MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 26, 2010, through September 7, 2010

CORBIN R. DAVIS
CLERK OF THE SUPREME COURT

VOL. 487
FIRST EDITION

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MARILYN KELLY	2013
Justices	
MICHAEL F. CAVANAGH	2015
ELIZABETH A. WEAVER	2011[1]
MAURA D. CORRIGAN	2015
ROBERT P. YOUNG, Jr.	2011
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
ALTON THOMAS DAVIS	2011[2]

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

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

ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

[1] To August 26, 2010.

[2] From August 26, 2010.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2011
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
RICHARD A. BANDSTRA	2015
JOEL P. HOEKSTRA	2011
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2011
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2011
BRIAN K. ZAHRA	2013
PATRICK M. METER	2015
DONALD S. OWENS	2011
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2011
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
ALTON T. DAVIS	2015[1]
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2011
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2011

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

[1] To August 25, 2010.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2011
	CHARLES T. LaSATA	2011
3.	DEBORAH ROSS ADAMS	2013
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2013
	ANNETTE J. BERRY	2013
	GREGORY D. BILL	2013
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2011
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2011
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2013
	ERIC WILLIAM CHOLACK	2011
	JAMES R. CHYLINSKI	2011
	ROBERT J. COLOMBO, Jr.	2013
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2011
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2013
	PATRICIA SUSAN FRESARD	2011
	SHEILA ANN GIBSON	2011
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2011
	RICHARD B. HALLORAN, Jr.	2013
	AMY PATRICIA HATHAWAY	2013
	CYNTHIA GRAY HATHAWAY	2011

		Term Expires January 1 of
	DANIEL ARTHUR HATHAWAY	2015
	MICHAEL M. HATHAWAY	2011
	MURIEL D. HUGHES	2011
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	MARY BETH KELLY	2015
	TIMOTHY MICHAEL KENNY	2011
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MacDONALD	2011
	KATHLEEN M. McCARTHY	2013
	WADE H. McCREE	2015
	BRUCE U. MORROW	2011
	JOHN A. MURPHY	2011
	MARIA L. OXHOLM	2013
	LINDA V. PARKER	2011
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2011
	DANIEL P. RYAN	2013
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2011
	LESLIE KIM SMITH	2013
	VIRGIL C. SMITH	2013
	JEANNE STEMPIEN	2011
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2011
	DEBORAH A. THOMAS	2013
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2011
	JOHN G. McBAIN, Jr.	2015
	CHAD C. SCHMUCKER	2011
	THOMAS D. WILSON	2013
5.	JAMES H. FISHER	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2013
	MARY ELLEN BRENNAN	2015
	RAE LEE CHABOT	2011
	MARK A. GOLDSMITH	2013
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015

		Term Expires January 1 of
	SHALINA D. KUMAR	2015
	CHERYL A. MATTHEWS	2011
	DENISE LANGFORD MORRIS	2013
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2011
	DANIEL PATRICK O'BRIEN	2011
	WENDY LYNN POTTS	2013
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2013
	JOAN E. YOUNG	2011
7.	DUNCAN M. BEAGLE	2011
	JOSEPH J. FARAH	2011
	JUDITH A. FULLERTON	2013
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2013
	GEOFFREY L. NEITHERCUT	2013
	DAVID J. NEWBLATT	2011
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2011
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2011
	J. RICHARDSON JOHNSON	2013
	PAMELA L. LIGHTVOET	2013
	ALEXANDER C. LIPSEY	2011
10.	JANET M. BOES	2011
	FRED L. BORCHARD	2011
	WILLIAM A. CRANE	2011
	DARNELL JACKSON	2013
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2011
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2011
	WILLIAM C. MARIETTI	2011
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2011
	RICHARD L. CARETTI	2011
	MARY A. CHRZANOWSKI	2011
	DIANE M. DRUZINSKI	2015

		Term Expires January 1 of
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	DONALD G. MILLER	2013
	EDWARD A. SERVITTO, Jr.	2013
	MARK S. SWITALSKI	2013
	MATTHEW S. SWITALSKI	2015
	ANTONIO P. VIVIANO	2011
	DAVID VIVIANO	2013
	TRACEY A. YOKICH	2013
17.	GEORGE S. BUTH	2011
	PAUL J. DENEFELD	2011
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2013
	DENNIS B. LEIBER	2013
	JAMES ROBERT REDFORD	2011
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2013
	CHRISTOPHER P. YATES	2013
	DANIEL V. ZEMAITIS	2015
18.	WILLIAM J. CAPRATHE	2011
	KENNETH W. SCHMIDT	2013
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	CALVIN L. BOSMAN	2011
	JON H. HULSING	2015
	EDWARD R. POST	2011
	JON VAN ALLSBURG	2013
21.	PAUL H. CHAMBERLAIN	2011
	MARK H. DUTHIE	2013
22.	ARCHIE CAMERON BROWN	2011
	TIMOTHY P. CONNORS	2013
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2015
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2011
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2013
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2011

		Term Expires January 1 of
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2013
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2011
	JAMES R. GIDDINGS	2011
	JANELLE A. LAWLESS	2015
	PAULA J. M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	PETER E. DEEGAN	2011
	DANIEL J. KELLY	2015
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2011
35.	GERALD D. LOSTRACCO	2015
36.	WILLIAM C. BUHL	2013
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2011
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2011
	CONRAD J. SINDT	2013
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2013
	MICHAEL A. WEIPERT	2011
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2013
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2011
41.	MARY BROUILLETTE BARGLIND	2011
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2011
44.	MICHAEL P. HATTY	2011
	DAVID READER	2011
45.	PAUL E. STUTESMAN	2013
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2011
48.	GEORGE R. CORSIGLIA	2011
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2013
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013

		Term Expires January 1 of
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2011
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2013
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2013
	JACK VITALE	2011
2A.	NATALIA M. KOSELKA	2011
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2011
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2011
	DENNIS M. WILEY	2011
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2011
8.	ANNE E. BLATCHFORD	2011
	PAUL J. BRIDENSTINE	2013
	CAROL A. HUSUM	2011
	ROBERT C. KROPF	2015
	JULIE K. PHILLIPS	2015
	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2011
10.	SAMUEL I. DURHAM, Jr.	2011
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2013
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2011
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2013
	KIRK W. TABBEY	2011
14B.	CHARLES POPE	2015
15.	JULIE CREAL	2013

		Term Expires January 1 of
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2011
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2013
17.	KAREN KHALIL	2011
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2013
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2011
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2013
21.	RICHARD L. HAMMER, Jr.	2015
22.	SYLVIA A. JAMES	2013
23.	GENO SALOMONE	2013
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2011
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2011
26-1.	RAYMOND A. CHARRON	2015
26-2.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2013
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2013
30.	BRIGETTE R. OFFICER	2011
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2013
	EDWARD J. NYKIEL	2011
34.	TINA BROOKS GREEN	2013
	BRIAN A. OAKLEY	2011
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2011
	RONALD W. LOWE	2013
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2011
	ROBERTA C. ARCHER	2013
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2011
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2011
	DONALD COLEMAN	2013
	NANCY A. FARMER	2013

		Term Expires January 1 of
	DEBORAH GERALDINE FORD	2011
	RUTH ANN GARRETT	2013
	RONALD GILES	2015
	KATHERINE HANSEN	2011
	BEVERLY J. HAYES-SIPES	2015
	PAULA G. HUMPHRIES	2011
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2013
	WILLIE G. LIPSCOMB, Jr.	2015
	LEONIA J. LLOYD	2011
	MIRIAM B. MARTIN-CLARK	2011
	WILLIAM McCONICO	2013
	DONNA R. MILHOUSE	2013
	B. PENNIE MILLENDER	2011
	CYLENTHIA L. MILLER	2011
	KEVIN F. ROBBINS	2013
	DAVID S. ROBINSON, Jr.	2013
	BRENDA KAREN SANDERS	2015
	NOCEEBA SOUTHERN	2011
37.	JOHN M. CHMURA	2013
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2011
	WALTER A. JAKUBOWSKI, Jr.	2013
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2013
	CATHERINE B. STEENLAND	2011
40.	MARK A. FRATARCANGELI	2013
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2013
	STEPHEN S. SIERAWSKI	2011
	KIMBERLEY ANNE WIEGAND	2013
41B.	LINDA DAVIS	2015
	SEBASTIAN LUCIDO	2013
	SHEILA A. MILLER	2011
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL, III	2011
43.	KEITH P. HUNT	2013
	JOSEPH LONGO	2011
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015

		Term Expires January 1 of
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2011
47.	JAMES BRADY	2015
	MARLA E. PARKER	2011
48.	MARC BARRON	2011
	DIANE D'AGOSTINI	2013
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2013
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2011
	CYNTHIA THOMAS WALKER	2015
51.	RICHARD D. KUHN, Jr.	2015
	PHYLLIS C. McMILLEN	2013
52-1.	ROBERT BONDY	2013
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2011
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2011
52-3.	LISA L. ASADOORIAN	2013
	NANCY TOLWIN CARNIAK	2011
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	MICHAEL A. MARTONE	2011
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2011
	CAROL SUE READER	2013
54A.	LOUISE ALDERSON	2011
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2013
	CHARLES F. FILICE	2015
	AMY RONAYNE KRAUSE	2011
54B.	RICHARD D. BALL	2011
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2011
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2011
	JULIE H. REINCKE	2015
56B.	GARY R. HOLMAN	2013
57.	WILLIAM A. BAILLARGEON	2011
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2011
59.	PETER P. VERSLUIS	2011
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2013

		Term Expires January 1 of
	ANDREW WIERENGO	2011
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2011
	JEANINE NEMESI LaVILLE	2013
	BEN H. LOGAN, II	2013
	DONALD H. PASSENGER	2011
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2013
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2013
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	RICHARD L. HUGHES	2011
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2013
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2013
	MARY CATHERINE DOWD	2011
	HERMAN MARABLE, Jr.	2013
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2013
	M. RANDALL JURRENS	2011
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2011
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2013
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	RICHARD A. COOLEY, Jr.	2011
	JOHN D. MONAGHAN	2013
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015
74.	JENNIFER CASS BARNES	2011
	TIMOTHY J. KELLY	2013
	DAWN A. KLIDA	2011
75.	STEVEN CARRAS	2011
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015

		Term Expires January 1 of
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015
86.	JOHN D. FORESMAN	2011
	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA I. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2015
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2011
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2014
THEODORE A. METRY	2011
MATTHEW R. RUMORA	2014

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	CHARLES C. NEBEL	2011
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	RICHARD E. VOLLBACH, Jr.	2011
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	THOMAS K. BYERLY	2011
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2011
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	FRASER T. STROME	2011
Huron	DAVID L. CLABUESCH	2013

Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT S. SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2015
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	LARRY J. NELSON	2013
Lenawee	GREGG P. IDDINGS	2011
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2011
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	FRANK L. ARNOLD	2013[1]
Monroe	JOHN A. HOHMAN, JR.	2013
Montcalm	CHARLES W. SIMON, III	2013
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2013
Newaygo	GRAYDON W. DIMKOFF	2013
Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	BRADLEY G. LAMBRIX	2013

[1] From August 18, 2010.

Ogemaw	SHANA A. LAMBOURN	2013
Ontonagon	JANIS M. BURGESS	2011
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN D. TOMLINSON	2013
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	DARLENE A. O'BRIEN	2013
Washtenaw	NANCY CORNELIA WHEELER	2015
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2015
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2015
Wayne	DAVID J. SZYMANSKI	2015
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie.	50
Clare	Harrison	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
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
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SUPREME COURT CASES

PEOPLE v FLICK
PEOPLE v LAZARUS

Docket Nos. 138258 and 138261. Argued January 13, 2010 (Calendar No. 6). Decided July 27, 2010.

In Docket No. 138258, Steven E. Flick was charged in Jackson County with knowing possession of child sexually abusive material, MCL 750.145c(4), after evidence indicated that he had paid to access websites containing such material. A forensic examination revealed that child sexually abusive materials had been deleted from his computer, but remained stored in the temporary Internet files on its hard drive. Flick brought a motion to dismiss the case on the ground that MCL 750.145c(4) did not prohibit the mere viewing of child sexually abusive materials, only their possession. The district court, Charles J. Falahee Jr., denied the motion and bound defendant over to circuit court, where Edward J. Grant, J., denied defendant's motion to quash the information and dismiss the case. Flick appealed.

In Docket No. 138261, Douglas B. Lazarus was also charged in Jackson County with knowing possession of child sexually abusive material, MCL 750.145c(4), on the basis of similar evidence. The district court, James M. Justin, J., bound defendant over to circuit court, where Chad C. Schmucker, J., quashed the information and dismissed the case. The prosecution appealed. After the cases were consolidated for appeal, the Court of Appeals, MARKEY, P.J., and WHITBECK and GLEICHER, JJ., affirmed with respect to Flick and reversed with respect to Lazarus, holding that in both cases the prosecution had established probable cause to believe that defendants knowingly possessed child sexually abusive material under MCL 750.145c(4) based on the evidence that defendants had sought, paid for, received, and viewed child sexually abusive images that remained in their computers. Unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket Nos. 277925 and 278531). The Supreme Court granted defendants' applications for leave to appeal. 483 Mich 1024 (2009).

In an opinion by Justice CORRIGAN, joined by Justices WEAVER (except for part IV), YOUNG, and MARKMAN, the Supreme Court *held*:

Evidence that a defendant intentionally accessed and purposely viewed child sexually abusive material on the Internet while knowingly having the power and intention to exercise dominion or control over the material is sufficient to support a bindover for trial on a charge of possessing child sexually abusive material under MCL 750.145c.

1. The statute that penalizes a person who "knowingly possesses any child sexually abusive material" does not define the term "possesses." Because that term has a unique legal meaning, it must be defined in accordance with its settled meaning in legal dictionaries and at common law. A review of the legal definition of that term, its meaning at common law, and the context of the surrounding statutory language indicates that the term includes both actual and constructive possession, and that constructive possession under MCL 750.145c means knowingly having the power and the intention at a given time to exercise dominion or control over child sexually abusive material either directly or through another person or persons.

2. It is undisputed that each defendant purposely used a computer to locate websites containing child sexually abusive material and voluntarily paid to access this material, at which point defendants knowingly had the power and the intention to exercise control or dominion over the electronic visual images or computer images. This evidence was sufficient to bind each defendant over for trial on charges of violating MCL 750.145c.

Court of Appeals judgments affirmed; cases remanded for further proceedings.

Justice CORRIGAN, joined by Justice YOUNG, concurring, would further have held that that the presence of temporary Internet files containing depictions of child sexually abusive material may be circumstantial evidence that an electronic visual image or computer image of such material previously was displayed on a defendant's computer screen.

Justice CAVANAGH, joined by Chief Justice KELLY and Justice HATHAWAY, concurring in part and dissenting in part, would have remanded the case against Flick to determine whether his admission that he had downloaded child sexually abusive material, if admissible, was evidence that he actually exercised or intended to exercise control or dominion over the images, and would affirm the ruling that Lazarus could not be bound over for trial because there was no evidence that he actually exercised or intended to exercise dominion and control over the prohibited images he had viewed.

1. STATUTES — WORDS AND PHRASES — CHILD SEXUALLY ABUSIVE MATERIAL — "KNOWINGLY POSSESSES."

The statutory prohibition on the knowing possession of child sexually abusive material includes both actual and constructive possession, which occurs when a person knowingly has the power and the intention at a given time to exercise dominion or control over the material either directly or through another person or persons (MCL 750.145c[4]).

2. CRIMINAL LAW — CHILD SEXUALLY ABUSIVE MATERIAL — EVIDENCE SUFFICIENT FOR BINDOVER.

Evidence that a defendant intentionally accessed and purposely viewed child sexually abusive material on the Internet while knowingly having the power and intention to exercise dominion or control over the material is sufficient to bind a defendant over for trial on a charge of possessing child sexually abusive material (MCL 750.145c[4]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Rappleye & Rappleye, P.C. (by *Robert K. Gaecke, Jr.*), for Steven E. Flick.

Dungan, Kirkpatrick & Dungan, PLLC (by *Michael Dungan*), for Douglas B. Lazarus.

Amicus Curiae:

Brian A. Peppler, *Jeffrey L. Sauter*, and *William M. Worden* for the Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. In these consolidated cases, we consider the scope of the Michigan Penal Code provision that criminalizes the "knowing possession" of child sexually abusive material, MCL 750.145c(4). Defendants intentionally accessed and purposely viewed depictions of child sexually abusive material on the Internet. The

only child sexually abusive material later found on their computers, however, had been automatically stored in temporary Internet files.[1]

Defendants contend that because the prosecution failed to establish that they knowingly possessed child sexually abusive material, the district courts erred by binding them over for trial. We hold that the term "possesses" in the phrase "[a] person who knowingly possesses any child sexually abusive material" in MCL 750.145c(4) includes both actual and constructive possession. Contrary to defendants' arguments, the evidence presented at the preliminary examinations established that defendant Flick and defendant Lazarus did more than passively view child sexually abusive material on the Internet. When any depiction of child sexually abusive material was displayed on each defendant's computer screen, he knowingly had the power and the intention to exercise dominion or control over that depiction. As a result, each defendant constructively possessed those images, which amounts to possession of child sexually abusive material. Consequently, we af-

[1] Temporary Internet files or TIFs are records of all the websites a computer user has visited. Every time a user visits a website, most web browsers will automatically send a record of that website to the hard drive so that the computer can access the website faster in the future. A user can access the stored TIF even if working off-line. The TIF remains on the computer permanently unless the user manually deletes that record or the computer deletes that record in accordance with its maintenance settings. Even after its deletion, evidence of the TIF remains in an imbedded index on the computer's hard drive. The "internet cache" or "internet temporary folder" is a "set of files kept by a web browser to avoid having to download the same material repeatedly. Most web browsers keep copies of all the web pages that you view, up to a certain limit, so that the same images can be redisplayed quickly when you go back to them." Douglas Downing, et al., *Dictionary of Computer and Internet Terms*, 8th ed, p 149 (Barron's, 2003).

firm the Court of Appeals judgment and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v FLICK*, DOCKET NO. 138258

Federal agents identified defendant Steven Edward Flick as a purchaser of access to a website containing child pornography during April, September, and October 2002. In May 2006, federal agents and Jackson County Sheriff's Detective Duaine Pittman obtained a search warrant for defendant Flick's computer and seized it. A forensic examination of the computer revealed child pornographic images on the hard drive. In a subsequent interview with Detective Pittman, defendant Flick acknowledged that he paid by credit card to access websites containing child pornography. Defendant Flick also admitted that he had downloaded child pornographic images on his computer. Defense forensic computer analyst Larry Dalman also examined the computer. Dalman corroborated the results of the forensic examination performed by a specially trained federal agent, which located "numerous" child pornographic images on defendant Flick's hard drive. However, Dalman reported that each image had been deleted or was located in the computer's temporary Internet files.

The prosecution charged defendant Flick with possession of child sexually abusive material in violation of MCL 750.145c(4). Defendant Flick moved to dismiss in the district court, arguing that he had not "possessed" child pornography as required by the statute. The district court denied the motion, observing that "it stretches the imagination somewhat to argue that a person does not possess child pornography where he admits he purchased it and downloaded it no matter

where it appears on his computer system." Defendant Flick subsequently moved to quash the information in the circuit court, contending that the evidence established that he merely viewed, rather than knowingly possessed, child pornography. The circuit court denied the motion and refused to dismiss the case.

Defendant Flick filed a delayed application for leave to appeal. After granting the application and consolidating defendant Flick's appeal with the prosecution's appeal in *People v Lazarus*,[2] the Court of Appeals affirmed the circuit court order denying defendant Flick's motion to quash the information and dismiss the case in an unpublished opinion per curiam.[3] Defendant Flick then applied for leave to appeal in this Court.

B. *PEOPLE v LAZARUS*, DOCKET NO. 138261

Federal agents linked defendant Douglas Brent Lazarus's e-mail information to an online child pornography subscription purchased using his credit card. In September 2006, Detective Pittman interviewed defendant Lazarus. During the interview, defendant Lazarus stated that he knew that his former spouse had turned over to federal agents the computer that the couple had purchased together. Defendant Lazarus admitted that he looked at child pornography and acknowledged that he paid by credit card to access websites containing child pornographic images.

Joshua Edwards, a specially trained federal agent, searched defendant Lazarus's computer. The forensic search revealed "a large number of websites that con-

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[2] *People v Flick*, unpublished order of the Court of Appeals, entered August 21, 2007 (Docket No. 278531).

[3] *People v Lazarus* and *People v Flick*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket Nos. 277925 and 278531).

tained titles indicative of child pornography" and approximately 26 "banners strung together" of child pornographic images. Edwards explained that "there would be more images if you counted each one from the banner." Among the 26 banner images, either 12 or 14 images resided in the "allocated space" of defendant Lazarus's computer. The allocated space of defendant Lazarus's computer also housed two pornographic movies in which the persons depicted "appeared to be under the age of 18." According to Edwards, allocated space meant "files that are not deleted and are still on a hard drive that the user could access." Edwards testified that the images found in the unallocated space of the computer also remained accessible until the file is "overwritten with new data," which he analogized to a person's setting aside a video cassette recording of a television show. Edwards acknowledged, however, that each depiction was located in the computer's temporary Internet files.

The prosecution charged defendant Lazarus with possession of child sexually abusive material in violation of MCL 750.145c(4). Defendant Lazarus moved to quash the information in the district court, arguing that the existence of child pornographic images in his computer's temporary Internet files did not establish "knowing possession." The district court denied defendant Lazarus's motion. Defendant Lazarus renewed his motion to quash in the circuit court, asserting that he had "simply engaged in the passive viewing of the images on his computer screen," and that passive viewing did not constitute possession of child pornography. The circuit court agreed and granted the motion to quash.

The prosecution appealed as of right. After consolidating the prosecution's appeal with defendant Flick's appeal, the Court of Appeals reversed the circuit court order quashing the information and dismissing the case

against defendant Lazarus in an unpublished opinion per curiam.[4] The Court of Appeals also interpreted MCL 750.145c(4). The panel concluded that although child sexually abusive images were located in defendants' temporary Internet files, "[b]ecause defendants unquestionably possessed the computers in which the detectives found multiple contraband images of child pornography," the prosecution established probable cause that defendants possessed child sexually abusive material. The Court of Appeals further held that "the evidence that defendants sought, paid for, received and viewed the child pornographic images, and that the images continued to reside in their computers, suffices to establish a reasonable inference that defendants knowingly possessed the contraband." Defendant Lazarus then applied for leave to appeal in this Court.

We granted both applications for leave to appeal and directed the parties to address:

> (1) whether intentionally accessing and viewing child sexually abusive material on the Internet constitutes "knowing possession" of such material under MCL 750.145c(4); and (2) whether the presence of automatically created "temporary internet files" on a computer hard drive may amount to "knowing possession" of child sexually abusive material or may be circumstantial evidence that defendant "knowingly possessed" such material in the past.[5]

II. STANDARD OF REVIEW

Whether conduct falls within the scope of a penal statute is a question of statutory interpretation. We

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[4] *People v Lazarus* and *People v Flick*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket Nos. 277925 and 278531).

[5] 483 Mich 1024, 1024-1025 (2009).

review questions of statutory interpretation de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). When reviewing a district court's bindover decision, we review the court's determination regarding the sufficiency of the evidence for an abuse of discretion, but we review the court's rulings concerning questions of law de novo. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

III. ANALYSIS

Both defendants were charged under MCL 750.145c(4), which provides in pertinent part:

> *A person who knowingly possesses any child sexually abusive material* is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

MCL 750.145c(1)(m) defines "child sexually abusive material" as including "any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture . . . ."[6]

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[6] MCL 750.145c(1)(m) provides in full:

> "Child sexually abusive material" means any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound

Defendants concede that they intentionally bought access to websites containing depictions of child pornography or "child sexually abusive material" under MCL 750.145c(1)(m). However, defendants argue that MCL 750.145c(4) criminalizes the knowing possession of child sexually abusive material, rather than the accessing and viewing of such material. Because *viewing* child pornography on the Internet is distinct from *possessing* it, they contend that the district courts erred by binding defendants over for trial.

