added.

The court of appeals, however, held "We agree with petitioner that ["services performed" and "services rendered"] **must** be given two different meanings * * *." App 4a, emphasis added. The court of appeals cited no law, and there is none, supporting its use of the word "**must**." The court cites *US Fidelity Ins & Guaranty Co* v *MCCA*, 484 Mich 1 (2009). There, this Court observed that "the use of different terms within similar statutes **generally implies** that different meanings were intended." Id at p. 14, emphasis added. The Court held that one statute's reference to personal protection insurance "benefits" had a meaning distinct from personal protection insurance "coverage" in another statute, because the word "coverage" had a precise meaning in the insurance industry. Id. at 14. Here, services rendered and services performed are not words of art. There is nothing in the statute to suggest that the phrase "services rendered" should be given anything other than its plain meaning.

Former Justice Levin observed "The use of different words suggests, although it does not necessarily mean, that a different meaning may have been intended." *Kelley v. Riley*, 417 Mich 119 (1983), fn 6 to Justice Levin's initial opinion, emphasis added. Likewise, in *People v Thompson*, 477 Mich 146 (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 those 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, I, 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.*

Another relevant rule of construction states: "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 v Carrier*, 487 Mich 180, 192 (2010), quoting *People v Powell*, 280 Mich 699, 703 (1937). The City Income Tax Act was enacted in 1964. Before its enactment, 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.[5]

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).

Courts around the country apply this common sense rule. The Oregon Supreme Court very recently held "the fact that the legislature has used different terms does not, by itself, require the terms to have different meanings. Rather, [s]uch rules always give way to more direct evidence of legislative intent." *Brown v Saif Corp*, 361 Or 241, 260 (2017), emphasis added. Likewise, the North Dakota Supreme Court stated:

> "The use of different words does not necessarily imply a different meaning or a different result. The same thought may be expressed or the same result indicated by the use of different words or phrases. Whether different expressions have the same or a different meaning or purpose rests primarily upon the meaning of the words themselves and

[5] *Riverview v Trenton,* 359 Mich 98, 107 (1960); *DeCaire v Bishop's Estate*, 330 Mich 378, 384 (1951); *McGaughan v W Bloomfield Twp,* 268 Mich 553, *556* (1934); *Bunde v Bunde's Estate,* 214 Mich 469,470, 472-473 (1921); *Snyder v Neal,* 129 Mich 692, 693-694 (1902); *Plummer v Twp of Edwards,* 87 Mich 621, 621-622 (1891); *Withey v Osceola Circuit Judge,* 108 Mich 168, 168-169 (1895).

> the context in which they are used." *Foughty v Friedrich*, 108 NW2d 681, 691 (ND, 1961).

Those decisions are completely consistent with this Court's most fundamental rule: "When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v. City of Allen Park*, 465 Mich 675, 683 (2002). Here, the common and ordinary meaning of "services rendered in the city" is "services performed in the city." There is no legal basis to give those synonymous phrases anything other than their common and ordinary meanings.

D. The statute's treatment of sales of goods fully supports the City's position.

The court of appeals compounded its error by conflating the treatment of sales of goods with services rendered. App 2a, pp. 3-4. The relevant statute, MCL 141.623, quoted earlier in this brief, carefully distinguishes between revenue generated by intangible "services" versus sales of tangible "goods, merchandise or property."

The court ignored that obvious distinction and concluded that because sales of goods are considered in-city or out-of-city based on the physical delivery arrangements, services should be similarly treated. That conclusion makes no sense. "Professionals provide services, not goods. The client pays for the professional's skill and expertise, not a physical product." App 10a. C.f., Abraham

Lincoln, "a lawyer's time and advice is his stock in trade." Legal services are rendered at the location of the service where the lawyer employs her skill and expertise in conducting research, reviewing or drafting documents, participating in telephone calls, arguing a motion, etc.

Further, under the Uniform Commercial Code, MCL 440.2016(1), "[A] "**sale**" [of tangible goods] consists in the **passing of title** from the seller to the buyer for a price (section 2401)." The parties can agree on when title passes, or the default is that "title passes to the buyer at the time and place at which the seller completes its performance with reference to **the physical delivery of the goods** * * *." MCL 440.2401(b), emphasis added.

MCL 141.623, consistent with the delivery requirement inherent in the sale of tangible goods, creates simple, bright line tests to distinguish in-city from out-city sales of tangible property. In contrast, a lawyer is entitled to payment for services rendered regardless of if, when or where any document may later be created, delivered or emailed. The Legislature did not view the phrase "services rendered in the city" as needing clarification and, when given its plain meaning, it does not.

E. The hypotheticals cited by the lower court, as well as the Taxpayer's failure to incorporate a "delivery" component in its own procedures, confirm that the lower court's decision is unworkable and would produce absurd results.

The court of appeals closes its opinion by posing hypotheticals which, it argues, supports engrafting a physical delivery component onto the phrase "services rendered in the City": "For example, a lawyer's time and advice may well result in the drafting of a will, a complaint, a contract, a brief, etc. And those items may well be delivered to the client in a different location than where the lawyer performs the drafting." App 6a. Again, the court disregards the fact that legal services are intangible and are rendered where performed – regardless of when, where or if any document may later be created or delivered.