The prosecution responds that because each defendant intentionally paid to access websites containing child pornography and admitted placing child pornography on his computer, and child pornographic images remained in each defendant's temporary Internet files, the district courts did not abuse their discretion in binding defendants over for trial. The statute criminalizes the knowing possession of "any child sexually abusive material," which includes in relevant part an "electronic visual image" or "computer or computer-generated image . . . ."

The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009). "The touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). The words of a statute provide the most reliable indicator of the Legislature's intent and

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recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. *Lowe*, 484 Mich at 721-722. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); MCL 8.3a. When we interpret the Michigan Penal Code, we do so "according to the fair import of [the] terms, to promote justice and to effect the objects of the law." MCL 750.2.

The primary question in interpreting MCL 750.145c(4) is the meaning of the term "possesses" in the phrase, "[a] person who knowingly possesses any child sexually abusive material . . . ." The statute does not define the term "possesses." Typically, when a statute fails to internally define terms, we accord those terms their ordinary meaning. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). In doing so, it is often helpful to consult the definitions in a lay dictionary. *Id*. Where the undefined term has a unique legal meaning, however, it "shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a; see *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921) ("A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown."). Because the term "possesses" has a unique legal meaning, we interpret the phrase "[a] person who knowingly possesses any child sexually abusive material" in accordance with its settled meaning in legal dictionaries and at common law.[7]

[7] Our conclusion that the term "possesses" and its cognate forms, including "possessor" and "possession," are legal terms of art is hardly

In MCL 750.145c(4), the term "possesses" is a verb. Black's Law Dictionary (7th ed) defines the verb "possess" as "[t]o have in one's actual control; to have possession of."[8] The legal definition of the verb "possess" further directs our attention to the related concepts of "control" and "possession." Black's Law Dictionary (7th ed) defines the noun "control" as "[t]he direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." It defines the noun "possession" as "1. [t]he fact of having or holding property in one's power; the exercise of dominion over property. 2. [t]he right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. [s]omething that a person owns or controls. 4. [a] territorial dominion of a state or nation." Black's Law Dictionary (7th ed) also contains 27 separate subentries in addition to these definitions of "possession."

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novel. See, e.g., Salmond, *Jurisprudence* (Williams ed, 10th ed, 1947), p 285 ("In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it, and since their day the problem has formed the subject of voluminous literature, while it still continues to tax the ingenuity of jurists.").

[8] Lay dictionaries define the verb "possess" more broadly. *Random House Webster's College Dictionary* (2001), for example, lists ten definitions for the verb "possess," including: (1) "to have as belonging to one; have as property; own"; (2) "to have as a faculty, quality, or the like"; (3) "to occupy or control from within"; (4) "to dominate or actuate the manner of such a spirit"; (5) "to cause to be dominated or influenced, as by an idea or feeling"; (6) "to have knowledge of, as a language"; (7) "to keep or maintain in a certain state, as of peace or patience"; (8) "to make owner, holder, or master, as of property or information"; (9) "to have sexual intercourse with"; and (10) "to seize or take; gain."

The definitions of "control" and "possession" provide helpful insight regarding how we should interpret the term "possesses," particularly in light of the surrounding context provided by the Legislature. The Legislature reasonably selected the verb "possesses" to communicate that only a person who has the power to exercise a degree of dominion or control over "any child sexually abusive material" is sufficiently culpable to fall within the scope of MCL 750.145c(4). That is, the possessor holds the power or authority to control or exercise dominion over child sexually abusive material at a given time. Moreover, the Legislature enumerated what constitutes "child sexually abusive material" in great detail, including, in relevant part, "*any depiction*, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, *electronic visual image*, computer diskette, *computer or computer-generated image*, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act . . . ." MCL 750.145c(1)(m). A review of the entire subsection reveals that the Legislature intended to broadly encapsulate any depictions, storage devices, and reproductions of child sexually abusive material in MCL 750.145c(1)(m). Thus, the Legislature chose to prohibit the possession of a wide range of child sexually abusive material. However, the Legislature also modified the verb "possesses" with the adverb "knowingly," thereby requiring a specific *mens rea* or knowledge element as a prerequisite for establishing criminal culpability under MCL 750.145c(4). Stated another way, unless one knowingly has actual physical control or knowingly has the power and the intention at a given time to exercise dominion or control over a depiction of child sexually abusive material, including an "electronic visual image" or "computer image," either directly or through another

person or persons, one cannot be classified as a "possessor" of such material.

Moreover, this interpretation of the term "possesses" is consistent with the established meaning of possession in Michigan caselaw. In our criminal jurisprudence, possession is either actual or constructive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992); *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Possession can be established with circumstantial or direct evidence, and the ultimate question of possession is a factual inquiry "to be answered by the jury." *Hill*, 433 Mich at 469. Proof of actual physical possession is not necessary for a defendant to be found guilty of possessing contraband, including a controlled substance. *Wolfe*, 440 Mich at 519-520. "Although not in actual possession, a person has constructive possession if he 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . .' " *Hill*, 433 Mich at 470, quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963). Dominion or control over the object need not be exclusive. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). This Court has described constructive possession of an article in the context of firearms as when "there is proximity to the article together with indicia of control." *Hill*, 433 Mich at 470. Similarly, when analyzing whether the defendant had constructive possession of cocaine, the Court stated "[t]he essential question is whether the defendant had dominion or control over the controlled substance." *Konrad*, 449 Mich at 271.

Konrad further described the meaning of "dominion or control" in the context of a controlled substance, stating:

> In the foremost discussion of what is necessary to have dominion or control over drugs, Judge Posner explained that

> a defendant "need not have them literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them, as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody." *United States v Manzella*, 791 F2d 1263, 1266 (CA 7, 1986). [*Konrad*, 449 Mich at 271.]

In *Konrad*, the Court held that "[t]he evidence permits the conclusion that the defendant had paid for the drugs and that they were his—that is, that he had the intention and power, in the sense referred to by Judge Posner, to exercise control over them." *Id*. at 273. More recently, the United States Court of Appeals for the Sixth Circuit differentiated actual from constructive possession, explaining that "[a]ctual possession exists when an individual knowingly has direct physical control over a thing at a given time, and constructive possession exists when a person does not have physical possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others."[9] Having reviewed the meaning of possession at common law along with the relevant legal definitions and surrounding statutory context, we conclude that the term "possesses" in MCL 750.145c(4) includes both actual and constructive possession. We further conclude that a defendant constructively possesses "any child sexually abusive material" when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons.

When the term "possesses" is viewed in this light, defendants' arguments that they merely *viewed,* rather than *knowingly possessed*, child sexually abusive mate-

[9] *United States v Hunter*, 558 F3d 495, 504 (CA 6, 2009).

rial are untenable. It is undisputed that each defendant purposely operated his computer to locate websites containing child sexually abusive material and voluntarily used his credit card to purchase access to websites with depictions of such material. Upon subscribing to these websites and intentionally accessing the depictions of child sexually abusive material contained there, defendants knowingly had the power and the intention at a given time to exercise control or dominion over the contraband depictions of child sexually abusive material that appeared as either "electronic visual images" or "computer images" on their computer screens. Defendants' insistence that they merely viewed child sexually abusive material is a chimerical distinction that ignores defendants' intention and power to exercise control or dominion over the depictions of child sexually abusive material displayed on their computer screens—material that defendants sought and paid for the right to access. Indeed, the many intentional affirmative steps taken by defendants to gain access and control over child sexually abusive material belie their claims that they merely viewed the depictions.

The evidence in both cases established that defendants did more than passively view child sexually abusive material. Defendant Flick admitted that he paid by credit card to download child sexually abusive material on his computer, and numerous images of such material were found on defendant Flick's hard drive. Larry Dalman, the forensic computer analyst retained by defendant Flick, reported that each image had been deleted. Defendant Flick's admission that he downloaded child sexually abusive material, coupled with Dalman's report that images of child sexually abusive material had been deleted, sufficiently establishes that at a minimum defendant Flick knowingly had the power and the intention to exercise dominion or control

over the depictions of child sexually abusive material on his computer screen. Just as a criminal defendant cannot dispose of a controlled substance without either actually physically controlling it or having the right to control it,[10] a defendant cannot intentionally procure and subsequently dispose of a depiction of child sexually abusive material without having either actual or constructive possession. Defendant Lazarus's computer also contained child sexually abusive material that he purposely sought and paid to access. According to Joshua Edwards, multiple depictions of child sexually abusive material found on the hard drive were accessible. Regardless of whether the only remaining presence of child sexually abusive material on defendant Lazarus's computer was located in his temporary Internet files, the contraband depictions at issue are the "electronic visual images" or "computer images" on his computer screen, and not the automatically created temporary Internet files.

When defendants purposely accessed depictions of child sexually abusive material on their computer screens, each defendant knowingly had the power and the intention to exercise dominion or control over the depiction in myriad ways with a few keystrokes or mouse clicks. For example, defendants could: (1) print a hard copy of the depiction, (2) resize it, (3) internally save it to another folder on the hard drive, (4) externally save it using a CD-R or USB flash drive, (5) set the depiction as a screen saver or background theme, (6) share the depiction using a file-streaming network, (7) e-mail it, (8) post the depiction as a link on a website, (9) use the depiction to create a video or slide show, or (10) delete the depiction from the hard drive. We emphasize that a defendant knowingly having the power and the

[10] See CJI2d 12.7.

intention at a given time to exercise control or dominion over the depiction on his computer screen is similar to a defendant coming across contraband while walking down the street and taking additional intentional affirmative steps to knowingly possess it. In this regard, the Alabama Court of Criminal Appeals offered the following helpful analogy:

> "If a person walks down the street and notices an item (such as child pornography or an illegal narcotic) whose possession is prohibited, has that person committed a criminal offense if they look at the item for a sufficient amount of time to know what it is and then walks away? The obvious answer seems to be 'no.' However, if the person looks at the item long enough to know what it is, then reaches out and picks it up, holding and viewing it, and taking it with them to their home, that person has moved from merely viewing the item to knowingly possessing the item by reaching out for it and controlling it. In the same way, the defendant in this case reached out for prohibited items and, in essence, took them home."[11]

Whether the defendant initially views the contraband while walking down the street or while accessing the Internet, it is not the initial viewing that amounts to knowing possession. Rather, it is the many intentional affirmative steps taken by the defendant to gain actual physical control, or to knowingly have the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons, that distinguishes mere viewing from knowing possession. In either case, the

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[11] *Ward v State*, 994 So 2d 293, 299-300 (Ala Crim App, 2007) (citation omitted); see also *United States v Kain*, 589 F3d 945, 950 (CA 8, 2009) ("A computer user who intentionally accesses child pornography images on a web site gains actual control over the images, just as a person who intentionally browses child pornography in a print magazine 'knowingly possesses' those images, even if he later puts the magazine down without purchasing it.").

prosecution must establish that the defendant had either actual or constructive possession of child sexually abusive material.

By contrast, if a person accidentally views a depiction of child sexually abusive material on a computer screen, that person does not "knowingly possess" any child sexually abusive material in violation of MCL 750.145c(4). For example, imagine a person who purchases a ticket and sits in a theater expecting to see a critically acclaimed film, but the motion picture projectionist instead inserts a film containing child sexually abusive material. When that person views the unexpected depiction of child sexually abusive material on the theater screen, he does not "possess" child sexually abusive material because he accidentally viewed a film as a result of the actions of a rogue projectionist. Similarly, imagine a person who accesses a website where one would not expect depictions of child sexually abusive material to appear, but a depiction appears on the website as a result of computer hackers. That person did not intentionally seek out depictions of child sexually abusive material or purposely view such depictions. Rather, the unsolicited depiction appeared on the computer screen, and once that person realized the contents of the website, he undertook efforts to remove the depiction from his computer screen. Under these facts, a person does not "possess" child sexually abusive material by virtue of his accidental viewing of a contraband depiction on the Internet.[12]

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[12] Our example about accidental viewing is readily distinguishable from these consolidated cases where neither defendant claims that he accidentally accessed child sexually abusive material on the Internet. Even if defendants had made such a claim, a review of the record would dispel the validity of it. During defendant Lazarus's preliminary examination, the supervising federal agent testified that federal investigators "wanted to identify websites that were exclusively child pornography and had

IV. RESPONSE TO DISSENT

The dissent concludes that MCL 750.145c(4) should not be interpreted to authorize a trial court to bind over a defendant who admits that he intentionally accessed and purposely viewed depictions of child sexually abusive material on the Internet. We disagree with the dissent's conclusion because the Legislature drafted MCL 750.145c(4) in broad terms, criminalizing the knowing possession of "any child sexually abusive material." Our interpretation ascertains and gives effect to the legislative intent based on the words of the statute, the surrounding context, and the unique legal meaning of the term "possesses." Contrary to the dissent's analysis, we believe that the evidence in these consolidated cases provides a sufficient basis to conclude that neither district court abused its discretion in binding defendants over for trial. At trial, both defendant Flick and defendant Lazarus will have ample opportunity to develop a full factual record and dispute whether the prosecution can successfully establish the "knowing possession" of child sexually abusive material in violation of MCL 750.145c(4).

We agree with the dissent that it is important to understand the interrelated roles of the computer user and the computer in the creation and deletion of temporary Internet files. After discussing a law review note and providing select excerpts of federal agent Joshua Edwards's testimony, the dissent correctly notes that "it is the *computer*, not the user, that creates and deletes the TIFs." However, both sources upon which the dissent relies stand for a more nuanced proposition.

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exclusive child pornography content on them." The federal agent explained, "[a]nd with that then—there wouldn't be much argument in terms of the website containing, say, for instance, adult pornography or other types of pornography."

That is, a computer user engages in the volitional search for depictions of child sexually abusive material on the Internet, which causes the computer to create temporary Internet files. As the law review note explains, "[t]hese volitional searches for child pornography provide a user with access to and control over child pornography images."[13] When asked whether a computer user would have to take "some proactive measure" before temporary Internet files containing images of child sexually abusive material would appear on a computer hard drive, Edwards responded, "[y]es, someone would have had to put them on the hard drive." Therefore, the dissent's sources clarify that the creation and deletion of temporary Internet files by a computer depends on the volitional actions taken by the computer user.

Finally, the dissent asserts that our constructive possession analysis creates "unnecessary confusion." In fact, the dissent manufactures this confusion by conflating our preliminary review of the legal definition of the undefined term "possesses" in Black's Law Dictionary (7th ed) with our subsequent discussion of the adverb "knowingly." When read in context, there is no confusion. We have carefully reviewed the meaning of the term "possesses" in the context of MCL 750.145c(4), in legal dictionaries, and in our criminal jurisprudence to conclude that the term "possesses" refers to both actual and constructive possession. On the basis of the established meaning of construc-

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[13] Note, *Possession of child pornography: Should you be convicted when the computer cache does the saving for you?*, 60 Fla L R 1205, 1206 (2008). The note further explains that although viewing a depiction of child sexually abusive material on a computer screen may seem like window-shopping rather than possession, "surfing the Internet involves significant interaction and exchange of information between a user's computer and the web servers visited. Furthermore, the user retains a significant level of control over the information on the computer." *Id*. at 1207.

tive possession in Michigan caselaw, we hold that a defendant constructively possesses child sexually abusive material when he knowingly has the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons. Because our holding is unambiguous and entirely consistent with existing caselaw, we reject the dissent's efforts to create confusion about our analysis where none exists.

V. CONCLUSION

The Internet has become the child pornographer's medium of choice. It strains credibility to think that the Legislature intended the provision at issue—designed to protect children from sexual abuse—to preclude the prosecution of individuals who intentionally access and purposely view depictions of child sexually abusive material on the Internet. A statute outlawing the knowing possession of "*any* child sexually abusive material" is consistent with the societal desire to protect children by preventing the dissemination of child pornography to an audience with the power and the intention to exercise dominion or control over such contraband depictions. Our interpretation supports the statute's purpose in a manner consistent with the statutory language.

The district courts did not err in binding defendants over for trial. Both defendants intentionally accessed and purposely viewed child sexually abusive material on the Internet. When the "electronic visual image" or "computer image" of such material was displayed on each defendant's computer screen, he knowingly had the power and the intention to exercise dominion or control over the depiction displayed. Accordingly, in

each case, we affirm the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

WEAVER (except for part IV), YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

CORRIGAN, J. (*concurring*). I write separately to explain that I would also address the second issue on which this Court granted leave to appeal: whether the presence of temporary Internet files containing depictions of child sexually abusive material may amount to "knowing possession" of child sexually abusive material or may be circumstantial evidence that the defendant knowingly possessed such material in the past.[1] I acknowledge that the issue is not decisive in either of these consolidated cases. However, I offer my analysis because our courts will continue grappling with this emerging issue as long as the Internet remains the child pornographer's medium of choice. Accordingly, I would hold that the presence of temporary Internet files containing depictions of child sexually abusive material may constitute circumstantial evidence that such material previously was displayed on the defendant's computer screen.

The parties posit straightforward arguments regarding the evidentiary value of temporary Internet files containing depictions of child sexually abusive material on a computer hard drive. Defendants assert that the presence of child sexually abusive material in temporary Internet files cannot establish sufficient evidence of knowing possession. According to defendants, the prosecutor must show "something more" to establish knowing possession. Defendants contend that the ne-

[1] 483 Mich 1024 (2009).

cessity of "something more" is consistent with the Court of Appeals decision in *People v Girard*, 269 Mich App 15; 709 NW2d 229 (2005). The prosecutor responds that the presence of child sexually abusive material in temporary Internet files can establish knowing possession if the defendant has actual knowledge that the depictions are stored in this manner. Alternatively, the prosecutor asserts that depictions in temporary Internet files are circumstantial evidence that a person previously viewed child sexually abusive material on his computer.

I agree with defendants and the prosecutor that the mere presence of child sexually abusive material in temporary Internet files is not conclusive evidence of knowing possession unless other direct or circumstantial evidence establishes that the defendant knowingly had the power and the intention to exercise dominion or control at a given time over the depictions stored in temporary Internet files. However, I discern no cogent reason to bar or disregard proof of the presence of temporary Internet files containing child sexually abusive material on a computer hard drive. It is one potential source of relevant circumstantial evidence that the defendant knowingly possessed such material in the past.

To establish a violation of MCL 750.145c(4), a prosecutor must prove that a defendant knowingly possessed child sexually abusive material beyond a reasonable doubt. "Possession may be proven by circumstantial as well as direct evidence." *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). "The question of possession is factual and is to be answered by the jury." *Id*. Ordinarily, "circumstantial evidence and reasonable inferences may be sufficient to prove the elements of a crime." *People v Tanner*, 469 Mich 437, 444 n 6; 671 NW2d 728 (2003). "It

is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Insofar as defendants argue that the presence of temporary Internet files is not persuasive evidence of knowing possession without "something more," defendants mistakenly conflate the weight to be assigned such evidence with its relevance. If the presence of temporary Internet files containing child sexually abusive material is "relevant evidence,"[2] the finder of fact should be able to consider it in determining whether the prosecutor established the knowing possession of child sexually abusive material.[3] Defendants are free to dispute whether the evidence is reliable or whether the contraband depictions were, in fact, knowingly possessed. My analysis does nothing to diminish the prosecutor's burden to prove the case beyond a reasonable doubt. Therefore, I would hold that the presence of child sexually abusive material in temporary Internet files may constitute circumstantial evidence that a defendant knowingly possessed the "electronic visual image" or "computer image" displayed on his computer screen in violation of MCL 750.145c(4).

Additionally, I would conclude that defendants overstate the import of the Court of Appeals decision in *Girard*. It is true that *Girard* stated that "[a]s discussed below, the prosecution had to show more than just the

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[2] See MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

[3] See MRE 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.").

presence of child sexually abusive material in a temporary Internet file or a computer recycle bin to prove that defendant knowingly possessed the material." *Girard*, 269 Mich App at 20. However, *Girard* declined to continue its discussion, observing:

> *We need not address whether the mere presence of a document or image in a temporary Internet file or in the computer recycle bin would be sufficient to prove knowing possession beyond a reasonable doubt* because the evidence adduced below, viewed in a light most favorable to the prosecution, showed that defendant's possession reached beyond such circumstances. Defendant's wife and the complainant testified that they had seen defendant looking at images of adolescents on his computer screen for extended periods, including during the course of engaging in sexual acts. Furthermore, defendant's friend testified that defendant had e-mailed pictures of nude children to him. [*Id*. at 23.]

Because the Court of Appeals explicitly bypassed the issue whether the presence of a document in a temporary Internet file or computer recycle bin constituted knowing possession, I think that defendants misread *Girard* as mandating that a prosecutor show "something more" to prove knowing possession beyond a reasonable doubt.

Consequently, I would further hold that the presence of temporary Internet files containing depictions of child sexually abusive material may be circumstantial evidence that an "electronic visual image" or "computer image" of such material previously was displayed on a defendant's computer screen.

YOUNG, J., concurred with CORRIGAN, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclu-

sion that intentionally accessing and purposely viewing prohibited images on the Internet amounts to knowing possession of those images under MCL 750.145c(4). Accordingly, I would affirm the circuit court's decision to grant defendant Douglas Lazarus's motion to quash, and I would remand defendant Steven Flick's case to the circuit court for further proceedings consistent with this opinion.

I. ADDITIONAL FACTUAL BACKGROUND

It is important to understand the significance of the presence of temporary Internet files (TIFs) and deleted TIFs on a computer. When a computer user visits a website, the computer performs two functions simultaneously: (1) it opens and displays the website, and (2) without any indication to the user, it automatically creates TIFs containing copies of the images and other data that the computer must download in order to display the website. Note, *Possession of child pornography: Should you be convicted when the computer cache does the saving for you?*, 60 Fla L R 1205, 1213-1214 (2008). As the prosecution's expert, Detective Joshua Edwards, testified, computers are set by default to automatically delete TIFs after a certain number of days. See also *id*.[1] Thus, unless a user is savvy enough to

[1] Detective Edwards agreed that "computers come from the factory" with default settings to "take images from web pages to the temporary Internet file" and that a user is "not in control of what [the user's] computer takes an image of and sends to [the] temporary Internet file." He further testified that a computer user does not have to do something proactive for a temporary Internet file to end up in deleted, or unallocated, space because "[t]he settings can be set to delete those files every 30 days, every 180 days, and that's—the computer can delete those automatically for you." He explained that these default settings can be changed and altered, but he also agreed that there "are always default settings" for the temporary Internet files to be deleted. As noted by the majority, Detective Edwards did testify that some "proactive measure"

be aware of this process and change the computer's default settings, TIFs are constantly being saved to the computer's hard drive when a user visits a website, and later deleted, without any action from or indication to the user.[2] Further, as Detective Edwards testified, both TIFs and the deleted TIFs may remain on the computer's hard drive and can be accessed by someone with expertise on how to do so. But the average computer user does not know how to access TIFs or the deleted TIFs.[3] *Id.* See also *United States v Kuchinski*, 469 F3d 853, 862 (CA 9, 2006). Therefore, it cannot necessarily be inferred from the presence of TIFs on a computer that the computer user knew of the TIFs' presence or manually accessed the TIFs or intended to do so. Further, it also cannot necessarily be inferred from the presence of deleted TIFs on a computer that the computer user manually deleted the files.

The majority misleadingly characterizes some of the relevant facts in these cases to buttress its statement that the defendants did more than "passively view" prohibited images.[4] As noted by the majority, both

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would have to be taken for a temporary Internet file to be on a computer's hard drive, but he did not specify what that proactive measure is. Given that he also testified that computers "come from the factory" with default settings to automatically create temporary Internet files, it appears that the "proactive measure" he was referencing was viewing a website, not actively saving TIFs to a computer.

[2] Thus, although a computer user may intentionally access and view a website, under a computer's default settings, it is the *computer*, not the user, that creates and deletes the TIFs.

[3] Even after a file has been "deleted," it may be accessible to a user with the proper software and expertise. This is because "deleted" files remain in a computer's unallocated space until they are replaced with another file. Detective Edwards analogized this to a television show recorded on VHS tape that a person has decided not to keep but has not yet taped over.

[4] It appears that these factual errors would not affect the majority's ultimate conclusion because the majority concludes that purposely ac-

defendants admitted that they had intentionally paid for access to child pornography websites and knowingly viewed prohibited images online at those websites. TIFs of prohibited images and "deleted" prohibited images were found on their computer hard drives.[5] The majority also implies, however, that defendant Flick actively deleted prohibited images and relies on this to support its argument that defendant Flick did more than passively view prohibited images.[6] Contrary to this assertion, there is no evidence in the record before this Court that either defendant was aware of the TIFs, had accessed the TIFs, or had manually or intentionally deleted TIFs or any other files with prohibited images. Additionally, while there was no allegation that defendant Lazarus had knowingly saved any prohibited images to his computer or accessed TIFs while they were on his hard drive, the majority argues that defendant Lazarus did more than "passively view" images because someone could have accessed the TIFs on his hard drive that his computer automatically created. But, as discussed above, the average computer user is not aware of

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cessing and viewing prohibited images on a computer screen is, by itself, sufficient to establish possession. I am unsure, however, why the majority finds it necessary to artificially buttress its analysis with misleading factual characterizations if it is truly concluding that knowingly accessing and intentionally viewing images is sufficient to establish possession.

[5] Although the majority discusses deleted images only in the context of defendant Flick, Detective Edwards testified that defendant Lazarus also had prohibited images on his "unallocated," i.e., deleted, space.

[6] For example, the majority opinion states, "Defendant Flick's admission that he downloaded child sexually abusive material, coupled with [the expert's] report that images of child sexually abusive material had been deleted, sufficiently establishes that at a minimum defendant Flick knowingly had the power and the intention to exercise dominion or control" over the prohibited images, and "a defendant cannot intentionally procure and subsequently dispose of a depiction of child sexually abusive material without having either actual or constructive possession."

TIFs and cannot access them, and there was no evidence that defendant Lazarus had done so or knew how to do so. Thus, I do not think the fact that TIFs are theoretically accessible provides any support for the statement that defendant Lazarus did more than "passively view" prohibited images.

Finally, I note that while the prosecution alleged that defendant Flick told a police officer that he had "downloaded" prohibited images, it is unclear from the record before this Court whether defendant Flick admitted that he had actively saved images to his hard drive. Alternatively, he may have merely admitted that his computer had transferred images to his screen for viewing without his actively saving any images.[7] At best, however, the facts pertaining to defendant Flick are identical to defendant Lazarus's, given that he admitted intentionally accessing and viewing prohibited images on websites.

II. LEGAL ANALYSIS

In addition to disagreeing with the majority's factual assertions, I also disagree with some of its legal analy-

[7] The confusion arises because the term download has multiple meanings. It is often used to refer to actively saving a copy of a file to a computer's hard drive, see Note, *Possession of child pornography*, *supra* at 1211, but, as the prosecution acknowledged in its brief to this Court, it also can more generally refer to sending files electronically from one computer to another, as is necessary to view a website. It is unclear which meaning defendant intended in his statement because, during the hearing on the motion to quash, defendant Flick's counsel stated, without contradiction from the prosecution, that defendant had never e-mailed, printed, *or saved* any prohibited images to his computer. Consistent with this, in response to the motion to quash, the prosecution focused on the argument that paying to view images is sufficient for possession, stating that "[j]ust because the individual chooses not to save the images does not mean that they were not possessed by the purchaser at the time of purchase."

sis. Under MCL 750.145c(4), it is a felony for a person to knowingly possess child sexually abusive material. In these cases, it is undisputed that defendants Flick and Lazarus knowingly accessed and viewed child sexually abusive material on their computer screens and that their computer hard drives contained TIFs of child sexually abusive material. The legal question before the Court is therefore whether intentionally accessing and knowingly viewing prohibited images on the Internet constitutes "possession" of these images. The majority holds that it does. I disagree.[8]

As correctly noted by the majority, because "possess" is a word with a unique legal meaning, it should be interpreted according to its meaning under the common law. *Dennis v Robbins Funeral Home*, 428 Mich 698, 703; 411 NW2d 156 (1987). As further noted by the majority, this Court has held that there are two types of possession: actual and constructive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). Given this well-established law, I also agree with the majority that either actual or constructive possession of prohibited images would be sufficient to satisfy MCL 750.145c(4). It is clear that viewing images on a website does not constitute actual, or physical, possession, and thus the issue is whether intentionally accessing and knowingly viewing prohibited images amounts to constructive possession.

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[8] Justice CORRIGAN's concurrence also addresses whether the presence of TIFs on a computer's hard drive, alone, establishes "knowing possession" and whether TIFs are circumstantial evidence of previous possession. As to the first issue, I generally agree that the presence of TIFs on a hard drive, alone, does not establish *knowing* possession, given that computers automatically create and delete TIFs, and, as discussed above, the average computer user is unaware of TIFs or how to exercise dominion and control over them. As to the second issue, it is unnecessary to reach it in these cases.

I generally agree with the majority that, under Michigan law, in order to constitute constructive possession, an ability to exercise dominion and control, without an actual exercise of dominion and control, is sufficient only when the person has the power *and the intent* to exercise dominion or control. See *People v Konrad*, 449 Mich 263, 273; 536 NW2d 517 (1995), concluding that the defendant constructively possessed drugs because "he had the intention and power . . . to exercise control over them," and *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989), stating that "a person has constructive possession if he 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons,' " quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963).[9] I disagree with the majority, however, on what constitutes constructive possession in this context.

Specifically, I disagree with the majority's application of the power and intention standard to this case. The majority equates exercising dominion and control, in this context, with a list of actions that a person might take to actively interact with the viewed image, includ-

[9] The majority opinion generally agrees with this statement, and cites *Konrad*, *Hill*, and *Burch*, but, confusingly, it also states at one point that "a person who has the power to exercise a degree of dominion or control over 'any child sexually abusive material' is sufficiently culpable to fall within the scope of MCL 750.145c(4)." The majority states that this statement is a "preliminary review" of the meaning of "possess" and is not intended to be the final standard. This statement could be read, however, to mean that the power to exercise a degree of dominion and control, without the intent, is sufficient to satisfy the statute because the majority states that the power, itself, is sufficient to "fall within the scope of MCL 750.145c(4)." Despite the unnecessary confusion created by this statement, I will take the majority at its word. I urge the lower courts to do the same and assume that the majority is holding that the power *and* the intention to exercise dominion and control are required to satisfy the statute.

ing printing, resizing, saving, sharing, posting, e-mailing, or deleting it. It therefore concludes that these defendants constructively possessed prohibited images because they intentionally accessed and viewed the images on a website and, at that point, "knowingly had the power and the intention to exercise dominion or control" over the pictures because they could print, save, e-mail, etc., the images. In other words, the majority does not argue that accessing and viewing the prohibited images constituted an actual exercise of dominion or control. Instead, it argues that because defendants intentionally accessed and viewed the images, defendants must have also had the power *and intention* to take an additional action to exercise dominion and control, such as saving or e-mailing the images.

This argument has one fatal flaw: while defendants clearly had the *power* to exercise dominion and control over the prohibited images, the majority fails to explain what support there is for its conclusion that defendants *intended* to do so. There is no evidence to support this conclusion, at least with regard to defendant Lazarus.[10] Thus, the majority is apparently holding that an intention to exercise dominion and control over prohibited images on a computer screen can be inferred whenever a defendant simply has the power to do so. I do not think that this is a reasonable inference, as it is a giant, and clearly erroneous, logical leap to assume that every time a person intentionally accesses and views images

[10] Defendant Lazarus admitted intentionally paying to access websites with prohibited images and knowingly viewing prohibited images, but there are no allegations that he intended to save, print, e-mail, enlarge or otherwise exercise dominion and control over the prohibited images. As explained above, the facts with regard to defendant Flick are less clear. While it would be sufficient to establish that he exercised dominion and control if he did save prohibited images to his hard drive, if he did not, then the facts of his case are the equivalent of defendant Lazarus's.

on a website, that person *intends* to save, print, e-mail, or otherwise exercise dominion and control over those images. Indeed, one could imagine many reasons that a person might view an image on a screen but not intend to save, print, e-mail, or otherwise interact with the image.[11]

Moreover, the foreign authority that the majority offers in support of its conclusion that knowingly accessing and viewing prohibited images is knowing possession is inapposite. The majority quotes *Ward v State*, 994 So 2d 293, 299-300 (Ala Crim App, 2007), an Alabama Court of Criminal Appeals case that concluded that intentionally accessing and viewing an image on a website constitutes constructive possession. The Alabama Court analogized the situation to knowingly viewing drugs on the street and then intentionally picking them up and carrying them home. *Id.* The Alabama case is irrelevant to Michigan law, however, because Alabama has a different, and much broader, standard for constructive possession: whether the person had the *ability* to exercise dominion and control. *Id.* at 301-302. If Alabama law governed in these cases, I would agree that defendants had constructive possession of the images because they had the ability to exercise dominion and control over them. As discussed, however, the definition of constructive possession in Michigan is stricter and requires not merely the ability to exercise dominion and control but also the *power and the intention* to do so. The majority's reliance on this case demonstrates its refusal to acknowledge the difference

[11] For example, a person could want to avoid taking up space on the computer's hard drive or having other household members see the images. Alternatively, as often happens when a person visits a website, the defendant might be content to view the images as they are presented on the website without any additional action.

between having the ability, or the power, to exercise dominion and control and having the power *and the intention* to do so.

Furthermore, the analogy from the Alabama case on which the majority relies is wholly irrelevant to these cases. The majority claims that the facts of these cases are comparable to a person viewing drugs and then carrying them home, because both demonstrate "the many intentional affirmative steps taken by the defendant to gain actual physical control, or to knowingly have the power and the intention at a given time to exercise dominion or control . . . ." When a person physically carries drugs home, however, the person unquestionably has *actual*, physical possession of the items. Thus, the inquiry is very different from the one required by the facts of these cases, which involve not actual possession but rather constructive possession.

In contrast, as the Prosecuting Attorneys Association of Michigan amicus curiae brief concedes, the federal courts of appeals have generally not held that accessing and viewing child pornography, even with the presence of TIFs, could constitute knowing possession when interpreting equivalent language in the federal statute.[12] Only one circuit has been directly confronted with the question whether intentionally viewing and accessing images constituted possession, and it held that a defendant did not possess images merely because he viewed them on a screen and TIFs were consequently found on his hard drive. *Kuchinski*, 469 F3d at

[12] Like Michigan's statute, the federal statute used to prohibit the knowing possession of child pornography. The statute was amended in 2008, however, and it now prohibits both knowingly possessing prohibited images and knowingly accessing them "with intent to view . . . ." 18 USC 2252A(a)(5). The federal courts of appeals interpretation of the statute before amendment, however, is still relevant.

861-863.[13] Further, while most other federal courts of appeals have not addressed the exact issue presented in this case, they have consistently found intentionally accessing and knowingly viewing images on the Internet, and/or the presence of TIFs, to rise to the level of possession only when some other factor demonstrates that the defendant *actually exercised dominion or control* over the images, such as evidence that the defendant manually saved or deleted the images to or from his computer. See, e.g., *United States v Romm*, 455 F3d 990, 998 (CA 9, 2006), stating that "[i]n the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it," and holding that the defendant had exercised dominion and control where he admitted that he viewed and enlarged images, saved them to his hard drive, and then deleted them.[14]

In summary, with regard to defendant Lazarus, I would hold that there was no evidence supporting a

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[13] A case cited by the majority opinion, *United States v Kain*, 589 F3d 945, 950 (CA 8, 2009), did state that "[a] computer user who intentionally accesses child pornography images on a web site gains actual control over the images," but its analysis has limited utility in this context because the court was interpreting the amended version of 18 USC 2252A(a)(5) discussed in the preceding footnote, and, regardless, the defendant in that case had prohibited images in both TIFs and files that had been manually saved to his computer.

[14] See, also, *United States v Miller*, 527 F3d 54, 66-69 (CA 3, 2008) (the defendant saved files to a zip disk); *United States v White*, 506 F3d 635, 642 (CA 8, 2007) (the defendant saved images to a computer disk, admitted that he had images on his computer, and gave the agent step-by-step instructions on how to access them); *United States v Irving*, 452 F3d 110, 122 (CA 2, 2006) (images were saved in the "My Documents" folder); *United States v Bass*, 411 F3d 1198, 1201-1202 (CA 10, 2005) (the defendant purchased special software to attempt to delete TIFs of child pornography from the computer); *United States v Tucker*, 305 F3d 1193, 1198-1199, 1204 (CA 10, 2002) (the defendant intentionally deleted TIF files).

charge of knowing possession under MCL 750.145c(4) because there is no evidence that he actually exercised, or intended to exercise, dominion and control over the prohibited images he was viewing. With regard to defendant Flick, I would remand to the trial court to reconsider whether defendant's admission is admissible, and, if it is, whether it is evidence that defendant Flick actually exercised, or intended to exercise, control and dominion over prohibited images.[15]

III. CONCLUSION

I dissent from the majority's conclusion that defendants knowingly possessed prohibited images merely by intentionally accessing and purposely viewing those images on the Internet. Accordingly, I would affirm the district court's ruling that defendant Lazarus could not be bound over for trial, and I would remand defendant Flick's case for further proceedings consistent with this opinion.

KELLY, C.J., and HATHAWAY, J., concurred with CAVANAGH, J.

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[15] In the trial court, defendant Flick argued that his admission was inadmissible because there was no corpus delicti absent the statement. The trial court disagreed because, like the majority of this Court, it determined that paying for and viewing a prohibited image was sufficient to establish possession. Given my differing view of what constitutes "possession," however, I would remand to the trial court to reconsider this issue.

TKACHIK v MANDEVILLE

Docket No. 138460. Argued January 12, 2010 (Calendar No. 2). Decided July 27, 2010.

Janet E. Mandeville executed a trust and a will that expressly indicated her intent to give no property to her husband, Frank Mandeville, Jr., who had been willfully absent for the 18 months before her death. The will appointed her sister, Susan Tkachik, as personal representative. Following Janet Mandeville's death, Frank Mandeville petitioned the Macomb County Probate Court for probate and sought to set aside the will and trust. The court, Pamela G. O'Sullivan, J., granted Tkachik's motion for summary disposition on the ground that Mandeville had been absent for more than a year before his wife's death and was not considered a surviving spouse under MCL 700.2801(2)(e)(*i*). Tkachik subsequently filed a complaint in the probate court, seeking a determination that the court's ruling that Mandeville was not a surviving spouse terminated the Mandevilles' tenancies by the entirety in two properties. The court concluded, however, that its ruling on the surviving-spouse issue had not terminated those tenancies and that fee-simple title to the properties had vested in Mandeville on his wife's death. Tkachik amended her complaint to seek contribution for various property-related expenses that the decedent had paid during her spouse's absence. The court granted Mandeville summary disposition. Tkachik sought leave to appeal, which the Court of Appeals denied. The Supreme Court, on reconsideration of Tkachik's application for leave to appeal in that court, remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 898 (2007). The Court of Appeals, MURPHY, P.J., and K. F. KELLY and DONOFRIO, JJ., affirmed, holding that if a married couple owns property as tenants by the entirety, when one spouse dies, the decedent's estate cannot claim contribution from the surviving spouse. 282 Mich App 364 (2009). The Supreme Court granted plaintiff's application for leave to appeal. 485 Mich 853 (2009).

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

The equitable doctrine of contribution may be applied between co-tenants in a tenancy by the entirety to prevent unjust enrichment in cases where the particular circumstances require it, including where one spouse has willfully abandoned the other before that spouse's death and, thus, is not a "surviving spouse" under the Estates and Protected Individuals Code.

1. In this case, equity requires defendant to contribute his share of the property maintenance costs incurred by the decedent because, but for her payments, there would be no property for defendant to receive. Considering defendant's willful abandonment of the decedent, which left her responsible for making the payments necessary to retain the properties, allowing him to retain the money that made his ownership possible would be unjust.

2. Defendant's argument that a finding of unjust enrichment would divide marital property and undermine the protective purpose of the tenancy by the entirety is based on a misunderstanding of the relief plaintiff requests. Plaintiff is seeking contribution for the past monetary expenses that the decedent incurred to maintain the properties while defendant was willfully absent. Granting this relief will not divide the marital real properties, which defendant continues to own in fee simple absolute.

3. Equity allows complete justice to be done by adapting its judgments to the special circumstances of the case. Here, the decedent spouse took sole responsibility for the property maintenance payments for the last 18 months of her life, during which time defendant remained willfully absent despite being aware that she was battling cancer; the decedent had disinherited defendant in her will; the decedent sought diligently to divest defendant of his interest in the real properties before she died; and defendant was deemed a non-surviving spouse under MCL 700.2801(2)(e)(*i*). Under the circumstances of this case, it is appropriate to apply the doctrine of contribution between tenants by the entirety, and plaintiff is entitled to such contribution.

Reversed and remanded to the probate court for further proceedings.

Justice WEAVER, joined by Justice HATHAWAY, dissenting, agreed with a portion of Justice YOUNG's dissent and stated that the majority's unrestrained decision was a huge mistake.

Justice YOUNG, dissenting, would have held that plaintiff cannot present a legal or equitable claim that would allow the decedent's estate to recover contribution from defendant because Michigan law does not recognize a right of contribution among tenants by

the entirety and defendant was not unjustly enriched when, by operation of law, he took sole ownership of marital property previously held as a tenancy by the entirety with the decedent.

TENANTS BY THE ENTIRETY — EQUITABLE CONTRIBUTION — DECEDENTS' ESTATES.

A court may apply the equitable doctrine of contribution to a tenant by the entirety to prevent unjust enrichment.

Penzien Hirzel, PLLC (by *Charles M. Penzien*), for plaintiff.

Cashen & Strehl (by *William K. Cashen*) for defendant.

Amicus Curiae:

Judith A. Curtis for the Family Law Section of the State Bar of Michigan

MARKMAN, J. This case presents a relatively narrow question, one that is accessible to both the lay and legal reader: whether a husband who has abandoned his wife for the final 18 months of her life while she was battling cancer, who had no personal contact with her during this period, and who did not even attend her funeral, should have to contribute his share of the mortgage, tax, and insurance payments that the wife alone paid during her final months on real properties that they owned together. In legal terms, the question becomes whether the doctrine of contribution can be applied between co-tenants in a tenancy by the entirety where one spouse has willfully abandoned the other before that spouse's death and, thus, is not a "surviving spouse." See MCL 700.2801(2)(e)(*i*). In either iteration of the question before this Court, the core issue is the same, and the inequities in this case are inescapable. Accordingly, the resolution of this case turns exclusively on whether the firmly established doctrine of contribution can be appropriately applied on these facts. Be-

cause there is no adequate remedy at law for the harm plaintiff alleges, because no other governing legal or equitable principle precludes this remedy, and because the relief plaintiff seeks—when properly understood—will not upset the common law of this state, we conclude that the equitable doctrine of contribution can be appropriately applied in this context. Therefore, we reverse the judgment of the Court of Appeals and remand to the probate court for proceedings not inconsistent with this opinion.

I. FACTS AND HISTORY

Janet and Frank Mandeville were married in 1975 and remained so until Janet died on July 13, 2002, after a battle with breast cancer. The Mandevilles acquired two properties during their marriage. In 1984, they acquired a marital residence in Macomb County, and, in 1987, they acquired a parcel of property in Ogemaw County. They owned both properties as tenants by the entirety. Accordingly, by the right of survivorship inherent in a tenancy by the entirety, the marital real properties passed to Frank upon Janet's death. Without question, he now owns them in fee simple absolute.

In the last decade of their marriage, Frank Mandeville was often out of the country for extended periods. Specifically, he was absent for the 18 months preceding Janet's death. During this period, Frank did not attempt to call Janet or otherwise communicate with her, even though, as he acknowledged, he knew that she was seriously ill. He did not attend her funeral. In Frank's absence, Janet maintained the properties and was responsible for paying the taxes, insurance, and mortgage. In Frank's absence, Janet was cared for by her sister, Susan Tkachik.

In the months before she died, Janet executed a living trust and final will that disinherited her husband and left everything to her mother, Wanda Tkachik. Janet's will stated: "It is my specific intent to give nothing to my husband under this Trust Agreement. If I am survived by my husband, for the purposes of this Trust Agreement, he will be deemed to have predeceased me." In addition, the will named Susan Tkachik (hereafter Tkachik) the personal representative of the estate. Tkachik now brings this action in that capacity. Moreover, consistent with Janet's unequivocal intent to disinherit her husband in her will, before she died, Janet also transferred her retirement benefits so that they would not pass to Frank, and she unsuccessfully attempted to defeat the right of survivorship by transferring her interest in the marital properties by quitclaim deed.

Several months after Janet's death, Frank Mandeville filed a petition for probate as well as a complaint seeking to set aside Janet's will and trust. Tkachik, acting as the personal representative of her deceased sister's estate, moved for summary disposition, arguing that Frank Mandeville should not be considered a surviving spouse because he had been willfully absent from the marriage for more than a year.[1] Applying the clear language of MCL 700.2801(2), the probate court

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[1] MCL 700.2801(2) provides, in relevant part:

> For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.

ruled that Frank Mandeville was not a "surviving spouse" and granted plaintiff's motion in October 2003.

In November 2003, Tkachik filed suit on behalf of the estate in probate court to effectuate her sister's intent to disinherit Frank Mandeville completely. Plaintiff sought a determination that, because defendant was not a "surviving spouse," the Mandevilles should be considered tenants in common with regard to their real properties and defendant should not obtain fee ownership of the properties. The probate court denied plaintiff's request, reasoning that the surviving spouse statute is limited in its application and does not destroy a tenancy by the entirety. Therefore, it properly held that upon Janet's death, fee-simple title to the properties had vested in defendant.

Plaintiff amended her complaint to seek contribution from defendant for the monetary expenses Janet incurred in maintaining the properties before her death. The probate court granted defendant's motion for summary disposition on the estate's contribution claim. Plaintiff filed a delayed application for leave to appeal in the Court of Appeals, which was denied for lack of merit in the grounds presented. *Tkachik v Mandeville*, unpublished order of the Court of Appeals, entered November 16, 2006 (Docket No. 270253). Initially, plaintiff's application for leave to appeal in this Court was also denied. *Tkachik v Mandeville*, 477 Mich 1057 (2007). However, this Court granted plaintiff's motion for reconsideration, and, on reconsideration and in lieu of granting leave to appeal, remanded the case to the

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Parts 1 through 4 of Article II of the Estates and Protected Individuals Code (EPIC), MCL 700.2101 *et seq*., relate to: (1) intestate succession, (2) spousal elections, (3) spouses or children not provided for in the will, and (4) exempt property and allowances. MCL 700.3203 governs priority among persons seeking appointment as a personal representative.

Court of Appeals as on leave granted to consider "whether a contribution claim against the defendant, based on an unjust enrichment theory, is appropriate under the facts of the case." *Tkachik v Mandeville*, 480 Mich 898 (2007).[2]

On remand, the Court of Appeals affirmed the probate court's decision. *Tkachik v Mandeville*, 282 Mich App 364, 366; 764 NW2d 318 (2009). The panel reasoned that defendant had not been unjustly enriched because he had only received "that which was given to him by operation of law, without any obligation . . . ." *Id.* at 372. Moreover, the panel emphasized the fact that Janet was deceased, and stated that it could not enter a "posthumous divorce" based on "perceived inequities" because "Michigan law does not recognize such an action." *Id.* at 373, 378. Plaintiff again appealed in this Court. We granted plaintiff's application for leave to appeal, directing the parties to address the following issue:

> [W]hether, when a husband has abandoned his wife for the year and a half preceding her death, and the wife alone has made mortgage, tax, and insurance payments on property held as tenants by the entirety, the wife (or her estate) may receive contribution for the husband's share of these payments. [*Tkachik v Mandeville*, 485 Mich 853 (2009).]