Although the "absurd results rule" in statutory interpretation does not permit departure from the literal language of a statute, it does call for the avoidance of absurdity to the extent possible if any construction proves necessary. *Rafferty v. Markovitz*, 461 Mich. 265, 270 (1999). Attempting to incorporate a physical "delivery" component into determining where legal services were rendered contravenes the plain meaning of the statute and would produce absurd and unworkable results. The following examples illustrate the point.

- Assume that Taxpayer's Detroit attorneys prepare documents for a commercial transaction for a Southfield client. Before any documents are agreed upon or executed the transaction falls apart. There is no "delivery" of anything, anywhere, but the Taxpayer is obviously entitled to be paid for the attorney's services – all of which were rendered in Detroit. We know that the Taxpayer's actual

procedure codes all such revenue as "out-city" based solely on the client being coded out-of-city. The lower court's opinion creates unnecessary confusion as to this and innumerable other situations.

- Assume the same hypothetical, but the Southfield client elects to terminate the Taxpayer's services before any closing. Indenbaum's affidavit states "A Honigman client can terminate the services of Honigman at any time for any reason but remains obligated to pay for legal services performed through the date of termination." App 27a, ¶11. Although there is no "delivery," and all services were rendered in the City, the Taxpayer's procedures would treat the revenue as "out-of-city." The lower court's opinion does not contemplate this scenario.

- Many commercial transactions consume months, and it is impossible for an attorney to know if, when or where a "physical" closing will occur. Many closings are now handled by email scan exchanges of signature pages. The lower court's opinion would require the impossible, namely, that each attorney somehow identify the location of an ultimate paper "closing" in virtually every time entry in every bill. The Taxpayer makes no effort to even try and track such data and it would be incredibly difficult or impossible to do so.

- Assume one of the Taxpayer's Detroit attorneys drafts a deed conveying a parcel of Detroit property to a Southfield client. The deed is recorded in the Wayne County Register of Deeds. Is that in-city or out-city?

- Assume one of the Taxpayer's Detroit attorneys drafts a will for a Southfield client. The client executes the will and takes possession of it in the Taxpayer's Detroit office. Or leaves it with the Taxpayer in Detroit. Is that in-city or out-city?

- The lower court's opinion (app. 6a) poses the hypothetical of a Honigman Detroit attorney speaking by telephone with a client in Ann Arbor. The court concludes that the attorney's service in that scenario is "rendered" in Ann Arbor. It is the City's position that all attorney services were rendered in Detroit, the location where the attorney exercises her professional skill in listening to and advising the client. Moreover, what if the client takes the call on a cell phone while driving in Detroit? How would the Taxpayer even know the location of the client in that scenario or, the location of any client making a call? Must each attorney answering a call begin the conversation by asking the client from where the client is calling?

- Attorneys would likewise have to attempt to track the physical location of every person they speak with every day. That is the very definition of absurd.

- The Michigan court of appeals' four districts are headquartered in Detroit, Troy, Lansing and Grand Rapids. Each of those cities except Troy has an income tax, and the tax rates vary from city to city. Assume a lawyer in Flint (which also has a city income tax) spends 20 hours preparing and then e-filing a brief with the court of appeals. Where <u>exactly</u> would the location of "physical delivery" be for a brief e-filed with the court of appeals? Is there a central computer somewhere? Does

it depend on the court of appeals' district? Does anyone believe the Flint lawyer would attempt to track that "physical location" for income tax purposes? The Honigman firm makes no effort to do so.

- Finally, if the physical delivery requirement were to be applied as the Taxpayer's lawyer represented at the lower court argument, and, presumably, as set forth in the lower court's opinion, then the services of Taxpayer's lawyers in Wayne County Circuit Court should produce in-City revenue even if the client is located outside the City. But, contrary to its counsel's representations to the lower court, Taxpayer's affidavits confirm that it has not included any such revenue as "in-city" revenue. The Taxpayer argues that "rendering" requires physical delivery in the city only when it reduces the Taxpayer's tax liability; otherwise delivery is ignored. The Taxpayer's disingenuous conduct provides another compelling reason for reversal.

CONCLUSION AND RELIEF

For the reasons stated, the City asks the Court to reverse the lower court's opinion. The City also asks the Court to find the controlling phrase "services rendered in the city" unambiguous, and to hold the phrase synonymous with the phrase services performed in the City.

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January 14, 2019

STATE OF MICHIGAN

IN THE SUPREME COURT

HONGIMAN, MILLER, SCHWARTZ
AND COHN LLP,

Supreme Court No.157522
Petitioner-Appellee,
(Appellant below)

Court of Appeals No. 336175
MTT Document No. 16-000266

v.

CITY OF DETROIT,

Respondent-Appellant
(Appellee below)

PROOF OF SERVICE

On January 14, 2019, the undersigned caused to be served upon Petitioner-Appellee's counsel, via electronic filing, the City's brief on appeal to the Michigan Supreme Court and this proof of service.

/s/ Charles N. Raimi

Attorney for appellant, City of Detroit