II. STANDARD OF REVIEW

Plaintiff's claim sounds in equity, and requires this Court to consider whether the common law doctrine of contribution is appropriately applied in this context. We hear and consider equity cases de novo on the record on

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[2] The order cited three cases that the parties were directed to consider: *Turner v Turner*, 147 Md App 350; 809 A2d 18 (2002); *Crawford v Crawford*, 293 Md 307; 443 A2d 599 (1982); and *Cagan v Cagan*, 56 Misc 2d 1045; 291 NYS2d 211 (NY Sup Ct, 1968).

appeal. *Biske v City of Troy*, 381 Mich 611, 613; 166 NW2d 453 (1969). The interpretation and applicability of a common-law doctrine is also a question that is reviewed de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). " '[T]he granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.' " *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947) (citation omitted).

III. ANALYSIS

Plaintiff asks this Court to exercise its equitable powers. Therefore, this case requires an understanding of the principles that guide this Court in determining whether to provide equitable relief, a determination that, in this case, also requires consideration of the law governing tenancy by the entirety, the doctrine of contribution, and claims for unjust enrichment.

A. EQUITABLE PRINCIPLES

In its sound discretion, this Court may grant equitable relief "[w]here a legal remedy is not available[.]" *Powers v Fisher*, 279 Mich 442, 448; 272 NW 737 (1937). "A remedy at law, in order to preclude a suit in equity, must be complete and ample, and not doubtful and uncertain . . . ." *Edsell v Briggs*, 20 Mich 429, 433 (1870). Furthermore, to preclude a suit in equity, a remedy at law, "both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . ." *Powers*, 279 Mich at 447, citing 1 Pomeroy, Equity Jurisprudence (3d ed), § 280. Equity jurispru-

dence " 'mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life.' " *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959) (citation omitted). While legislative action that provides an adequate remedy by statute precludes equitable relief, the *absence* of such action does not. This is so because "[e]very equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." 30A CJS, Equity, § 93, at 289 (1992). Equity allows "complete justice" to be done in a case by "adapt[ing] its judgment[s] to the special circumstances of the case." 27A Am Jur 2d, Equity, § 2, at 520-521.

B. TENANCY BY THE ENTIRETY

A tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons. *Field v Steiner*, 250 Mich 469, 477; 231 NW 109 (1930). In *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936), this Court explained that a defining incident of this tenancy under Michigan law is "that one tenant by the entirety has no interest separable from that of the other" and "has nothing to convey or mortgage or to which he alone can attach a lien." Thus, when title to real estate is vested in a husband and wife by the entirety, separate alienation by one spouse only is barred. *Id*. Furthermore, MCL 557.71 states, "a husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety."

In addition to these rights, both spouses have a right of survivorship, meaning that, in the event that one spouse dies, the remaining spouse automatically owns

the entire property. MCL 700.2901(2)(g); *Rogers v Rogers*, 136 Mich App 125, 134; 356 NW2d 288 (1984). Thus, entireties properties are not part of a decedent spouse's estate, and the law of descent and distribution does not apply to property passing to the survivor. *Id*. at 134-135.

C. CONTRIBUTION AND UNJUST ENRICHMENT

Contribution is an equitable remedy based on principles of natural justice. *Lorimer v Julius Knack Coal Co*, 246 Mich 214, 217; 224 NW 362 (1929). In *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975), this Court explained:

> The general rule of contribution is that one who is compelled to pay or satisfy the whole *or to bear more than his aliquot share of the common burden or obligation*, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. [Emphasis added.]

This Court has applied the doctrine of contribution between co-contractors. *Comstock v Potter*, 191 Mich 629, 637; 158 NW 102 (1916) ("[O]ne who has paid more than his share of the joint obligation may recover contribution from his co-contractors."). And, in *Strohm v Koepke*, 352 Mich 659, 662-663; 90 NW2d 495 (1958), this Court recognized the right of equitable contribution for tenants in common. *Strohm* grounded a cotenant's right to contribution "upon purely equitable considerations," explaining that "[i]t is premised upon the simple proposition that equality is equity." *Id.* at 662.

Plaintiff predicates her claim for contribution on a theory of unjust enrichment. Unjust enrichment is defined as the unjust retention of " 'money or benefits

which in justice and equity belong to another.' " *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (citation omitted). "No person is unjustly enriched unless the retention of the benefit would be unjust." *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950). *Buell* also explained: " 'One is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.' " *Id*. (citation omitted).

D. APPLICATION

In this case, we must determine: (a) whether defendant was unjustly enriched; and, if so, (b) whether the doctrine of contribution can be appropriately applied in these circumstances to prevent his unjust enrichment. After carefully considering the governing legal and equitable principles, and after meaningfully engaging with " 'the circumstances and exigencies of [this] particular case,' " as equity requires, *Youngs*, 317 Mich at 545 (citation omitted), we answer both questions in the affirmative.

1. UNJUST ENRICHMENT

Defendant argues, and the Court of Appeals and the dissents in this Court agree, that he has not been unjustly enriched because he "has only received that which was given to him by operation of law, without any obligation . . . ." *Tkachik*, 282 Mich App at 372. In support of this conclusion, the Court of Appeals relied on *Buell* for the proposition that there can be no unjust enrichment where a person comes into ownership of property that " 'law and equity give him absolutely without any obligation on his part to make restitution.' " *Buell*, 327 Mich at 56 (citation omitted). There are significant legal and

factual flaws in this argument, which we herein reject. As a threshold matter, this conclusion is based on a misreading of *Buell*, the primary authority offered in support of the conclusion that defendant has not been unjustly enriched. The Court of Appeals and the dissents fail to note what is most obvious in *Buell*, namely, that its limitation on a finding of unjust enrichment requires the consideration of both legal *and* equitable factors. Thus, even though by operation of *law* defendant received the property "absolutely," he is still unjustly enriched if he is obligated by *equity* to make restitution. *Id.* Therefore, *Buell* does not preclude a finding that defendant was unjustly enriched. Rather, its rule plainly states exactly the contrary—that a defendant may be held to have been unjustly enriched if *equity* demands that he make restitution.

On the facts of this case, we conclude that equity, and the principles of natural justice embodied therein, call on defendant Frank Mandeville to contribute his share of the property maintenance costs incurred by his wife Janet Mandeville, who bore these obligations alone in the 18 months before her death. While defendant was willfully absent from the marriage, and from the marital properties, Janet maintained the properties and incurred all the necessary expenses. In light of these facts, the Court of Appeals' and the dissents' conclusion that defendant received the properties "without any obligation" is an oversimplification that is at odds with the realities of this case. Significantly, this conclusion does not account for what *would* have happened to the properties had Janet not made the mortgage, tax, and insurance payments. Janet made those payments to preserve the undivided interest in the properties that she and her husband shared. Failure to make these mortgage and tax payments would have resulted in the loss of the properties to foreclosure. Simply put, but for

Janet's payments, *there would be no property* to pass to defendant by operation of law.[3] Considering this reality, we are unable to conclude that defendant received the properties " 'without any obligation on his part to make restitution.' " *Buell*, 327 Mich at 56 (citation omitted).

The Court of Appeals' and the dissents' contrary conclusion is also based on a misunderstanding concerning the relief plaintiff requests. The Court of Appeals determined that a finding of unjust enrichment "would subvert the protective purpose of the tenancy by the entirety, as it would permit the state to pierce the marital relationship and divide property contrary to how the parties chose to hold the property." *Tkachik*, 282 Mich App at 376. The flaw in this argument is that *plaintiff is not seeking to divide marital real property*, and the relief she *actually* seeks will not "subvert" or in any other way affect the law of tenancies by the entirety. Indeed, plaintiff is legally incompetent to divide or alter defendant's interest in the marital properties because, as the parties acknowledge, defendant already owns the properties in fee simple absolute, as they passed to him solely and absolutely upon Janet's death.[4] What plaintiff is seeking as the personal representative of Janet's estate is contribution for the past *monetary* expenses that Janet incurred in maintaining

[3] The dissents do not account for this reality in their decisions. Rather, the fact that defendant now owns the properties only because Janet preserved the couple's undivided interest and prevented foreclosure is determinedly overlooked in the dissenting opinions.

[4] In fact, not only is plaintiff legally incompetent to divide the marital real properties, Janet herself could not have unilaterally divested defendant of his interest in the properties that they held as tenants by the entirety. Thus, although Janet attempted diligently before her death to defeat the right of survivorship by transferring her interest in the properties by quitclaim deed, this deed was ineffectual in nullifying defendant's rights in the properties. While Janet's efforts have no legal significance in regards to defendant's ownership of the properties, they

the marital properties while defendant was willfully absent from Janet and the properties. Thus, the fact that the properties undisputedly passed to defendant automatically by operation of law does not defeat a finding that defendant was unjustly enriched or bar a claim for contribution. As the facts here illustrate, permitting a contribution claim in these circumstances will not interfere with well-settled principles governing property held in a tenancy by the entirety and specifically will not affect the unencumbered right of survivorship.[5] Janet and Frank Mandeville held their properties as tenants by the entirety; upon Janet's death, such properties passed to Frank solely and absolutely, at which point he owned them in fee simple absolute. The law of tenancy by the entirety, and specifically the right of survivorship, has already been given full effect in this case, a result that is unaltered when Frank is required to pay contribution to plaintiff for past monetary expenses.[6]

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do evidence her clear intentions regarding whether she wanted defendant to benefit from her preservation of the properties, for which she alone took responsibility in his absence.

[5] Justice YOUNG's dissent states that "[t]his is true only to a certain extent." *Post* at 81. In light of the reality that defendant owns the properties in fee simple absolute, I fail to see how this is anything but *completely* true. His dissent itself acknowledges that this decision "does not alter the actual ownership of the property," but then argues that this analysis "force[s] defendant to compensate the estate for the privilege of such ownership—notwithstanding the fact that *both* the law *and* the express means by which the Mandevilles themselves titled their property provide this property to Frank Mandeville with *no conditions whatsoever*." *Post* at 81 (emphasis in original). No one disputes that under the law of tenancy by the entirety, and specifically by right of survivorship, defendant took the properties without any conditions or obligations at law. The open question presented in this case, however, is whether defendant in the instant circumstances is obligated now by *equity* to contribute his share of the property maintenance payments.

[6] The analysis and conclusion are the same when the question of whether defendant is unjustly enriched is viewed through a contractual

In sum, when the applicable law is understood, and the specific circumstances of this case are evaluated in the context of a contribution claim, we conclude that defendant has been unjustly enriched by his retention of " 'money or benefits which in justice and equity belong to another.' " *McCreary*, 333 Mich at 294 (citation omitted). Defendant owns the marital properties *only because of* Janet's maintenance payments. Considering his willful abandonment of Janet, by which she alone became responsible for the properties, for defendant to retain the monies that preserved these properties and made his ownership possible would be unjust.

2. ADEQUATE REMEDY

The next consideration is whether the doctrine of contribution can be appropriately applied in these circumstances to prevent defendant's unjust enrichment. In making this determination, the first question to be addressed is whether there is an adequate legal remedy that precludes this Court from providing equitable relief. *Powers*, 279 Mich at 447. We conclude that there is not. Although Justice YOUNG claims that "[h]ere, Janet Mandeville had several available remedies that

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lens. See *Mich Med Serv v Sharpe*, 339 Mich 574, 577; 64 NW2d 713 (1954) ("Enrichment of [a person or entity] is not unjust if pursuant to the express agreement of the parties, fairly and honestly arrived at before hand."). The fact that the properties passed to Frank in accordance with the agreement the Mandevilles made when taking title as tenants by the entirety does not preclude a finding that he was unjustly enriched because, once again, plaintiff is not seeking to affect that contract. Permitting a contribution claim to prevent unjust enrichment will not interfere with the parties' freedom to contract. Janet and Frank contracted to hold the properties by the entirety with a right of survivorship; when defendant is required to pay contribution to plaintiff, this contract will, notwithstanding, already have been given full effect: the properties passed to defendant by right of survivorship, at which point, as now, he held title in fee simple absolute.

she declined to pursue," specifically arguing that Janet could have filed for divorce or separate maintenance, *post* at 82, one simply does not need to think too long or too hard about the legal remedies of divorce or separate maintenance to realize that they are entirely *in*adequate for several reasons. First, divorce, and by extension separate maintenance, is an *inappropriate* remedy for many people, especially those for whom divorce is religiously or morally objectionable.[7] Second, divorce is a *disproportionate* remedy when compared to the relief actually sought—contribution for the past monetary expenses that Janet incurred in maintaining the properties.[8]

The Court of Appeals and dissents disagree. They fault Janet for not taking legal steps to dissolve her marriage and accuse plaintiff of attempting to create a " 'de facto' " divorce that would "distribute jointly held property" in the absence of such action. *Tkachik*, 282 Mich App at 373. However, this criticism is based on a persistent misunderstanding about plaintiff's claim for

[7] By bringing an action for separate maintenance, a spouse is exposed to a counterclaim and judgment for divorce. See MCL 552.7(2) through (4). Notably, if a counterclaim for divorce is filed, such judgment is mandatory. MCL 552.7(4)(b) (providing that "the court *shall* enter . . . [a] judgment dissolving the bonds of matrimony if a counterclaim for divorce has been filed") (emphasis added). Thus, if divorce is an inappropriate remedy because of a person's religious or moral beliefs, separate maintenance is also. Although Justice YOUNG's dissent does not dispute our understanding of the procedural workings of an action for separate maintenance set forth in the statute, it charges that we do not adequately explain why separate maintenance constitutes an inadequate legal remedy. *Post* at 82. We offer exactly such an explanation in this section. It is *that dissent* that owes an explanation of its contrary position to people who have religious or moral objections to divorce.

[8] Moreover, one wonders how an action for separate maintenance at this juncture could be said to be as "effectual" in "its modes of obtaining . . . relief," *Powers*, 279 Mich at 447, where, for obvious reasons, neither Janet nor her estate can bring such an action.

contribution. As stated, plaintiff's contribution claim will *not* divide the marital real properties that defendant undisputedly owns in fee simple absolute.

Thus, the remedy of divorce, which would have both dissolved the Mandevilles' bonds of marriage and necessitated a division of real property, does not constitute an adequate remedy at law for the actual, and relatively narrow, relief sought by plaintiff. As this Court has made clear,

> [t]he fact that there is a legal remedy is not the criterion. That legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . . [*Powers*, 279 Mich at 447.]

Because the "final relief" granted in divorce—dissolution of the marital bonds and division of marital property—is hardly as "effectual" as contribution in recouping the limited monetary payments at issue, we do not believe that plaintiff's claim must fail because, for whatever reason, Janet did not pursue this action in life.[9] Divorce would have been a hugely blunderbuss

[9] The same can be said of a claim for separate maintenance. Justice YOUNG's dissent argues at length that separate maintenance constituted Janet's sole remedy in these circumstances. Specifically, it claims this must be true because that "the *standard* that the majority employs—a breakdown in the marital relationship sufficient to show that the couple is no longer acting as husband and wife—is *precisely* the standard used in an action for divorce or separate maintenance proceedings." *Post* at 83 (emphasis in original). His dissent misapprehends the standard we employ. While the facts of this case certainly evidence a breakdown of the marital relationship, satisfying this standard alone is not what moves us to act in equity. Rather, our decision is based on a fact-specific analysis that takes into account the manner in which *this* marital relationship broke down, and particularly considers the conduct of defendant as evidence of the nature and extent of the breakdown. Simply put, marriages may break down in a variety of ways that would be sufficient to satisfy the general standard used in an action for separate mainte-

"remedy" in view of what plaintiff here is actually seeking, and could only be viewed as equivalently "effectual" if a surgical amputation of a toe could be viewed as equivalently "effectual" to a podiatrist appointment as a remedy for an ingrown toenail.

In addition, we do not think that plaintiff's claim is precluded by the equitable maxim that " '[e]quity will not assist a [person] whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.' " *Powers v Indiana & Mich Electric Co*, 252 Mich 585, 588; 233 NW 424 (1930) (citation omitted). To find that Janet was somehow derelict in her legal responsibilities because she should have done *more* would be both inaccurate and more than a little unfair. First, Janet took significant steps in preparation for her death to make clear her intentions that her husband not receive property when she died. She unequivocally disinherited Frank in her will; she transferred her retirement benefits so that they would not pass to him; and she undertook specific efforts to divest him of his interest in the marital real properties before she died. Second, it should be remembered that she undertook these efforts as she was preparing for death, receiving treatment for breast cancer, and preserving and maintaining the two properties at issue by herself. As plaintiff's counsel explained at oral argument: "[Janet] did everything possible, including transferring her ERISA benefits, and

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nance or divorce. However, it is defendant's *inequitable* conduct, evidencing the nature of the specific breakdown of *this* marriage, that satisfies the equitable standard. Thus, contrary to Justice YOUNG's dissent, the two standards—whether a marriage has broken down sufficiently to grant a judgment for divorce or separate maintenance and whether equity can be invoked to allow contribution between spouses—are distinct. Moreover, regardless of the differences between these standards, separate maintenance is an inadequate remedy in this case.

her real property, and her estate property, all three buckets of property, to prevent them from going to her husband at the time—and unfortunately she passed before she could take that next step whatever that next step might have been for her." In light of the hard realities in this case, we do not think that Janet was derelict in these circumstances for not doing *more* in pursuance of her legal responsibilities.[10]

3. CONTRIBUTION AND TENANCY BY THE ENTIRETY

Because divorce and separate maintenance are inappropriate, disproportionate, and ineffectual remedies, an equitable remedy is necessary because there is no adequate remedy at law. *Powers*, 279 Mich at 447. Accordingly, defendant should be liable on a contribution theory for the payments Janet made in excess of her "aliquot share of the common burden or obligation . . . ." *Caldwell*, 394 Mich at 417. Although in *Strohm* this Court recognized the application of contribution between co-tenants in common, the question whether contribution can be applied between co-tenants by the entirety is one of first impression in this state. Established equitable principles guide this Court in determining whether the doctrine of

[10] In light of these facts, we are confident that allowing equity to come to Janet's aid, even when she did not seek a divorce or bring an action for separate maintenance while alive, will not upset any legitimate financial arrangement between the Mandevilles. This record leaves little need to speculate about how Janet felt about the "arrangement" by which she took sole responsibility for maintaining the properties at the end of her life after being abandoned by her husband. Again, she unequivocally disinherited him in her will, transferred her retirement benefits, and attempted to divest him of his interest in the marital real properties. Furthermore, plaintiff—Janet's sister, the person who cared for her in her final months and who is the personal representative of her estate—is bringing this action on Janet's behalf. These facts dispel any fear that, by permitting plaintiff's claim for contribution, we are upsetting any arrangement in contravention of Janet's intent.

contribution should be extended. We are particularly mindful that the Court's equitable powers are " 'to be exercised according to the circumstances and exigencies of each particular case.' " *Youngs*, 317 Mich at 545 (citation omitted).

On these facts, we conclude that the firmly established doctrine of contribution can be appropriately applied between tenants by the entirety and, therefore, we will permit plaintiff's claim for contribution. Equity allows "complete justice" to be done by "adapt[ing] its judgment[s] to the special circumstances of the case." 27A Am Jur 2d, Equity, § 2, at 520-521 (1996). Our consideration of the "special circumstances" of this case leads us to conclude that the following facts are legally sufficient to permit a claim for contribution between tenants by the entirety: (a) where the decedent spouse has taken sole responsibility for the property maintenance payments while the other spouse had absolutely no personal contact with her for at least the last 18 months of her life; (b) where the other spouse did not attempt once to communicate with the decedent spouse during this time, even though he acknowledged that he was aware that she was battling cancer; (c) where the other spouse was disinherited in the decedent spouse's will; (d) where the decedent spouse sought diligently, albeit unsuccessfully, to divest the other spouse of his interest in the real properties before she died; and (e) where the other spouse was deemed a non-surviving spouse under MCL 700.2801(2)(e)(*i*). These unusual facts cry out for equitable relief so that "complete justice" can be done and give us assurance that in granting plaintiff's remedy we are exercising our discretion carefully and responsibly.[11]

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[11] As this list of factors makes clear, contrary to Justice YOUNG's assertion, our determination that contribution is appropriately applied in

Defendant, the Court of Appeals, and Justice YOUNG's dissent raise several arguments in opposition to our determination that the doctrine of contribution can be applied appropriately in this case. Their arguments, however, do not consider equity's guiding principles, but rather are grounded on flawed legal analysis and unwarranted policy concerns. First, Justice YOUNG's dissent claims that the surviving spouse provision bars the relief plaintiff requests because, in its view, plaintiff is asking this Court to extend the provision in contradiction of its express limitations. We fail to see how granting plaintiff's equitable claim would impermissibly "extend" MCL 700.2801, when this Court is neither interpreting this provision nor acting in pursuance of its authority.[12] Rather, our power to grant equitable relief derives, not from this provision, but from this Court's inherent authority to do equity where no ad-

this case is based on much more than an " 'I know it when I see it' " intuition. *Post* at 95. Rather, it is based on a consideration of the highly unusual and inequitable circumstances of this case. Justice YOUNG's dissent itself acknowledges that the facts of this case are "rare," *post* at 95, but fails to realize that these "rare" facts are precisely what make it appropriate for this Court to do equity.

[12] Once more, Justice YOUNG's dissent fails to recognize that we are *not* construing MCL 700.2801 or any other statutory provision in this case. The issue here only requires this Court to determine whether to exercise its equitable powers where no statute provides for or precludes such an exercise. It does not require us to give effect to any statute. For this reason, granting (or failing to grant) equitable relief cannot possibly contravene "the most basic of judicial interpretative rules." *Post* at 86 n 45. It is important to remember, however, that although *this* Court is not called upon to interpret MCL 700.2801, this provision has already been given full and proper effect by the lower court, a result that is unaltered by this decision. The probate court properly recognized the provision's limited applicability to the identified sections of EPIC, which relate to intestate succession. It thus held that defendant's status under MCL 700.2801 is immaterial to his sole ownership of the marital real properties, which passed to him by the right of survivorship, not by intestate succession. In light of this disposition, the statutory argument in Justice YOUNG's dissent is errant from the start.

equate remedy at law exists. Indeed, contribution is available to plaintiff *precisely because* neither the Estates and Protected Individuals Code nor any other statute provides, or precludes, the remedy that plaintiff seeks. Thus, the fact that MCL 700.2801 is silent with respect to contribution can hardly be said to defeat plaintiff's claim. Justice YOUNG's contrary position, under which this Court may not grant plaintiff relief because the Legislature did not specify this remedy in the surviving spouse provision, ignores a basic tenet of our jurisprudence: courts possess an inherent power to afford equitable remedies. These do not derive from any "declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief where justice and good conscience so dictate." 30A CJS, Equity, § 93, at 289 (1992).[13]

Second, the Court of Appeals below and Justice YOUNG's dissent distinguish and dismiss as unpersua-

[13] For much the same reason, Justice YOUNG's observation that "the Michigan Legislature has *declined* to adopt legislation that would have accomplished statutorily exactly the changes plaintiff seeks in the common law here" has no bearing on the proper result in this case. *Post* at 99 (emphasis in original). By inserting this observation into its discussion, Justice YOUNG's dissent misses the critical difference between the respective duties of a legislative body and a court sitting in equity. While the Legislature crafts policy for the general public, a court in equity examines "the circumstances and exigencies of [the] particular case." *Youngs*, 317 Mich at 545 (citation omitted). Thus, simply because, for whatever reason, the Legislature did not adopt a broad, statewide statutory remedy—and Justice YOUNG has no greater insight into why this transpired than anyone else—does not mean that such a remedy is not appropriate to achieve equity in the particular circumstances of a case. Concerning Justice YOUNG's allegation that we have "fashion[ed] an unprecedented judge-created rule," *post* at 100, we can only point out, first, that the *entirety* of the common law constitutes the "fashion[ing of] a judge-created rule," the dissents' preferred rule no more and no less than the majority's; and, second, that, as a case of genuinely first impression, it is quite certain that, whatever rule prevails, it will be one without "precedent," because this is precisely how the common law has always evolved.

sive decisions from other jurisdictions that permit a claim for contribution between tenants by the entirety, and, thus, lend support to plaintiff's claim in the instant case. See, e.g., *Crawford*, 293 Md 307; *Turner*, 147 Md App 350; *Cagan*, 56 Misc 2d 1045. Each of these out-of-state cases ruled that the ordinary presumption that a spouse's payments toward real property are considered a gift to the other spouse is inapplicable where the spouses are not living together as husband and wife. *Crawford*, 293 Md at 311; *Turner*, 147 Md App at 407; *Cagan*, 56 Misc 2d at 1049-1050. And therefore, each of these courts recognized that the doctrine of contribution may be applicable between tenants by the entirety.

Justice YOUNG's dissent distinguishes these cases because, in its view, "[t]he common thread among these cases is that the plaintiffs were able to overcome—in *live divorce proceedings that sought to partition marital property*—the presumption that money expended by one party to the divorce to maintain a concurrent estate was not a gift to his or her spouse." *Post* at 89-90 (emphasis in original).[14] While the issues in these out-of-state cases undisputedly arise in the context of di-

[14] The Court of Appeals rejected the analysis of these cases because it determined that it was "not applicable in the context of considering whether a decedent's estate is entitled to contribution from the surviving spouse . . . ." *Tkachik*, 282 Mich App at 376. In focusing on the fact that Janet is deceased, the Court of Appeals implied that, *if* she had been living, she might have been entitled to contribution, while her estate would not be. This implication is inconsistent with MCL 600.2921, which states, "All actions and claims survive death." If, under the Court of Appeals' rationale, Janet could have sought contribution from defendant while alive, there is no reason why her estate itself should not also be able to seek contribution. See *In re Olney's Estate*, 309 Mich 65, 83; 14 NW2d 574 (1944) ("When the law declares that a cause of action shall survive, it is equivalent to saying an executor may sue upon it.") (quotation marks and citations omitted).

vorce and separate maintenance actions, Justice YOUNG's exclusive focus on this context in his analysis of the central teaching of these cases is questionable. From the actual language of these authorities, it seems that each of these cases stands clearly for the proposition that "a tenant by the entireties is entitled to contribution when he or she makes a payment, *after the parties discontinue living together as husband and wife*, which preserved the property and, therefore, accrued to the benefit of the co-tenant." *Crawford*, 293 Md at 313 (emphasis added); see also *Turner*, 147 Md App at 406 (explaining that *Crawford* " 'permit[s] a spouse to seek contribution in those instances *when married parties were not residing together* and one of them, or the other, had paid a disproportionate amount of the carrying costs of property' ") (emphasis added; citation omitted).[15]

When viewed as standing for this core proposition, the persuasive authority from sister states and the

[15] Justice YOUNG's dissent claims that these cases only support our position "when read out of context and after ignoring [these] decisions' own internal limitations." *Post* at 87. In response, one can merely invite the readers to peruse these cases for themselves and judge which of our readings is the more sound. In our judgment, each of these cases stand clearly for the proposition that a tenant by the entirety may be entitled to contribution when he or she makes some payment after the spouses discontinue living together as husband and wife. *Crawford*, *Turner*, and *Cagan* stand for this same proposition. Thus, Justice YOUNG's dissent does not present the whole story when it asserts that this decision "renders Michigan the one place in the common law world where a tenant by the entirety can now be liable for contribution to his deceased spouse's estate." *Post* at 68. *No state* whose courts have addressed this specific proposition has rejected it. That is, his dissent insists on focusing on the *general* rule of non-contribution between tenants by the entirety—a rule with which we agree—rather than the *exception* to the rule that is the subject of this case, as well as *Crawford*, *Turner*, and *Cagan*. The reader can determine what is most "disingenuous" in this case, *post* at 91 n 58—for the dissent to include within its supposed consensus states whose judiciaries have never before addressed the *specific* issue before this Court, or for this majority to point out the artificiality of that consensus.

instant case have much in common. Janet and Frank Mandeville had "discontinue[d] living together as husband and wife." *Crawford*, 293 Md at 312. There was no "showing of an intention to make a gift" on Janet's part; in fact, the record is replete with evidence to the contrary. *Id.* at 313. And, Janet made payments that "preserve[d] the property, and therefore, accrue[d] to the benefit of the co-tenant [Frank]." *Id*. Under this analysis, Janet is entitled to contribution. *Id.*; see also *Turner*, 147 Md App at 407. While it is certainly possible to distinguish these cases, as the Court of Appeals and Justice YOUNG have worked hard to do, it is nonetheless difficult to dismiss them because their logic and reasoning closely resemble those of this case. These cases provide persuasive authority on which this Court may rely as it exercises its equitable jurisdiction "to afford remedial relief, where justice and good conscience so dictate." 30A CJS, Equity, § 93, at 289 (1992).

Third, the dissent warns that granting plaintiff's requested relief constitutes a "sweeping modification of the common law," *post* at 68, "represents a seachange in our laws governing property," *post* at 93, and is the equivalent of recognizing "an action amounting to posthumous divorce." *Post* at 97. These concerns are considerably overwrought, and incorrect, largely because they are grounded in a misapprehension that the remedy plaintiff seeks will somehow result in the division of marital real property. However, as has been explained already, contrary to the Court of Appeals' and Justice YOUNG's assertions, there is nothing in the relief sought that would in any way "subvert the protective purpose of the tenancy by the entirety . . . ." *Tkachik*, 282 Mich App at 376. In this case, as in every future case, the "protective purpose of the tenancy by the entirety"—i.e. the unencumbered right of survivorship—

will be given full effect, and the surviving spouse would own entirety properties in fee simple absolute.[16]

Moreover, granting plaintiff the monetary compensation she is seeking would not require a "posthumous divorce." Indeed, this whole concept of "posthumous divorce" is inapposite, and in fact seems quite peculiar,[17] because granting plaintiff's claim for contribution would not require this Court, or any future court, to do anything even remotely akin to rendering a judgment for divorce. Plaintiff is not asking this Court to take off anyone's wedding ring, decide who gets the family heirlooms, or become involved in any of the hard issues that arise in a divorce, such as child custody, parenting time, and child and spousal support. And, as we have repeatedly made clear in this opinion, granting the relief plaintiff seeks will not divide marital real property. Instead, it will simply require a court to look to the evidence of how much Janet paid in mortgage payments, taxes, insurance, and other costs to maintain the real properties and then award an appropriate amount in the form of contribution.

Justice YOUNG's final, and most overwrought, argument is that our decision somehow "ignores the fact that

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[16] Accordingly, we are not persuaded by Justice YOUNG's overwrought accusation that this decision "upsets the reliance interests of all Michigan spouses" who have taken title to property as tenants by the entirety. *Post* at 94. Not only is this inaccurate because the right of survivorship is not affected by this decision, but it imputes ludicrous motives to Michigan spouses. We believe that there are few men and women in Michigan who get married, and who acquire property as tenants by the entirety, in *reliance* on the fact that they can later abandon their spouses and their marital property, contribute nothing to the maintenance of such property, succeed to the property upon their spouse's death, and have no further responsibilities at law or in equity. *That* is the only reliance interest that could conceivably be upset by this decision.

[17] No more peculiar, however, than Justice YOUNG's notion that we are "mentally divorcing" the Mandevilles. *Post* at 97 n 65.

marriage has always been recognized in Michigan as a *special* relationship" and "transforms this . . . into no more than a mere 'business partnership.' " *Post* at 81. Thus, our decision is "yet another (however well intentioned) assault on the institution of marriage in our country." *Post* at 81. We respectfully suggest that these arguments would be more aptly directed inwardly. It is Justice YOUNG's dissent that wishes to focus exclusively on the way that property is titled, as if the Mandevilles were mere business partners whose relationships and mutual obligations did not extend beyond their real property transactions, in other words, that a tenancy by the entirety is nothing more than a real property arrangement that is more *extra-strongly* binding upon persons who are married than upon *all* other persons. It is Justice YOUNG's dissent that ignores all evidence concerning the realities of a particular marriage, and that would—exclusively in the case of married persons—subordinate all such realities to the deed itself. Thus, *alone* among parties to a deed, the realities of the parties' actual conduct and relationship, and the demands of fairness and equity, would be irrelevant for married parties. Under the rule the dissents would adopt, marriage would indeed define a "special relationship," but not in a way that *honors* or *respects* marriage, but in a way that *disadvantages* marriage. Married parties *alone* would be deprived of resort to equity, no matter how compelling the circumstances, and *alone* would be bound by a legal document, no matter how unfair and inequitable its consequences in a particular circumstance. Marriage indeed entails a "special relationship," because it involves persons who have vowed to be with their spouse for better or worse, in sickness and in health, and because it gives rise to life-long commitments of a singular nature, not because it comprises a legal arrangement in which persons are forever to be deprived of fundamental principles of equity that apply to all other

persons. See *Strohm*, 352 Mich at 662. To say the least, we do not believe it is *this* opinion that degrades the *genuinely* "special relationship" of a marriage, or that treats marriage as tantamount to a mere "business partnership." The dissents accord "special" treatment to marriage only in the sense of imposing "special" disadvantages upon married persons, and by "specially" depriving such persons of a remedy in equity available to all others.

In sum, the counterarguments presented by defendant, the Court of Appeals, and the dissents are unavailing. No governing legal principle precludes the remedy plaintiff seeks, and no policy concern persuades us that granting this remedy will somehow upset the common law of this state, or produce what Justice YOUNG's dissent describes as a " 'tectonic shift' " in our common-law jurisprudence. *Post* at 68 n 1. Rather, the decision here is altogether consonant with the "incremental process of common-law adjudication as a response to the facts presented." *In re Arbitration Between Allstate Ins Co & Stolarz*, 81 NY2d 219, 226; 597 NYS2d 904; 613 NE2d 936 (1993). Therefore, we decide this case by exercising our equitable powers " 'according to the circumstances and exigencies of [this] particular case' " where no adequate remedy at law exists. *Youngs*, 317 Mich at 545 (citation omitted). Significantly, the circumstances and exigencies of this particular case contain a limiting principle that provides further assurance that we have properly exercised our discretion in granting equitable relief. Such limiting principle is inherent in MCL 700.2801, which sets forth the circumstances in which a spouse is not a "surviving spouse," namely, where that spouse has been willfully absent from the decedent spouse for a year or more before the decedent's passing. As explained, this provision is not the *source* of this Court's power to grant plaintiff relief, for we possess an inherent power to afford equitable relief in our sound discretion and under carefully defined circum-

stances; rather, it merely provides context for when a spouse's conduct is so offensive to any "natural sense of justice" that a court may properly act.[18] With this limiting principle in place, any fear that permitting a claim for contribution in the context of a tenancy by the entirety will result in a radical sea-change in the common law of this state rings hollow.

IV. CONCLUSION

On the facts of this case, and particularly in considering defendant's willful absence from his decedent spouse, by which she alone took responsibility for the properties in

[18] Justice YOUNG's dissent is highly critical of our consideration of the surviving-spouse provision, but its own analysis of the role of MCL 700.2801 is simply inaccurate. His dissent treats this provision as controlling, asserting that it precludes this Court from doing equity because "the Legislature actually *has acted* in this area through its enactment of Michigan's surviving spouse statute." *Post* at 99 (emphasis in original). In view of this assertion, we reiterate that the surviving spouse provision is *silent* as to contribution and, thus, neither permits nor precludes this Court from granting this remedy. The provision is, however, *relevant* in this case because it is descriptive of the exact behavior that moves this Court here to act in equity—defendant willfully abandoning his wife during the last 18 months of her life. We know of no principle of statutory construction that bars a court in equity from taking into consideration conduct that is relevant to the equitable claim simply because the Legislature, in an entirely different context, has determined that such conduct is sanctionable.

Accordingly, Justice YOUNG need not wonder, "Where, other than in the guts of the majority, shall we determine how 'principles of natural justice' or 'good conscience' should direct our decisions?" *Post* at 96 n 64. If and when a court again encounters these rare facts, its determination of whether a tenant by the entirety is entitled to equitable contribution is to be informed by a time-honored and uncontroversial belief about marriage—i.e., one spouse should not benefit from the abandonment of the other in a time of great need. This belief is reflected in community norms, the teachings of religious traditions, *and* the non-surviving spouse provision, and, thus, future courts need not concern themselves with our "guts," but can direct their decisions to these reliable guides.

the last year and a half of her life, it would be unjust for defendant to retain the benefit of the monies that preserved these properties and made his eventual sole ownership possible upon her death. Because divorce is an inappropriate, disproportionate, and ineffectual remedy, an equitable remedy is necessary because there is no adequate remedy at law. *Powers*, 279 Mich at 447. Accordingly, by extending the doctrine of contribution to cotenants by the entirety, defendant is properly held liable for the payments that his spouse made in excess of her "aliquot share of the common burden or obligation . . . ." *Caldwell*, 394 Mich at 417. Thus, consistent with the longstanding and important principle of our jurisprudence concerning the availability of equitable relief, we conclude that the doctrine of contribution can be appropriately applied between tenants by the entirety and that plaintiff's claim for contribution should be granted. Accordingly, we reverse the judgment of the Court of Appeals and remand to the probate court for proceedings not inconsistent with this opinion.

KELLY, C.J., and CAVANAGH and CORRIGAN, JJ., concurred with MARKMAN, J.

WEAVER, J. (*dissenting*). I dissent and agree with Justice YOUNG when he states:

> With its decision today, the majority now permits posthumous collateral attacks on the validity of marriages in this state where neither spouse has taken the appropriate legal steps to challenge the marriage or the financial equities of the marriage during life. In doing so, the majority ignores the perfectly adequate legal remedies that our Legislature created in specific contemplation of marital disharmony—specifically, an action for separate maintenance—instead preferring to craft a new remedy recognized nowhere else in the country. This rule allowing contribution between tenants by the entireties *outside the*

> *context of a divorce or separate maintenance action* is not supported by a single case or authority from *any* jurisdiction, let alone authority from Michigan. As such, the new rule the majority creates today is untested and holds unforeseen consequences that reach much further than the narrow and unassuming decision the majority *believes* it has issued in this case. [Emphasis in original.]

In short, the majority's unrestrained decision today is a huge mistake.

HATHAWAY, J., concurred with WEAVER, J.

YOUNG, J. (*dissenting*). Because of the danger of unintended consequences and the difficulty that a court has in assessing them when amending the common law, the Hippocratic admonition to "first do no harm" is a wise prescription for restraint. It is an admonition that the majority today unfortunately ignores. Because the tenets of property law at issue here are among the most settled and uncontroversial in all of our jurisprudence, I vigorously dissent from the majority's sweeping modification of the common law in this case.[1]

Under the banner of equity, the majority today creates a rule that renders Michigan the one place in the common law world where a tenant by the entirety can now be liable for contribution to his deceased spouse's estate. This distinction is a dubious honor. For hundreds of years, the tenancy by the entirety with its

[1] This Court has on occasion allowed for the development of the common law as the circumstances and considerations of public policy have warranted, but our common-law jurisprudence has been guided by a number of prudential principles. See Robert P. Young, Jr., *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences," *id.* at 307, a principle that is quite applicable to the present case.

concomitant right of survivorship has existed as a means of protecting and fostering marriage, allowing a husband and wife to manage their property and assign financial equities as they saw fit, free from interference by third parties.

With its decision today, the majority now permits posthumous collateral attacks on the validity of marriages in this state where neither spouse has taken the appropriate legal steps to challenge the marriage or the financial equities of the marriage during life. In doing so, the majority ignores the perfectly adequate legal remedies that our Legislature created in specific contemplation of marital disharmony—specifically, an action for separate maintenance—instead preferring to craft a new remedy recognized nowhere else in the country. This rule allowing contribution between tenants by the entirety *outside the context of a divorce or separate maintenance action* is not supported by a single case or authority from *any* jurisdiction, let alone authority from Michigan. As such, the new rule the majority creates today is untested and holds unforeseen consequences that reach much further than the narrow and unassuming decision the majority *believes* it has issued in this case. Moreover, although in today's decision the husband is required to make a contribution on marital property held by the entirety, given the fact that men still generally contribute more to family assets than women, I fear that the majority's new rule may have a disproportionate adverse effect on women in the future.

Until today, Michigan law did not recognize the right of contribution between tenants by the entirety outside the context of the divorce or separation actions, and accordingly, I believe that Janet Mandeville's estate does not have a cognizable claim for contribution to

pursue against Frank Mandeville, the defendant. Simply put, under Michigan's settled law, a tenant by the entirety is not *unjustly* enriched when he takes sole ownership by operation of law over property that he previously owned with his spouse. The tenancy by the entirety is a unique incident of marriage. How married people choose to arrange their finances is varied and entirely a product of their determination. After a spouse's death, it is difficult for a court to assess any alleged inequity in the contributions of the respective spouses that they failed to address during the marriage itself. Indeed, there is a great danger in authorizing post hoc judicial inquiries concerning how a husband and wife choose to structure their marriage, as the majority authorizes in this case. Rights created by a tenancy by the entirety, being anchored in marriage, are not affected where one spouse makes greater contributions to acquiring or maintaining the property, and thus no inequities arise that would compel restitution by a surviving spouse. Where spouses do not avail themselves of the legal means of disaggregating their interests in property owned by the entirety, the courts should not be authorized to do so after one spouse dies.

I. PRINCIPLES OF LAW AND EQUITY

Because I believe that the majority's opinion is contrary to and undermines settled principles of law and equity, I begin my analysis with an examination of the legal principles underlying this action.

A. THE LAW OF TENANCY BY THE ENTIRETY

Michigan's law of estates and its rules governing concurrent estates is derived from the English common law, although much of this law has now been codified by

statute.[2] Generally, there are three types of concurrent estates: the tenancy in common, the joint tenancy, and the tenancy by the entirety.[3] The parties do not dispute that the facts of the instant case and the issues they raise implicate only this last type of estate: the tenancy by the entirety.

A tenancy by the entirety is a type of concurrent ownership in real property unique to married persons.[4]

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[2] See, generally, MCL 554.1 *et seq*.

[3] A tenancy in common, the default and most prevalent form of a concurrent estate, arises " '[w]here two or more [persons] hold possession of lands or tenements at the same time, by several and distinct titles. The quantities of their estate may be different, their proportionate share of the premises may be unequal, the modes of acquiring these titles may be unlike, and the only unity between them be that of possession.' " *Fenton v Miller*, 94 Mich 204, 214; 53 NW 957 (1892) (citation omitted).

A joint tenancy, by contrast, is a single estate owned by two or more parties and is characterized by four "unities": " 'joint tenants have one and the same interest; accru[e] by one and the same conveyance; commenc[e] at one and the same time; and have the same possession.' " *Kemp v Sutton*, 233 Mich 249, 258; 206 NW 366 (1925) (citation omitted). Michigan law has subsequently abolished the requirements of unities of time and title. See MCL 565.49. A joint tenancy may create a special right to survivorship in a tenant following a joint tenant's death. See *Albro v Allen*, 434 Mich 271, 274-276; 454 NW2d 85 (1990); *In re Renz' Estate*, 338 Mich 347, 356-357; 61 NW2d 148 (1953). Our law has long recognized that while joint tenancies are not favored, their creation with the accompanying right of survivorship is nonetheless permitted when expressly created. See *Kemp*, 233 Mich at 258; *In re Blodgett's Estate*, 197 Mich 455, 461; 163 NW 907 (1917); see also 3 Comp Laws 1915, § 11562 ("All grants and devises of lands, made to two or more persons, . . . shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."), which has endured as a legal presumption to the present day and is codified currently at MCL 554.44.

As will be discussed further in greater detail later in this opinion, a tenancy by the entirety is a unique type of joint tenancy reserved for a married couple.

[4] *Field v Steiner*, 250 Mich 469, 477; 231 NW 109 (1930).

A tenancy by the entirety represents a legal policy arising from the English common law whereby a husband and wife each have a sole tenancy in the real property acquired during the course of the marriage. Like many of our laws, the unique nature of this estate has a unique presumption: at common law, a husband and wife were recognized as but one legal person, and thus their ownership of real property reflected this unique status.[5] A conveyance to a husband and wife that shares the unities required for joint possession[6] presumptively creates a tenancy by the entirety unless the conveyance otherwise explicitly indicates that the parties intend to create a separate type of estate.[7] Consistent with the historical practice, under Michigan

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[5] Lord Blackstone has been credited with first authoritatively recording the existence of this concurrent estate. In his ubiquitous *Commentaries*, Blackstone noted:

> And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, *but the whole must remain to the survivor*.

2 Blackstone, *Commentaries on the Laws of England* 182 (R Burn ed, 1783) (1978) (emphasis added).

[6] See, e.g., *Kemp*, 233 Mich at 258 (noting that the four unities required to form a joint tenancy are that of interest, title, time, and possession), although the Legislature has since abolished the necessity of unity of time and title, see MCL 565.49.

[7] *DeYoung v Mesler*, 373 Mich 499, 502-504; 130 NW2d 38 (1964). The use of the words "tenancy by the entirety" or a derivative of the phrase need not be used to create the estate; similarly, a tenancy by the entirety will *not* be created just because the words are used if not otherwise appropriate. See, e.g., *In re Kappler Estate*, 418 Mich 237; 341 NW2d 113 (1983) (holding that a conveyance to two *unmarried* persons with the words "as tenants by the entireties" was ineffective to create a tenancy by the entirety, but instead created a tenancy in common).

law one tenant by the entirety holds no legal interest in the realty separable from that of the other tenant.[8] Because of this legal presumption, neither spouse can act unilaterally to convey or alienate any portion of an interest in the property.[9] As this Court has stated: "When the husband and wife have thus together acquired an unencumbered title to real estate[,] they have laid up treasures, where, without their concerted action, neither moth, nor rust, nor thieves, nor creditors, nor anything else but death or the tax gatherer can divest them."[10] In sum, each spousal tenant is vested with the entire title, and thus each tenant paradoxically holds complete, *sole* ownership *jointly* with the other tenant.

The most important feature of a tenancy by the entirety is the *right of survivorship*. This right provides that in the event that one spouse dies during the course of the marriage, the surviving spouse *automatically* takes fee simple ownership in the entire property.[11] Thus, this type of property is *not* a part of the decedent's estate, and the laws of descent and distribution do not apply.[12]

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[8] *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936); *Vinton v Beamer*, 55 Mich 559, 561; 22 NW 40 (1885).

[9] *Berman v State Land Office Bd*, 308 Mich 143, 144; 13 NW2d 238 (1944); *Hubert v Traeder*, 139 Mich 69, 70; 102 NW 283 (1905). The one exception to this rule is statutory: MCL 557.101 allows either spouse to convey to the other spouse his interest in the property, which thereby terminates the tenancy by the entirety. See also *Ash v Ash*, 280 Mich 198, 199; 273 NW 446 (1937) ("Defendant could terminate the tenancy by the entirety by a conveyance of his interest in the land to his wife.").

[10] *Way v Root*, 174 Mich 418, 427-428; 140 NW 577 (1913). Cf. Benjamin Franklin, Letter to Jean-Baptiste Le Roy, Nov 18, 1789, reprinted in *The Works of Benjamin Franklin* (1817) ("[B]ut in this world, nothing can be said to be certain but death and taxes.").

[11] MCL 700.2901(2)(g); see also *Speier v Opfer*, 73 Mich 35, 38-39; 40 NW 909 (1888).

[12] See, e.g., *Rogers v Rogers*, 136 Mich App 125, 134-135; 356 NW2d 288 (1984).

A tenancy by the entirety can only be terminated in limited, specific ways. The death of one of the tenants, a joint conveyance of the property, a creditor's action against both cotenants, or a dissolution of the tenants' marriage all operate to terminate a tenancy by the entirety. As stated, the death of one of the tenants automatically passes sole title to the remaining tenant through the right of survivorship. A conveyance executed by both tenants transfers title and ownership to new grantees of the property under whatever form of estate the grantees choose. Consistent with the concept that both cotenants must act to encumber a tenancy by the entirety, a creditor's action against both a husband and wife who have together encumbered their property may terminate the tenancy.[13] Finally, in divorce proceedings after a marriage has been terminated, property held as a tenancy by the entirety becomes a tenancy in common unless the parties or the court terminating the marriage provides otherwise.[14] During this time, as is consistent with divorce proceedings generally, the court equitably divides all marital property, including real property that had been held as a tenancy by the entirety.

B. THE RIGHT OF CONTRIBUTION AND CLAIMS FOR UNJUST ENRICHMENT

The doctrine of equitable contribution has evolved from the common law and is "founded on principles of equity and natural justice."[15] It provides that one who pays or satisfies "the whole or [bears] more than his aliquot share of the common burden or obligation, upon

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[13] *Sanford v Bertrau*, 204 Mich 244, 254; 169 NW 880 (1918); see also *Estes v Titus*, 481 Mich 573, 580-582; 751 NW2d 493 (2008).

[14] MCL 700.2807(1)(b).

[15] *Lorimer v Julius Knack Coal Co*, 246 Mich 214, 217; 224 NW 362 (1929).

which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares."[16] Thus, where contribution is appropriate to reach an equitable result, the party seeking contribution may recover the proportionate share from each of the joint obligors.[17]

Regarding concurrent estates, claims for contribution are generally available to cotenants who hold real property as tenants in common or joint tenants.[18] As this Court held in *Strohm v Koepke*, which acknowledged the right of equitable contribution for tenants in common, "[t]he doctrine of contribution between cotenants is based upon purely equitable considerations."[19] However, neither Michigan's statutory law nor any decision by this Court or any Michigan court has ever specifically recognized the right of contribution for a husband and wife who hold their property as a tenancy by the entirety.

Even though a tenancy by the entirety resembles a joint tenancy, a tenancy by the entirety is *not* a joint tenancy; rather, it is a type of sole tenancy.[20] Our law has recognized important distinctions among these cotenancies, providing rights and responsibilities to some

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[16] *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975).

[17] *Id.*

[18] See, e.g., *Wettlaufer v Ames*, 133 Mich 201; 94 NW 950 (1903); *Reed v Reed*, 122 Mich 77, 78-79; 80 NW 996 (1899).

[19] *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958). The law of other jurisdictions is generally in accord. For example, the Restatement of Restitution has long stated: "Where two persons are *tenants in common or joint tenants* and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution . . . ." Restatement Restitution, § 105(1), p 439 (1937) (emphasis added).

[20] *Budwit v Herr*, 339 Mich 265, 272; 63 NW2d 841 (1954).

but not others. For example, joint tenants and tenants in common have a statutory right of partition; tenants by the entirety do not.[21] Also, joint tenants and tenants in common may unilaterally convey their property rights for any reason; tenants by the entirety may not.[22] These distinctions and others represent a type of severability among other concurrent estates not permitted in a tenancy by the entirety.

This understanding is in accord with the historical tradition of the tenancy by the entirety, because it has been inextricably tied to marriage.[23] At common law, where the law viewed a married couple as a single legal person, there was no legal need to allow recovery or contribution by one tenant essentially against himself. By contrast, other types of cotenancies among nonmarried persons—whether they are two or more relatives, friends, business partners, or any other combination of individuals who may jointly buy real property—do not share the bond of marriage, and thus the law allowed mechanisms for recovery if one party was forced to assume more than his fair share of the costs or if there was a breakdown in the relationship. Moreover, a tenancy by the entirety already contained a mechanism for the contingency that a marriage relationship may break down: separation or divorce expressly allowed the courts to divide equitably property owned by the tenants.

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[21] MCL 600.3304 ("All persons holding lands as joint tenants or as tenants in common may have those lands partitioned."); see also 1 Restatement Property, 2d, § 4.5, comment b, p 229 (1983) ("A tenancy by the entirety creates an indestructible right in the surviving spouse to own in severalty the entire interest in the property. Compulsory partition is inconsistent with this characteristic of a tenancy by the entirety and, hence, compulsory partition is not available with respect to such a tenancy.").

[22] Compare *Pellow v Arctic Iron Co*, 164 Mich 87; 128 NW 918 (1910), with *Hubert*, 139 Mich at 70.

[23] See *In re Appeal of Lewis*, 85 Mich 340; 48 NW 580 (1891).

However, the lack of a specific provision or doctrine of law providing a right of contribution in a tenancy by the entirety does not necessarily preclude a right of contribution. In the instant case, plaintiff advances the theory that Frank Mandeville is liable for contribution to the decedent's estate on the basis of a theory of unjust enrichment.

Unjust enrichment is defined as the unjust retention of " 'money or benefits which in justice and equity *belong to another*.' "[24] The Restatement provides that "[e]ven where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."[25] This Court adopted a similar standard in *Buell v Orion State Bank*: "One is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution."[26] Thus, there can be no unjust enrichment where a party only receives or retains that which he already owns by operation of law.

II. APPLICATION

With these principles regarding Michigan's law of real property and equity in mind, I turn to the facts of

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[24] *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952), quoting approvingly *Hummel v Hummel*, 133 Ohio St 520, 528; 14 NE2d 923 (1938) (emphasis added).

[25] Restatement Restitution, § 1, comment c, p 13 (1937). This Court has previously quoted approvingly this standard in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW26 652 (1991) (lead opinion by RILEY, J.).

[26] *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950). This Court has similarly held that one cannot be unjustly enriched simply as a result of enforcing private agreements. See, e.g., *Mich Med Serv v Sharpe*, 339 Mich 574, 577; 64 NW2d 713 (1954) ("It is neither unjust, unfair nor inequitable to give effect to an agreement which was not induced by mistake, overreaching, fraud[,] or misrepresentation.").

this particular case. Plaintiff asks this Court to order contribution from Frank Mandeville to his deceased wife's estate under two alternative theories: either by a claim of unjust enrichment, or by extending Michigan property law to allow for a claim of contribution in a tenancy by the entirety. The majority has accepted this request, arguing that if there is no mechanism by which the estate can recover defendant's proportionate share for money the decedent expended to maintain the tenancy's properties, then defendant will be unjustly enriched by his wife's maintenance of the properties before her death. Contrarily, defendant argues that contribution designed to prevent unjust enrichment does not apply where a cotenant by the entirety receives property by the right of survivorship. For the reasons set forth below, I agree with defendant.

A. NEITHER MICHIGAN LAW NOR PRINCIPLES OF EQUITY SUPPORT THE MAJORITY'S RULE

In light of the legal doctrines discussed above, defendant here is not unjustly enriched when he takes full ownership by a right of survivorship to property held as a tenant by the entirety. And this is true even if one cotenant has contributed more to the expenses of property ownership within the marriage, which is consistent with how the cotenants designed their marriage. There simply is no obligation in Michigan for a cotenant by the entirety to pay interest and expenses to the estate of the deceased cotenant when fee simple title passes by operation of law. The surviving cotenant, receiving title by right of survivorship as the parties agreed when titling the property, cannot be *unjustly* enriched. Instead, the cotenant by the entireties takes fee ownership to property in which he already had prior *sole, inalienable* ownership with his spouse. As this Court stated in *Buell*, there can be no unjust enrichment

where a person comes into ownership of property that " '*law and equity give him absolutely* without any obligation on his part to make restitution.' "[27] Here, by operation of law, Frank Mandeville automatically takes the properties in fee simple absolute by the right of survivorship inherent in the tenancy by the entirety, which was exactly the Mandevilles' intent when they purchased the properties more than 20 years ago.[28] Neither plaintiff nor the majority can persuasively argue that, in taking full ownership to property he already owns, Frank Mandeville will retain "money or benefits" that belong to another.

The majority holds otherwise. Through an elaborate formulation, the majority attempts to rebalance the equities of the Mandevilles' marriage in order to show that Frank Mandeville was unjustly enriched because his wife paid certain costs associated with home ownership for an 18-month period. In the process, the majority has created a rule that subverts the purpose of the tenancy by the entirety and unnecessarily allows the state to dissect the marital relationship for the purpose of reassigning equities contrary to how the parties saw fit to title their property and conduct their marital relationship. More disturbing, the majority does so notwithstanding the fact that neither Janet nor

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[27] *Buell*, 327 Mich at 56 (citation omitted; emphasis added). The majority criticizes my discussion here as "an oversimplification that is at odds with the realities of this case," yet the majority can point to no place in the record nor any legal authority that establishes an agreement, understanding, or obligation for Frank Mandeville to make restitution in order to hold fee simple title to the property. This is unsurprising because the right of survivorship, *by its very nature*, unconditionally allows Frank Mandeville to do so without any obligations at law.

[28] Moreover, as defendant notes, he takes the property subject to a substantial mortgage that remains on the property. As a result, the deceased was provided the benefit of the use of the mortgage principal in her lifetime, yet upon her death the debt now resides with defendant alone.

Frank Mandeville took any legal action *while both spouses remained alive* that would have extinguished the tenancy by the entirety that governed the properties at issue here or rebalanced the equities of their marriage. Indeed, despite Frank Mandeville's extended absence, the couple did not consider their marriage over,[29] they never sought a divorce or legal separation, nor did Janet Mandeville file an action for separate maintenance.[30]

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[29] See Affidavit of Beverly Furnari, August 13, 2003. After being duly sworn, Ms. Furnari stated as follows:

> 1. That she was a close personal friend of Janet Mandeville and had frequent contact with her during the last few months of her life.
>
> 2. That through discussions with Janet Mandeville, she is aware that neither Janet Mandeville nor Frank Mandeville, Jr. considered their marriage to be terminated, deserted or abandoned by Frank Mandeville, Jr.'s extended absence exceeding more than one year prior to the death of Janet Mandeville.

This evidence is *uncontroverted*, yet the majority has decided simply to overlook this fact as inconvenient to its analysis.

[30] This is so even though the decedent attempted to divest her spouse of his interest in properties they owned by the entirety before she died—a fact to which the majority attaches a great deal of significance. See *ante* at 55-56. As was explained to Janet Mandeville by her counsel at the time she attempted to transfer her interest in the property by quitclaim deed, the documents drafted to accomplish this intention were *entirely ineffectual* to destroy defendant's rights in the property that Janet Mandeville owned by the entirety with her husband. See *supra* at 72-73 (explaining that one spouse in a tenancy by the entirety can neither divest the other spouse of his interest or act unilaterally to alienate the entireties property). Janet Mandeville's attorney testified at his deposition that "I explained to Jan that if, in fact, the real estate was owned by the entireties with her and Frank, that these quit claim deeds would have no validity whatsoever. That if Frank was alive, they would go to him. . . . She understood, she nodded. She said, 'I understand.' " Plaintiff's attorney again conceded as much at arguments on this case: "She effectuated a deed which has obviously no legal significance because its impossible to—for her to transact that."

The majority's opinion ignores the fact that marriage has always been recognized in Michigan as a *special* relationship unlike those involved in other concurrent ownership relationships. Thus, it is worthy of unique protections that can only be altered upon formal dissolution in a divorce or modification in a separate maintenance action. The majority's decision transforms this special marital relationship into no more than a mere "business partnership." Married couples have the additional options of buying property as tenants in common or joint tenants. *A married couple that enters into a tenancy by the entirety does so in specific reliance on the unique protections that our common law affords this form of joint property ownership.* Today's decision eviscerates such reliance interests but fails to explain why these interests are no longer worthy of protection. The majority's decision is yet another (however well intentioned) assault on the institution of marriage in our country.

The majority states that nothing in its analysis would alter the reality that Frank Mandeville is the fee simple owner of the properties previously held with his wife, and that the law of the tenancy by the entirety "has already been given full effect . . . ."[31] This is true only to a certain extent.[32] The majority does not alter the actual ownership of the property, but it does force defendant to compensate the estate for the privilege of such ownership—notwithstanding the fact that *both* the law *and* the express means by which the Mandevilles themselves titled their property provide this property to Frank Mandeville with *no conditions whatsoever*. Thus,

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[31] *Ante* at 51.

[32] The fact is, the estate *did* attempt to divest Frank Mandeville of his property interest in this property and only raised this contribution claim when that effort failed. The majority decision today allows this backdoor collateral attack on defendant's property rights as the surviving tenant.

the majority cannot deny that it is today recognizing a new right of contribution that *diminishes* the property rights of a surviving tenant by the entirety.

Moreover, contrary to the majority's argument, this is *not* an appropriate case in which to employ this Court's equitable powers. Equity is customarily employed only where there is *no adequate remedy at law*.[33] Here, Janet Mandeville had several available remedies that she declined to pursue. These remedies include filing for divorce or separate maintenance.[34] An action for separate maintenance, for example, would not require the couple to seek a divorce; instead, a showing that the marriage relationship had broken down—*precisely what plaintiff argues happened in this case*—would allow the trial court to make a determination based on all the circumstances as to how much financial support would be due to a complainant.[35] It could do so on the basis of the evidence offered by *both* spouses—something that cannot be done after one of the spouses has died.

The fact is that a claim for separate maintenance seems to be *precisely* the remedy contemplated by our Legislature to provide relief to an aggrieved spouse in this type of situation. Yet, the majority cannot adequately explain why the already existing action for separate maintenance is an inadequate legal remedy.

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[33] *Campau v Godfrey*, 18 Mich 27 (1869).

[34] See MCL 552.6 (divorce) and MCL 552.7 (separate maintenance).

[35] See, e.g., *Russell v Russell*, 75 Mich 572, 572-573; 42 NW 983 (1889) (affirming an award of financial support from a husband to his wife where the husband had deserted the marriage). Since the adoption of no-fault divorce in Michigan, fault need not be shown in an action for separate maintenance; instead, an action showing that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and thus the marriage cannot be preserved is sufficient to support an award. See MCL 552.7(1).

Instead, the majority prefers to create an action for contribution that allows an estate to collaterally attack financial arrangements made during the course of a valid marriage. The majority states that an action for divorce or separate maintenance is "inappropriate" and "disproportionate," and thus apparently "inadequate." This is ironic given that the *standard* that the majority employs—a breakdown in the marital relationship sufficient to show that the couple is no longer acting as husband and wife—is *precisely* the standard used in an action for divorce or separate maintenance proceedings. *I fail to see how the majority can reject this standard as inadequate as a matter of law while at the same time using it as an equitable substitute for these supposedly inadequate legal remedies*. Although the majority argues that these remedies are not "as 'effectual' " as a claim for contribution, that hardly demonstrates that they are inadequate as a matter of law.[36] Although the majority focuses on claims for divorce as "a hugely blunderbuss

[36] I further fail to see how the majority's new remedy, which requires one spouse to sue another in court when demanding contribution, is any more "effectual" than an action for separate maintenance, even if it "preserves" the marital union—or whatever may be left of a union between spouses who communicate with each other through lawsuits.

The majority also worries that an action for separate maintenance opens the door for a court to enter a decree of divorce, and that this may be an unacceptable outcome for those couples who have moral or religious objections to divorce. This concern ignores what is obvious about such a concern: if a couple has religious objections to divorce, then by the nature of those objections, the responding spouse would not counterclaim for a divorce in an action for separate maintenance. In any case, where a couple has decided no longer to live together as husband and wife but not divorce, an action for contribution is no more effectual than an action for separate maintenance. The primary difference is that only the latter was provided for by our Legislature, and only the latter prevents a spouse from unilaterally requiring a court to rebalance the equities of marital decisions.

'remedy,' "[37] it simply has *no answer* for why an action for *separate maintenance* is inadequate. This flaw in the majority's argument not only belies its conclusion that equity should be employed in this case,[38] but also undermines the entire rationale of the majority opinion.

While it would certainly be troubling for courts to attempt to recalibrate the equities of a marriage after death, the majority's decision is even more troubling because it does just that when the parties declined to take available legal action in life. A longstanding principle of this Court precludes equitable relief to parties who do not fully pursue the remedies available to them at law.[39] Just as Michigan courts are incompetent to grant a divorce after the death of one of the parties,[40]

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[37] *Ante* at 54-55.

[38] The majority quotes *Powers v Fisher*, 279 Mich 442, 447; 272 NW 737 (1937), for the proposition that the "legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . ." How can separate maintenance possibly be viewed as inadequate when, if it had been pursued, it would have allowed Janet Mandeville to acquire the same costs her estate now seeks here, after making virtually an identical legal showing that the marital relationship had broken down?

[39] See *Zoellner v Zoellner*, 46 Mich 511, 515; 9 NW 831 (1881).

I do not, as the majority implies, believe that Janet Mandeville was "derelict" in pursuing her legal remedies. In many respects, she dutifully and permissibly transferred her legal interests to beneficiaries other than her husband. This is irrelevant, though, to whether she pursued an action for separate maintenance—she admittedly did not—which was the only permissible means for seeking payment from defendant concerning their marital property owned by the entirety. More important, this does not mean that her estate should be accorded the extraordinary relief sought here because she could not otherwise legally transfer her interest in real property.

[40] Michigan law provides that a court is without jurisdiction to render a judgment of divorce, and thereafter distribute property, after the death of a party; in sum, one cannot judicially terminate a relationship that no longer exists because the death of a party. *Tiedman v Tiedman*, 400 Mich 571, 573; 255 NW2d 632 (1977); *Zoellner*, 46 Mich at 513-514.

unlike the majority, I believe that courts are equally incompetent to reassign equities, divide property, or award monetary contribution concerning marital property owned by the spouses after the death of one *as if* a divorce had occurred.

The majority also argues that the Legislature's enactment of the surviving spouse provision of the Estates and Protected Individuals Code[41] indicates its intent to recognize that a marital relationship can cease to exist even if it is not officially or legally severed. This argument is simply a nonstarter. The surviving spouse provision states that, if certain conditions are met showing a breakdown in a marriage, then a surviving spouse will not be treated as having survived the decedent.[42] However, the provision also *specifically restricts* its applicability to issues of intestate succession, spousal elections and allowances, and priority among persons seeking appointment as personal representatives.[43] Thus, the Legislature expressly limited the surviving spouse provision to specific circumstances involving a deceased spouse, none of which is present here. Pursuant to well established principles of statutory construction,[44] this Court *should decline* plaintiff's

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[41] MCL 700.1101 *et seq*.

[42] MCL 700.2801(2)(e)(*i*).

[43] See MCL 700.2801(2), which provides that its application is only "[f]or purposes of parts 1 to 4 of this article," which cover only issues of intestate succession, spousal elections and allowances, and priority among persons seeking appointment as personal representatives.

[44] See, e.g., *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010) ("In interpreting statutory language, this Court's primary goal is to give effect to the Legislature's intent. If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any 'contrary judicial gloss.' ") (citation omitted); *Miller v Mercy Mem Hosp*, 466 Mich 196, 201; 644 NW2d 730 (2002) (stating that when interpreting a statute, "[w]e first

request to extend the application of this statute where the Legislature has expressly limited it.[45]

Today, however, the majority manufactures an extension of the surviving spouse provision despite the limitations plainly expressed by the Legislature. The majority borrows the criteria of the surviving spouse provision as a means of deeming the Mandevilles' relationship sufficiently defunct to merit the employment of equity through a right of contribution while it ignores the limitations that the Legislature specifically imposed. It stands to reason that any time a spouse qualifies under MCL 700.2801 as a nonsurviving

review the language of the statute itself. If it is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover.").

[45] This is the most basic of judicial interpretative rules, as members of the majority have properly recognized in the past. See, e.g., *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759 & n 14; 641 NW2d 567 (2002) (opinion by MARKMAN, J.) (noting that "our judicial role 'precludes imposing different policy choices than those selected by the Legislature.' " and stating: "The dissent 'question[s] whether, under the majority's approach, compensability for any mental disabilities would ever exist.' To say the least, we respectfully disagree . . . . Compensability would exist where the Legislature has deemed there to be compensability, and it would not exist where the Legislature has not deemed there to be compensability. Whether such coverage is too broad or too narrow is not for us to decide."); *Henry v Dow Chem Co*, 473 Mich 63, 102; 701 NW2d 684 (2005) (opinion by CORRIGAN, J.) ("Equity is indeed an instrument of justice. But when it is exercised without due regard for the interests of those who are not before the Court, its invocation can lead to great injustice. It is precisely because a decision in plaintiffs' favor may have sweeping effects for Michigan's citizens . . . that we believe this matter should be handled by those best able to balance these competing interests: the people's representatives in the Legislature."); *Stokes v Millen Roofing Co*, 466 Mich 660, 675, 677-678; 649 NW2d 371 (2002) (MARKMAN, J., concurring) (noting the unfairness of the result, which is "highly inequitable," but otherwise stating that this Court "cannot allow equity to contravene the clear statutory intent of the Legislature. . . . [I]f such inequitable results are to be avoided, it is the Legislature that must take action.").

spouse, the majority would allow the estate of the decedent spouse to seek contribution for any perceived inequities. Thus, notwithstanding the majority's protestations to the contrary, its theory now results in the wholesale application of the surviving spouse provision in a new class of cases not otherwise contemplated under the plain language of the statute. I do not believe it is within a judge's power to borrow a limiting principle "inherent" in a statute that specifically excludes the very issue to which it would be applied and apply it in situations divorced from the statutory scheme and intent. The general equitable powers of this Court do not increase the judicial power to rewrite statutes.[46]

B. THE MAJORITY'S NEW RULE IS UNPRECEDENTED

The majority has not cited a single authority from this state or any other that provides support for its position allowing an action between spouses for contribution regarding property held as a tenancy by the entirety *outside the context of divorce or separation proceedings*. Indeed, no such authority exists. The decisions from other jurisdictions cited by the majority support its position only when read out of context and after ignoring those decisions' own internal limitations. There should be no mistake: the rule that the majority today creates represents a radical departure from this state's jurisprudence.

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[46] See, e.g., *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406-407; 738 NW2d 664 (2007) ("[I]f courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then immeasurable damage will be caused to the separation of powers mandated by our Constitution. Statutes lose their meaning if 'an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity.' Significantly, such unrestrained use of equity also undermines consistency and predictability for plaintiffs and defendants alike.") (citations omitted).

In *Crawford v Crawford*, a wife sought contribution for property-related expenses incurred after the couple had separated but not yet divorced. At issue was the presumption that any money paid by one spouse should be considered a gift to the other spouse, and thus not eligible for contribution in the divorce. Under Maryland law, where the parties had separated before divorce, "a co-tenant in a tenancy by the entireties is entitled, to the same extent as a co-tenant in a tenancy in common or joint tenancy is entitled, to contribution for that spouse's payment of the carrying charges which preserve the property."[47] The Maryland Court of Appeals held that absent a showing that the paying party intended to make a gift, "a tenant by the entireties is entitled to contribution when he or she makes a payment, after the parties discontinue living together as husband and wife, which preserves the property and, therefore, accrues to the benefit of the cotenant."[48] In Maryland, where a court finds contribution appropriate for one cotenant in equitable separation proceedings, that cotenant may receive "*Crawford* credits." As a later decision from the Maryland Court of Special Appeals explained:

> A "Crawford Credit" is a credit that one co-tenant, who, *after separation*, lays out money to make mortgage payments or other carrying charges on property held as tenants by the entireties, is usually entitled to receive, absent an agreement between the parties. Prior to a divorce decree, the entitlement of a spouse to such credits is an equitable matter and not a matter of right.[49]

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[47] *Crawford v Crawford*, 293 Md 307, 311; 443 A2d 599 (1982).

[48] *Id.* at 313. This same principle was applied in the same manner in *Turner v Turner*, 147 Md App 350, 406-407; 809 A2d 18 (2002), another Maryland case cited in this Court's original remand order.

[49] *Freedenburg v Freedenburg*, 123 Md App 729, 737 n 1; 720 A2d 948 (1998), citing *Crawford* and *Broseus v Broseus*, 82 Md App 183, 192; 570 A2d 874 (1990) (emphasis added).

The Maryland Court of Special Appeals later applied this concept in *Turner v Turner*, a *divorce action* that stated that the general law of contribution applies to a tenancy by the entirety " 'when married parties, owning property jointly, separate.' "[50] *Crawford*, as applied now when courts issue "*Crawford* credits," appears to have become a legal colloquialism for assigning and balancing equities when dividing property in divorce proceedings. These decisions are entirely consistent with Maryland's *divorce* law and provide no support for plaintiff's theory that contribution is appropriate where no divorce proceeding exists, and certainly not where a spouse has died.

Similarly, in *Cagan v Cagan*, a New York trial court allowed the plaintiff to recover costs for payments made by one tenant by the entirety in order to maintain the property and prevent foreclosure *following an action for separation*.[51] In a later case also from New York, the Supreme Court, Appellate Division, held that the responsibility for mortgage payments, taxes, and insurance on an entireties property should not be borne solely by the cotenant who remained in possession *after a legal decree of separation was entered* on the grounds of abandonment.[52]

The common thread among these cases is that the plaintiffs were able to overcome—in *live divorce proceedings that sought to partition marital property*—the presumption that money expended by one party to the divorce to maintain a concurrent estate was not a gift to

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[50] *Turner*, 147 Md App at 406, quoting *Baran v Jaskulski*, 114 Md App 322, 332; 689 A2d 1283 (1997).

[51] *Cagan v Cagan*, 56 Misc 2d 1045, 1049-1050; 291 NYS2d 211 (1968).

[52] *Sterlace v Sterlace*, 52 AD2d 743, 743-744; 382 NYS2d 191 (NY App 1976).

his or her spouse.[53] In a divorce action, it is *necessary* to make equitable divisions of property among the living spouses, and this necessarily includes what is often a couple's largest asset: their home. It is an unremarkable proposition that divorce courts, *sitting in equity while dividing marital property*, would require contributions to the spouse who paid more than his share during the divorce process, even when dealing with a couple who own their home as tenants by the entirety.

And Michigan divorce law is in accord with these principles of law articulated in other states. Michigan law demands equity in divorce and other domestic relations proceedings. Statutory law provides that upon an annulment of a marriage, a divorce, or an order of separate maintenance, a court will divide property "as it shall deem just and reasonable . . . ."[54] A separate statutory provision allows a court to award to either party a portion of the other's real and personal property, as well as spousal support, "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case."[55] In sum, when apportioning marital property *in a divorce*, Michigan courts must make a division that, although it need not be equal, must be equitable considering all the circumstances.[56]

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[53] States whose laws have this legal presumption apply it in relation to every type of concurrent estate. In addition to the above cases discussing the presumption in relation to a tenancy by the entirety, see also *Kratzer v Kratzer*, 130 Ill App 2d 762, 768-769; 266 NE2d 419 (1971) (tenancy in common); *Heinemann v Heinemann*, 314 So 2d 220, 221-222 (Fla App, 1975) (joint tenancy).

[54] MCL 552.19.

[55] MCL 552.23(1).

[56] E.g., *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996); *Sparks v Sparks*, 440 Mich 141, 149; 485 NW2d 893 (1992) (noting that

However, the cases on which the majority relies—discussing the presumption of gift doctrine among spouses and equity in divorce and separation actions—interpret concepts that are separate and distinct from those relevant to a tenancy by the entirety that is automatically terminated upon death. As such, they are wholly inapposite to the case presently before this Court, and their "logic and reasoning" most certainly do *not* "closely resemble" this case, as the majority alleges.[57] They present facts and thus legal decisions involving a *living husband and wife in the context of divorce or separation actions that are being actually litigated for the very purpose of partitioning marital property*. Indeed, the majority recognizes and admits this, stating that "the issues in these out-of-state cases undisputedly arise in the context of divorce and separate maintenance actions . . . ."[58] Yet, the majority's

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Michigan's divorce "statutes each include an indication that general principles of equity must be considered"); *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997) (stating that courts "must strive for an equitable division of increases in marital assets").

[57] See *ante* at 62. Certainly those cases share some similar factual situations with this case—as any divorce or separation case likely will. This does not mean that the *legal principles* in those divorce and separation cases should be applied here, where one spouse is deceased. The majority extracts fragments of sentences from those opinions, showing how those phrases could be said to be true on the facts of this case by inserting the names of the parties in this case. In doing so, the majority does precisely what I believe is improper: it takes cases where courts *in the context of divorce or separation proceedings* are reassigning equities and uses them to reassign equities in this case.

[58] *Ante* at 60-61. The majority also argues that "[*n*]*o state* whose courts have addressed this specific proposition has rejected it." *Ante* at 61 n 15. This argument is disingenuous because *no other state has considered the subject matter of this case*. Indeed, in order to gain contribution among tenants by the entirety, every other state seems to require what this dissent requires: a live case and controversy among living spouses in a divorce, separation, or separate maintenance proceeding. The majority extracts a generalized rule from these other cases—which allow contri-

argument irresponsibly and imprecisely conflates the law of contribution as applied in these two separate and distinct contexts. The majority argues that, because domestic relations and divorce law generally allows claims of contribution when necessary to produce an equitable result, this should also control when determining parties' rights and obligations in managing real property in probate after the death of a spouse. I strongly disagree.

It is difficult to apply the principles of these foreign cases after the death of one of the parties where there has been no divorce (or even any steps taken toward obtaining a divorce or separate maintenance), and no attempt to dispose of the property with judicial oversight while the parties remained alive. Contribution related to property held as a tenancy by the entirety is only available under Michigan law in the context of a divorce, separation, or separate maintenance proceeding where a court, addressing a breakdown in the marriage, is forced to balance the equities between the parties. Thus, because Janet Mandeville *could not* have sought contribution from defendant while alive because she did not pursue an action for divorce, separation, or separate maintenance, her estate likewise cannot pursue such an action.[59] The law is pellucidly clear that

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bution in these limited situations—in support of its unprecedented rule in this case allowing contribution generally and even after the death of a spouse.

[59] This makes the majority's reliance on MCL 600.2921 inappropriate where that provision states that "[a]ll actions and claims survive death" and thereby allows estates to bring claims on behalf of their decedents. See *ante* at 60 n 14. Because there is no cause of action under Michigan law for a tenant by the entirety to seek contribution, MCL 600.2921 cannot save any claim for a decedent's estate to pursue. To the extent that the Court of Appeals held contrarily, I believe that it erred; to the extent that the majority establishes a new right of contribution that may be "saved" by MCL 600.2921, it too errs.

absent the destruction of the tenancy by the entirety by one of the legal means previously described,[60] the death of a cotenant by the entirety automatically makes the surviving spouse the sole owner of the property and simultaneously extinguishes the decedent's ownership interest in the property. Thus, by operation of the type of estate chosen by the Mandevilles and how the Mandevilles chose to structure and maintain their marriage, there is no entitlement to order contribution in this case.

C. ALTHOUGH THE COMMON LAW RULE IS EQUITABLE, THE MAJORITY REJECTS IT IN FAVOR OF A NEW RULE THAT IS CONTRARY TO THE POLICIES OF THIS STATE

While this Court unquestionably has the authority to modify the common law,[61] doing so is a task we approach with the utmost caution,[62] and this case is a good illustration as to why. We are presented here with a set of rules that has been in place and applied in common law societies since before Michigan became a state. Everyone from young couples buying their first home to estate planners advising their clients how to structure their property have relied on these tenets with the justified expectation that the force of law will protect their choices. The majority's decision to change the common law in this case represents a sea-change in our laws governing property and threatens to upend legitimate financial relationships into which married persons have entered.[63]

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[60] See page 74 of this opinion (discussing how a tenancy by the entirety can be terminated).

[61] See, e.g., *Ames v Port Huron Log Driving & Booming Co*, 11 Mich 139, 145-155 (1863) (opinion by CAMPBELL, J., and opinion by MANNING, J.).

[62] See, e.g., *Henry*, 473 Mich at 89.

[63] The majority chalks this discussion up to "unwarranted policy concerns," *ante* at 58, but because plaintiff requests that we *change the*

There is a great danger in authorizing courts to engage in post hoc factual inquiries concerning how a husband and wife should have decided to structure their marriage, their finances, and the various equities involved in a lifetime of making choices as a couple rather than as individuals pursuing separate self-interests. The majority fails to address the unknown—and perhaps unknowable—implications that accompany its change in the common law. Beyond recounting the facts of this case, the majority does not discuss what facts would be legally sufficient for courts to divide marital property equitably after death. Nor does the majority sufficiently address what would serve as the limiting principle concerning a contribution claim against the surviving spouse. Moreover, as previously stated, the majority's new rule upsets the reliance interests of all Michigan spouses who have entered into tenancies by the entirety in preference to other forms of lesser protected joint property relationships. Strangely,

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common law of this state, it is imperative that this Court base its decisions firmly on the now-established laws and policies of this state. Indeed, the majority's author has persuasively explained as much:

> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. See *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy. [*Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002) (opinion by MARKMAN, J.) (emphasis in original).]

My discussion below sets forth the arguments justifying my belief that the majority's change to the common law is not based on the well established legal principles and policies of this state. That the majority's decision is contrary to these policies speaks more to the lack of firm support for its opinion rather than any "flaws" in my discussion.

but perhaps not unexpectedly, the majority opinion is silent on its justifications for unsettling these reliance interests.

Instead, the majority rests on the standards set forth by the surviving spouse provision, inappropriately borrowing its framework to order contribution in this case, even though the Legislature never intended this provision to be used in such a way. Yet, where this Court is considering a sweeping change to Michigan's common law through the employment of equity, I believe that the justices certainly owe more consideration and guidance to future courts than what amounts to the majority's theory of "I know it when I see it." The majority uses the rare facts of this case to change the overarching principle applicable in all cases; in essence, it uses the exception to rewrite the rule.

In its desire to order contribution for a plaintiff it clearly deems sympathetic, the majority leaves myriad questions unanswered regarding the scope of this newfound legal avenue to collaterally attack financial arrangements made in the course of a valid marriage. Particularly in situations where neither spouse ever asked a court to intervene in the marital relationship, it is deeply troubling that the majority now allows courts to do so under the guise of equity after the death of a spouse. This difficulty in allowing estates to pursue an action for contribution or unjust enrichment after the death of a spouse, particularly where neither party ever sought separate maintenance, is that doing so risks upsetting intimate and perfectly legitimate marital arrangements and the law that heretofore supported such relationships.

This difficulty arises because courts are poorly positioned to make such weighty decisions after the death of a married party, and especially as here, where the

parties *themselves* chose not to end their marriage. For example, at least in cases that follow the historical norm in which men contribute more than their spouses to acquiring and maintaining family property, the rule adopted by the majority may be turned into a "sword" to be used against stay-at-home wives and women who earn less than their husbands. Similarly, I wonder whether the majority would permit a rebalancing of marital equities *any time* a husband and wife have discontinued living together, or where there is no showing of an intent to make a gift, or where one spouse in a rocky marriage takes action that benefits the other spouse—all facts that the majority finds relevant to rebalance the equities of the Mandevilles' marriage. Under the majority's theory, what would stop disgruntled spouses, third parties, or courts from intervening in the financial arrangements of marriages wherever "principles of natural justice" and "good conscience so dictate"?[64] And to what extent does the majority allow courts to assess the equities of a marriage—which may last for decades—in determining the appropriate level for contribution? Should defendant receive credits or be allowed to counterclaim against a plaintiff-estate for areas in the marriage where he shared a larger portion of the financial burden, as he likely would have in a divorce or separate maintenance proceeding? The majority simply does not—and probably cannot—answer these questions. Because the method by which spouses arrange their financial circumstances is entirely a product of their own determination and in accordance with their wishes and values, I would decline to authorize this type of post

[64] Where, other than in the guts of the majority, shall we determine how "principles of natural justice" or "good conscience" should direct our decisions?

hoc judicial inquiry into the equitable nature of those arrangements that the majority permits—indeed, requires—upon a challenge of this nature.

Moreover, by accepting plaintiff's invitation to change our common law, the majority today creates an unprecedented action akin to allowing a new type of "posthumous divorce" in this state. As the preceding sections discussing Michigan divorce law and caselaw from our sister states demonstrates, the only method by which a spouse can normally obtain contribution for property involving a tenancy by the entirety is when a court is balancing equities concerning property in divorce or separate maintenance proceedings. That being the case, the majority grants plaintiff the *same relief* that Janet Mandeville would have been accorded in a divorce or separation, but without the benefit of an *actual* divorce or separation proceeding. And indeed, the majority treats the Mandevilles' marriage as sufficiently defunct in order to hold defendant liable for contribution.

I strongly object to any decision that recognizes an action amounting to posthumous divorce.[65] Following this decision, Michigan courts are now permitted to determine after a spouse's death whether a couple's relationship had broken down in life in order to reassign equities just as a family court would do in divorce or separate maintenance proceedings. The facts of this case show that neither Frank nor Janet Mandeville legally ended their marriage or took the steps that

[65] Contrary to the majority's attempt to disparage this argument as mere frivolity by stating, for example, that this Court is not taking anyone's wedding rings, I simply state that the relief the majority orders in this case *amounts to* or is *tantamount to* a posthumous divorce. Where the majority makes such extraordinary *factual* findings as that the Mandevilles had "discontinued living together as husband and wife," it is hard to argue that the majority is doing anything other than mentally divorcing the couple in order to hold defendant liable for contribution.

would allow courts to order contribution while Janet Mandeville was alive. Therefore, *courts should not be allowed to rebalance the equities of a marriage after the death of a party as if there had been a divorce* in order to determine the proper amount for monetary contribution. Recognizing the equivalent of posthumous divorce in this state is an untenable course of action for this Court to take where the positive law of this state has provided extensive indications that marriage is to be fostered, preserved, and ended only by judicial intervention at the request of the spouses themselves.[66]

I also recognize that the Legislature is better positioned to balance the complex public policy consider-

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[66] By allowing post hoc, posthumous judicial inquiries into the equities of a marriage, the majority's opinion here is in deep conflict with Michigan's public policy *favoring* marriage. See *Van v Zahorik*, 460 Mich 320, 332; 597 NW2d 15 (1999); *Wagoner v Wagoner*, 128 Mich 635, 638; 87 NW 898 (1901).

The majority's assertion that *its* opinion is the one that fosters and preserves marriage by allowing married couples to pursue actions for contribution is too clever by half. At its core, our society's respect for marriage relies on the marital couple itself to chart its own course and make its own decisions. In return, the marital couple relies on a set of established principles—legal and otherwise—to ensure that decisions will be given effect. Unlike the majority, I am not prepared to alter either this reliance or the principles themselves where one party unilaterally decides that he or she no longer likes the marital agreement. Ultimately, the majority's opinion allows plaintiff to obtain relief she otherwise would not be able to achieve based on the way the decedent and her husband structured their marriage. How can this possibly be said to preserve marriage or accord respect to the way a couple structured its marriage? Marriage necessitates mutuality in decision-making, yet the majority now grants to one spouse the power to invite courts into the marriage to analyze the decisions and equities as a court would in any normal business or partnership dispute—and worse still, it apparently allows a spouse to do so from beyond the grave. This absurd situation underscores the majority's inability to recognize this case for what it is: a marriage that arguably faltered in its latter years because of apparent problems for which there are settled, appropriate, and adequate remedies in existence that neither spouse in this case pursued.

ations inherent in plaintiff's request to allow the recalculation of equities after death or create a type of posthumous divorce in this state. As this Court has stated previously: "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's."[67] This principle is even more important where the requested change in the common law is contrary to a public policy of the state, as is the case here.[68]

Further, I note that the Michigan Legislature has *declined* to adopt legislation that would have accomplished statutorily exactly the changes plaintiff seeks in the common law here.[69] And as observed earlier, the Legislature actually *has acted* in this area through its enactment of Michigan's surviving spouse statute. However, the Legislature acted in a highly *limited* fashion and has *not* extended the statute's reach in ways that would encompass the facts of this case.[70] In this regard, the Legislature has already selected a policy

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[67] *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979); see also *Henry*, 473 Mich at 98 ("[W]hat we as *individuals* prefer is not necessarily what we as *justices* ought to impose upon the people. Our decision in this case is driven not by a preference for one policy or another, but by our recognition that we must not impose our will upon the people in matters, such as this one, that require a delicate balancing of competing societal interests. In our representative democracy, it is the legislative branch that ought to chart the state's course through such murky waters.").

[68] See *Van*, 460 Mich at 333 ("We hold that because the requested extension of the equitable parent doctrine would affect the state's public policy in favor of marriage, the Legislature is clearly the appropriate entity to consider this issue.").

[69] See SB 62 (2007). The bill, introduced by Senator Judson Gilbert, passed *neither* chamber of the Michigan Legislature.

[70] See pages 85-87 of this opinion.

for this state. Nevertheless, the majority apparently has no qualms extending the common law in a contrary fashion. As previously noted, long-established principles of statutory construction do not give this Court the authority to do so. Normally, if the Legislature believes that such a historical principle should be changed, it is free to do so. Although to date the Legislature has declined to make such a change, the majority has instead fashioned an unprecedented judge-created rule in contravention of this state's public policy.

III. CONCLUSION

There is an old legal adage that "bad facts make bad law." This phrase has rarely been as true as on the circumstances giving rise to this case. In its eagerness to provide relief to a plaintiff it deems sympathetic, the majority today rejects the legal remedies that were available to that plaintiff, and instead crafts an unprecedented new remedy. In doing so, the majority extends the law's equitable reach in new and unique ways, unsettling centuries of law in this area and implicitly reworking what is the key feature of a tenancy by the entirety: the unencumbered right of survivorship. Moreover, by allowing courts to make post hoc determinations regarding the distribution of equities in a marriage, the majority's decision imposes upon the citizenry of Michigan rules that amount to posthumous divorce under the guise of equity. And it does so by inappropriately borrowing the framework from a narrow statute limited in application by its explicit terms, resulting in the wholesale application of that statute into an area of law in which it was never intended.

Because the law's equitable reach is surely not designed to allow the estates of parties to accomplish after

death that which the parties themselves declined to pursue in life, I dissent from the majority's decision today. Instead, I believe that plaintiff cannot present a claim under Michigan law or in equity that would allow the decedent's estate to recover contribution from defendant. Michigan law does not recognize a right of contribution among tenants by the entirety, and thus plaintiff's claim is not cognizable under our current law governing real property. Nor, perforce, is her claim justified in equity on a theory of unjust enrichment. Defendant was not unjustly enriched when, by operation of law, he took sole ownership of marital property previously held as a tenancy by the entirety with the decedent. Unlike the majority, I would decline to extend the common law of this state as plaintiff requests. Michigan's public policy can provide no justification for, and is in fact antithetical to, the concept of "common law divorce" or the notion that courts should recalculate the equities involved in a marriage after a spouse has passed.

Accordingly, I vigorously dissent.

SMITH v ANONYMOUS JOINT ENTERPRISE

Docket Nos. 138456, 138457, and 138458. Argued March 9, 2010 (Calendar No. 5). Decided July 30, 2010.

Derith Smith, the elected supervisor of Elmwood Township, brought a defamation action in the Leelanau Circuit Court against Donald Barrows, John Stanek, Noel Flohe, and others after they mailed to several hundred area citizens copies of a personnel report alleging that plaintiff had committed misconduct while working for the village of Suttons Bay. An investigation of this report had revealed that several of the allegations were false. Defendants failed to verify the contents of the report before mailing it, despite the fact that concerns about its accuracy had been raised at a citizens' meeting that all three defendants attended. A handwritten caption that questioned whether plaintiff had misused taxpayer funds was added to the report before it was mailed. The trial court, Philip E. Rodgers, Jr., J., denied defendants' motion for summary disposition and directed verdict, and the jury rendered a monetary award in favor of plaintiff with the additional requirement that defendants publicly apologize to plaintiff. Defendants appealed. The Court of Appeals, SAAD, C.J., and FORT HOOD and BORRELLO, JJ., reversed, holding that defamation could not be established as a matter of law. Unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket Nos. 275297, 275316, and 275463). The Supreme Court granted plaintiff's application for leave to appeal. 485 Mich 870 (2009).

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

Plaintiff presented clear and convincing evidence to support the jury's finding that both Stanek and Barrows acted with actual malice in mailing the document. However, the record does not contain sufficient evidence to support the jury's finding that Flohe acted with actual malice.

1. To determine whether the constitutional standard for defamation of a public figure has been satisfied, a reviewing court must consider and independently review the factual record in full to determine whether the allegedly defamatory statements are protected under the First Amendment. In so doing, an appellate court

should not conduct an independent review of the fact-finder's credibility determinations, disregard findings of fact, or create new findings of fact. Instead, the court must exercise independent judgment regarding whether, as a matter of constitutional law, the evidence in the record supports the verdict, while giving due regard to the fact-finder's opportunity to observe the demeanor of the witnesses. Credibility determinations made by the finder of fact must be examined to ascertain whether they are clearly erroneous. If the reviewing court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact.

2. A plaintiff who is a public official may only prevail in a defamation action by establishing with clear and convincing proof that the allegedly defamatory statement was made with actual malice, which exists when a defendant published a statement knowing it to be false or with reckless disregard of whether it was false—that is, with actual malice. Clear and convincing proof is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the precise facts in issue. Evidence may be uncontroverted and yet not be clear and convincing; conversely, evidence may be clear and convincing despite the fact that it has been contradicted.

3. To establish that a defendant published a statement with reckless disregard for its truth, a plaintiff must prove something more than a departure from reasonably prudent conduct. A plaintiff must present sufficient evidence, circumstantial or otherwise, to justify a conclusion that the defendant made the allegedly defamatory publication with a high degree of awareness of the publication's probable falsity, or that the defendant entertained serious doubts as to the truth of the publication made. The failure to investigate the accuracy of a communication before publishing it, even when a reasonably prudent person may have done so, is not sufficient to establish actual malice, but a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a publication is. When a defendant has reported a third party's allegations, actual malice may be found if there were obvious reasons to doubt the veracity of the informant or the accuracy of the allegations.

4. Plaintiff presented evidence that, during a monthly meeting at which all three defendants were present, concern was expressed about mailing the report before the accuracy of its contents could be verified and that Stanek had been told in either May or June that the author of the report confirmed that plaintiff had not done

anything illegal. Stanek did not deny having been told this information, but he claimed that the conversation did not occur until June 13, which was after the copies of the report had been mailed. Considering the illogical timeline of events Stanek presented, his initial denial of responsibility for the mailing, and evidence that he refused to make a retraction after admitting knowledge that contents of the report were false, the jury's finding that Stanek acted with actual malice was not clearly erroneous and was based on clear and convincing evidence. Similarly, evidence indicated that Barrows was aware that others had concerns about the accuracy of the report and had been advised against distributing it without first verifying its contents. Further, the village treasurer had specifically told Barrows, in response to Barrows's repeated inquiries on the subject, that he was not aware of anything plaintiff had done that was illegal. However, there was no evidence that Flohe knew that the report's author had disavowed its accuracy or that he was present when the other defendants were advised to refrain from mailing the report before its contents could be verified.

5. The Court of Appeals erred by holding that the handwritten caption was incapable of defamatory meaning as a matter of law because, given the use of the term "alleged" and the inclusion of a question mark, it was merely an expression of opinion. Statements of opinion are not automatically shielded from an action for defamation, because they often imply an assertion of objective fact that may damage a person's reputation. The dispositive question that must be addressed on remand is whether, considering the complete caption and the context in which it was published, a reasonable fact-finder could conclude that it implied a defamatory meaning.

Affirmed with respect to Flohe; reversed and remanded to the Court of Appeals with respect to Stanek and Barrows.

Justice CORRIGAN, joined by Justices YOUNG and MARKMAN, concurring in part and dissenting in part, agreed that plaintiff did not satisfy her evidentiary burden with respect to defendant Flohe, but dissented from the conclusion that defendants Stanek and Barrows acted with actual malice when they mailed copies of the report because plaintiff failed to present clear and convincing evidence to support a finding that either defendant knowingly made a false statement or made a false statement in reckless disregard of the truth.

1. LIBEL AND SLANDER — PUBLIC OFFICIALS — ACTUAL MALICE.

A public official may only prevail in a defamation action by establishing by clear and convincing proof that the allegedly defamatory statement was made with actual malice, which exists when a

defendant published a statement knowing it to be false or with reckless disregard of whether it was false.

2. LIBEL AND SLANDER — STANDARD OF PROOF.

To establish that a defendant published a statement with reckless disregard for its truth, a plaintiff must present sufficient evidence, circumstantial or otherwise, to justify a conclusion that the defendant did so with a high degree of awareness of the publication's probable falsity or that the defendant entertained serious doubts regarding the publication's truth.

3. LIBEL AND SLANDER — ACTUAL MALICE.

The failure to investigate the accuracy of a communication before publishing it, even when a reasonably prudent person might have done so, is not sufficient to establish actual malice, but a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a publication is.

4. LIBEL AND SLANDER — ACTUAL MALICE — THIRD-PARTY ALLEGATIONS.

When a defendant has reported a third party's allegations, actual malice may be found if there were obvious reasons to doubt the veracity of the informant or the accuracy of the allegations.

5. LIBEL AND SLANDER — STATEMENTS OF OPINION.

Statements of opinion are not automatically shielded from actions for defamation.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Parsons Ringsmuth PLC* (by *Grant W. Parsons*), for Derith Smith.

Garan Lucow Miller, P.C. (by *Rosalind Rochkind* and *Michael J. Swogger*), for Donald Barrows.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Deborah A. Hebert*), for John Stanek.

Noel Flohe, *in propria persona*.

Amici Curiae:

Butzel Long (by *James E. Stewart*, *Leonard M. Niehoff*, and *Mary M. Mullin*) for the Detroit News,

AnnArbor.com, the Bay City Times, the Flint Journal, the Grand Rapids Press, the Jackson Citizen Patriot, the Kalamazoo Gazette, the Muskegon Chronicle, the Saginaw News, and Scripps Media, Inc.

WEAVER, J. In this case, we decide whether plaintiff, Derith Smith, presented clear and convincing evidence at trial to support the jury's finding that defendants John Stanek, Donald Barrows, and Noel Flohe defamed plaintiff by mass-mailing copies of a personnel report containing false information about her. After conducting an independent review of the record, we conclude there exists clear and convincing evidence that Stanek and Barrows acted with "actual malice," but that plaintiff has failed to meet her evidentiary burden as to Flohe.

Accordingly, we affirm the result reached by the Court of Appeals as to Flohe, but reverse the result it reached as to Stanek and Barrows. We remand this matter to the Court of Appeals for consideration of defendants' other issues, including whether the handwritten caption on the mailed report constitutes a non-defamatory statement of opinion when considered in its context within the report as a whole, whether the caption is provable as false, and whether defendants are entitled to the protection afforded by Michigan's statutory fair reporting privilege.

I. FACTS AND PROCEDURAL BACKGROUND

This defamation action arises from the mass mailing of a personnel report written about plaintiff, Derith Smith. Plaintiff worked for the village of Suttons Bay (the Village) in Leelanau County. Plaintiff's supervisor, Suttons Bay Village Manager Charles Stewart, composed the personnel report (the Stewart report), which

includes allegations that plaintiff was an independent contractor but had been compensating herself as an employee. The Stewart report also includes allegations that plaintiff had never been issued a W-2 form, received benefits to which she was not entitled, paid herself at a higher rate than the rate for which she was approved, and was not a "team player." Stewart presented his report to the Village's personnel committee, and the committee voted to terminate plaintiff's employment.

Plaintiff filed a claim for unemployment compensation benefits. The Village opposed plaintiff's claim, arguing that plaintiff was not an employee but rather an independent contractor and, therefore, not entitled to benefits. A subsequent investigation and review revealed that various allegations against plaintiff in the report were false. Accordingly, the Village withdrew its opposition to plaintiff's claim.

Plaintiff believed that she was wrongfully terminated, but did not institute a lawsuit against the Village because she had secured employment as the Elmwood Township Supervisor in the November 2004 election. On May 17, 2005, while serving as Elmwood Township Supervisor, plaintiff received an anonymous mailing. The mailing included a copy of the Stewart report, with an additional handwritten caption stating, "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?" and "Derrick [sic] Smith." Plaintiff later learned that copies of the Stewart report, including the caption, had been mailed to hundreds of citizens in Leelanau County.

At the time of the mass mailing, defendants Stanek, Barrows, and Flohe were involved in an informal group of concerned Leelanau County citizens. The group met fairly regularly to discuss various issues, including local

politics and elections. It is undisputed that Stanek, Barrows, and Flohe were displeased with plaintiff's performance as township supervisor and were responsible for the mass-mailing of the Stewart report.[1]

The record establishes that Barrows contacted Suttons Bay Village Treasurer Jerry VanHuystee on several occasions in 2004, asking whether VanHuystee had any information about plaintiff. VanHuystee testified that he told Barrows that he did not know of anything illegal done by plaintiff. After several requests for information from Barrows, VanHuystee retrieved the Stewart report from the Village's records and made a copy of it.[2] VanHuystee put the copy of the Stewart report in an envelope and marked it with Barrows's name. VanHuystee then dropped off the envelope at his sister-in-law's home, where Barrows was to pick it up. The copy of the Stewart report contained no handwritten caption at this time.

Barrows testified that he picked up the envelope containing the Stewart report and brought a copy of the report to a citizens' meeting held at Stanek's office during the first week of May 2005. Stanek, Barrows, and Flohe were all present at this meeting, although the trial testimony indicated that Flohe arrived late. At this particular meeting, copies of the Stewart report were available for attendees to view, and there was discussion

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[1] The trial testimony revealed apparent political discourse between plaintiff and defendants. Stanek and Flohe were Elmwood Township officials in 2003, and plaintiff was involved in a group of citizens who started a recall campaign against them. While both Stanek and Flohe survived the recall, they were defeated in the 2004 election. Stanek and Barrows had been supporters of Flohe in his 2004 bid for re-election; however, plaintiff was elected to replace Flohe as Elmwood Township Supervisor.

[2] Plaintiff does not allege on appeal that the Stewart report was improperly obtained from the Village's records or that it was not a "public record."

regarding whether the Stewart report should be mailed to other citizens. The trial testimony establishes that some attendees favored mailing the report, while others did not. George Preston was also present at this meeting, and he testified that he had expressed hesitation about mailing the Stewart report. Preston told the other attendees at the meeting that he would contact Stewart to verify the report's accuracy.

Preston and Stewart testified that Preston had contacted Stewart and informed him of the concerned citizens' intent to mail the Stewart report. Stewart confirmed with Preston that plaintiff had done nothing illegal and that the report should not be distributed. Preston and Stanek both testified that Preston relayed this information to Stanek; however, the trial testimony is somewhat conflicting with regard to exactly when he did so.

Barrows testified that he nonetheless took a copy of the Stewart report to a copy shop and paid to have approximately 500 copies made. Approximately 420 of those copies were placed into envelopes and sealed by the store's staff. The envelopes were placed in boxes along with the remaining 80 copies of the Stewart report. Barrows testified that on May 16, 2005, he took the boxes to Stanek's office where he, Stanek, and Flohe worked together to stamp and label the stuffed envelopes. The envelopes were then taken to the post office and mailed to citizens in Leelanau County. Citizens within the county began receiving the mailings by May 17, 2005, while the remaining copies of the Stewart report were displayed at citizen and township meetings.

Plaintiff subsequently brought a defamation claim against Stanek, Barrows, and Flohe.[3] Defendants

[3] Plaintiff initially filed suit against the village of Suttons Bay, Stewart, and Preston as well. However, those defendants were dismissed from the litigation.

moved for summary disposition, arguing that their actions were covered by the fair reporting privilege, MCL 600.2911(3).[4] The trial court denied summary disposition, ruling that plaintiff had alleged sufficient evidence that if believed by a jury, would show that defendants mailed the Stewart report with actual knowledge that it was false or with reckless disregard for the truth of the report.[5] The trial court additionally concluded that "if a jury finds that the publication was false and not made in good faith and with an honest belief that the report was true, the qualified privilege is defeated and damages may be awarded."

A jury trial was held, and a verdict was reached in favor of plaintiff. The jury awarded plaintiff monetary damages and a public apology in the form of a legal notice. The Court of Appeals reversed and remanded for entry of a judgment of no cause of action, concluding

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[4] MCL 600.2911(3) provides, in pertinent part:

> Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

[5] The trial court specifically noted the following evidence presented by plaintiff: Barrows's deposition testimony that it was his idea to mail the Stewart report to the masses and that he did so with Stanek and Flohe; a letter written by Stewart, but not sent, to Barrows in which Stewart recounts telling Preston prior to the mass mailing that plaintiff did not engage in any criminal wrongdoing; an email dated May 19, 2005, sent by Stewart to plaintiff, acknowledging that the allegations in the Stewart report were inaccurate; Stewart's deposition testimony that he told Preston prior to the mass mailing that plaintiff did not engage in any wrongdoing; and Preston's deposition testimony that he advised defendants not to send the mailing until he could investigate the truthfulness of the report; and Preston's deposition testimony that he advised Stanek, among others, that the allegations of wrongdoing in the report were false.

that defamation could not be established as a matter of law because defendants' failure to investigate the contents of the report did not constitute the "reckless disregard" required for a finding of actual malice[6] and defendants could not be held liable for relying on a report that they did not prepare.[7] The Court of Appeals noted that Stewart prepared the report, and it contained his "erroneous view of the status of plaintiff's employment."[8] With respect to the handwritten caption added to the report, the Court of Appeals concluded that it was merely an expression of opinion.[9]

This Court granted plaintiff's application for leave to appeal to address whether the Court of Appeals erred in determining that plaintiff did not present sufficient evidence to support a finding of actual malice.[10]

II. STANDARD OF REVIEW

The inquiry into whether evidence in a defamation case is sufficient to support a finding of actual malice presents a question of law.[11] To determine whether the constitutional standard for defamation of a public figure[12] has been satisfied, a reviewing court must con-

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[6] A public official or public figure plaintiff may prevail in a defamation action if he or she establishes that the alleged defamatory statements were made with "actual malice." *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964).

[7] *Smith v Anonymous Joint Enterprise*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket Nos. 275297, 275316, and 275463), pp 5-6.

[8] *Id*. at 5.

[9] *Id*.

[10] *Smith v Anonymous Joint Enterprise*, 485 Mich 870 (2009).

[11] See *Bose Corp v Consumers Union of United States, Inc*, 466 US 485, 510-511; 104 S Ct 1949; 80 L Ed 2d 502 (1984).

[12] The parties do not dispute that plaintiff's status as an elected township official renders her a public figure or a public official.

sider the factual record in full.[13] The reason for this "independent review" of the record is "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment . . . ."[14] Therefore, we must analyze the alleged defamatory statements at issue and their surrounding circumstances to determine whether those statements are protected under the First Amendment.[15]

The importance of protecting First Amendment liberties through an application of the "independent review" standard is well established.[16] While this Court generally reviews questions of law de novo, "the independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff."[17] If the reviewing Court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact.[18]

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[13] *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989); see also *Bose Corp*, 466 US at 511 ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' ").

[14] *Harte-Hanks*, 491 US at 686.

[15] *New York Times*, 376 US at 285.

[16] See *id.* (stating that "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression") (citation omitted).

[17] *Bose Corp*, 466 US at 514 n 31.

[18] *Id*.

Likewise, an appellate court should not conduct an independent review of credibility determinations, disregard findings of fact, or create new findings of fact.[19] Instead, "the court should exercise independent judgment regarding whether, as a matter of constitutional law, the evidence in the record supports the verdict,"[20] while giving "due regard" to the trial court's "opportunity to observe the demeanor of the witnesses . . . ."[21] Credibility determinations made by the finder of fact must be examined to ascertain whether they are clearly erroneous.[22]

III. ANALYSIS

A. LEGAL BACKGROUND

" 'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' "[23] Generally, to sustain a claim of defamation, the following elements must be established:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.[24]

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[19] *Locricchio v Evening News Ass'n*, 438 Mich 84, 112 n 17; 476 NW2d 112 (1991) (suggesting that the independent review standard does not extend to "credibility determinations").

[20] *Id*.

[21] *Bose Corp*, 466 US at 499-500.

[22] *Harte-Hanks*, 491 US at 688.

[23] *Nuyen v Slater*, 372 Mich 654, 662 n *; 127 NW2d 369 (1964) (citation omitted).

[24] *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

In the seminal case of *New York Times Co v Sullivan*, the United States Supreme Court recognized the "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 sharp attacks on government and public officials."[25] The Court concluded that a plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the alleged defamatory statements were made with "actual malice."[26] "Actual malice" exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth.[27] The high threshold established by the "actual malice" standard was codified by our Legislature in MCL 600.2911(6), which provides:

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

Pursuant to this statute, a plaintiff who is a public official or public figure bears the burden of sustaining a defamation claim by clear and convincing proof that the alleged defamatory statement was made with actual malice, specifically, either knowledge that the statement was false or with reckless disregard of whether or not the statement was false. Clear and convincing proof is that which produces in the mind of the trier of fact a

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[25] *New York Times*, 376 US at 270.

[26] *Id*. at 279-280; see also *Curtis Publishing Co v Butts*, 388 US 130; 87 S Ct 1975; 18 L Ed 2d 1094 (1967) (extending the *New York Times* actual malice standard to public figures).

[27] *New York Times*, 376 US at 280.

firm belief or conviction as to the truth of the precise facts in issue.[28] Evidence may be uncontroverted and yet not be clear and convincing.[29] Conversely, evidence may be clear and convincing despite the fact that it has been contradicted.[30]

After *New York Times*, the United States Supreme Court clarified the scope of the actual malice standard. In *St Amant v Thompson*, the Court explained that "actual malice" is a subjective concept.[31] However, a defendant in a defamation case cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true."[32] Instead, "[t]he finder of fact must determine whether the publication was indeed made in good faith."[33] The Court further held in *Harte-Hanks Communications, Inc v Connaughton* that "only through the course of case-by-case adjudication can [a court] give content to [the actual malice] constitutional standard[]."[34] The term "malice" in the actual malice standard does not equate to a showing of ill will.[35] Rather, the standard requires a showing that, at minimum, the allegedly defamatory statements were made with a "reckless disregard for the truth."[36]

The manner in which a plaintiff may establish "reckless disregard for the truth" for purposes of the actual

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[28] *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (citation omitted).

[29] *Id*.

[30] *Id*.

[31] *St Amant v Thompson*, 390 US 727, 731; 88 S Ct 1323; 20 L Ed 2d 262 (1968).

[32] *Id.* at 732.

[33] *Id*.

[34] *Harte-Hanks*, 491 US at 686.

[35] *Id.* at 666.

[36] *Id*. at 667.

malice standard cannot necessarily be expressed in a singular definition.[37] A plaintiff must prove something "more than a departure from reasonably prudent conduct."[38] Likewise, a plaintiff must present sufficient evidence to justify a conclusion that the defendant made the allegedly defamatory publication with a "high degree of awareness" of the publication's probable falsity,[39] or that the defendant "entertained serious doubts as to the truth" of the publication made.[40] And while "courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry."[41]

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[37] *St Amant*, 390 US at 730.

[38] *Harte-Hanks*, 491 US at 688.

[39] *Garrison v Louisiana*, 379 US 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964).

[40] *St Amant*, 390 US at 731. The Supreme Court has additionally recognized that even a false statement may be protected from defamation claims if it cannot be reasonably interpreted as stating actual facts about an individual. *Milkovich v Lorain Journal Co*, 497 US 1, 16-17; 110 S Ct 2695; 11 L Ed 2d 1 (1990). So too has our Court of Appeals. In *Ireland v Edwards*, 230 Mich App 607, 611-612; 584 NW2d 632 (1998), an attorney representing the father in a custody dispute commented on the mother's actions and her fitness as a parent. The mother, in turn, filed a defamation claim against the attorney. The Court of Appeals concluded that many of the allegedly defamatory statements, when read or heard in context, "could not reasonably be understood as stating actual facts" about the mother and that the attorney's statements about the time the mother spent with the child amounted to " 'rhetorical hyperbole.' " *Id*. at 618-619. Thus, the Court of Appeals concluded that the statements were not actionable. *Id*. at 619.

[41] *Harte-Hanks*, 491 US at 668, citing *Herbert v Lando*, 441 US 153, 160; 160 L Ed 2d 115; 99 S Ct 1635 (1979). See also *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 306; 680 NW2d 915 (2004), which noted that circumstantial evidence may be introduced to show actual malice because it would be rare for a defendant to admit that he or she acted with actual malice.

Finally, it is well settled that the failure to investigate the accuracy of a communication before publishing it, even when a reasonably prudent person may have done so, is not sufficient to establish that the defendant acted with reckless disregard for the truth.[42] However, a "purposeful avoidance of the truth" is dissimilar from the mere "failure to investigate," and "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of a publication is sufficient to find reckless disregard.[43] Furthermore, when a defendant has reported a third party's allegations, reckless disregard for the truth of the allegations "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[44]

B. APPLICATION OF ACTUAL MALICE STANDARD

1. STANEK

Plaintiff first relies on evidence that, during a meeting at which all three defendants were present, Preston expressed hesitation about mailing the Stewart report and stated that he would speak to Stewart to verify the accuracy of the report's contents. Specifically, Preston testified that in response to a discussion about mailing the Stewart report, he informed others that it "probably wouldn't be a good idea" because "no one had any real knowledge if in fact [the] document was true or not."[45]

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[42] *St Amant*, 390 US at 731, 733.

[43] *Harte-Hanks*, 491 US at 692.

[44] *St Amant*, 390 US at 732.

[45] Preston additionally testified that there were probably fewer than 10 people present at the meeting, and he "definitely" thought that the group heard him say he wanted to investigate the accuracy of the Stewart report. Barrows testified that he heard Preston say that he would talk to Stewart about the report. In addition, Barrows testified that there was

With regard to Stanek's liability, both Preston and Stanek testified that, at a monthly Elmwood Township meeting, Preston informed Stanek that he had spoken with Stewart and that Stewart confirmed that plaintiff had not done anything illegal. There were two monthly meetings at which this conversation could have occurred—either that of May 9, 2005, or that of June 13, 2005.

Preston testified that his conversation with Stanek occurred sometime in the spring, and that while he could not be certain of the month, he did not believe it was in June. In contrast, Stanek testified that he recalled that the conversation took place on June 13. In any event, Stanek did not deny that Preston informed him of Stewart's confirmation that plaintiff had not done anything illegal. If the jury believed that the conversation between Preston and Stanek did not take place before June 13, as Stanek asserts, plaintiff would not be able to establish that Stanek knew the allegations in the Stewart report were false *before* the mass-mailing. However, if the jury believed that the conversation between Preston and Stanek occurred at the May 9 meeting, then plaintiff would be able to establish that Stanek mailed the Stewart report despite the knowledge that it contained false information.

On this record, it is apparent that the jury did not believe that Preston waited until June 13 to tell Stanek about the Stewart report when citizens already started receiving the report by mail almost a month earlier on May 17 and expressed their concerns with its contents shortly thereafter. The testimony reveals that Preston

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debate about whether the Stewart memo should be sent out or not. Stanek, however, testified that those who expressed hesitance to mail the Stewart report did not indicate their reasons, and that he did not hear Preston say he would talk to Stewart about the report.

already knew by May 2 or 4 that defendants were considering mailing the Stewart report, and that he had contacted Stewart about this at some point before May 17. Thus, the jury apparently did not believe Stanek's testimony that Preston did not report back to him until June 13, almost a month *after* the Stewart report had been distributed. Instead, the jury apparently chose to believe Preston's testimony that he told Stanek about the Stewart report in the spring, but that he did not think it was as late as June.[46]

Here, the illogical timeline of events presented by Stanek, coupled with Preston's testimony that Stanek initially denied responsibility for the mailing and evidence that Stanek refused to make a retraction after admitting he knew that the contents of the Stewart report were false, lead us to conclude that the jury's finding that Stanek knew that the Stewart report contained false information or was aware of the report's probable falsity when he mailed copies of it was not clearly erroneous. We will not disturb the jury's credibility determinations in this regard.[47]

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[46] We reject the concurrence/dissent's proclamation that Preston's testimony—that the conversation took place in "late spring, so that's May, June"—somehow definitively means that the earliest the conversation could have occurred was the third week of May. Tempting as it may be, we likewise decline to substitute our subjective interpretation of the record for that of the jury. Findings of fact, although not necessarily immune from review, and the opportunity to observe first-hand the demeanor of witnesses, even in the context of defamation claims subject to enhanced First Amendment scrutiny, remain inherently within the province of the jury. See *Steadman v Lapensohn*, 408 Mich 50, 53-54; 288 NW2d 580 (1980); *Cochrane v Wittbold*, 359 Mich 402, 408; 102 NW2d 459 (1960); *Bose Corp*, 466 US at 512.

[47] *Harte-Hanks*, 491 US at 688; *Locricchio*, 438 Mich at 112 n 17. Although the concurrence/dissent iterates on five separate occasions that it has conducted an independent review of the record, it does not appreciate the scope of that review. Specifically, it does not recognize that an independent review of the record is not the equivalent of having carte

Moreover, we are satisfied that this evidence constitutes clear and convincing evidence that Stanek acted with actual malice. Although it is contradicted by Stanek's own testimony that he did not have knowledge of the Stewart report's falsity, his denial of such knowledge is not, in and of itself, sufficient to defeat plaintiff's claim that Stanek had the requisite knowledge to support a defamation claim.[48] The jury was undoubtedly presented with conflicting testimony here. Similarly, in *Harte-Hanks*, evidence was presented that, if believed, could effectively refute the claim of actual malice. However, as the United States Supreme Court explained in *Harte-Hanks*, we should not substitute for the judgment of the jury our own judgment of which testimony was most credible.[49] Accordingly, we do not

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blanche to adjudicate the merits of a case. Indeed, it is the concurrence/dissent that does not heed well-established United States Supreme Court precedent holding that,

> in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review "the evidence in the . . . record to determine whether it could constitutionally support a judgment" for the plaintiff. [*Time, Inc v Pape*, 401 US 279, 284; 91 S Ct 633; 28 L Ed 2d 45 (1971).]

Thus, the proper inquiry, misunderstood by the concurrence/dissent, is to ensure that a constitutionally sufficient quantum of evidence supports a judgment consistent with First Amendment principles.

[48] *St Amant*, 390 US at 732 ("The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.").

[49] On the issue of credibility determinations in defamation actions, the United States Court of Appeals for the Ninth Circuit has stated, "[W]e read *Bose* and *Harte-Hanks* as creating a 'credibility exception' to the *New York Times* rule of independent review." *Newton v Nat'l Broadcasting Co Inc*, 930 F2d 662, 671 (CA 9, 1990). Noting that the fact-finding function involves " 'credibility determinations, the weighing of the evidence, and the drawing

find the jury's credibility determinations clearly erroneous and, therefore, we agree with the jury's finding with regard to Stanek's liability.

2. BARROWS

Barrows testified that following plaintiff's election as township supervisor, he repeatedly asked VanHuystee, at least five times,[50] for information about plaintiff. Specifically, Barrows inquired whether plaintiff had been involved in any criminal activity. VanHuystee testified that he told Barrows on each of the five occasions that he did not know of any illegal conduct by plaintiff. Furthermore, VanHuystee testified that the occasions on which he told Barrows that plaintiff had not been involved in illegal activity were *prior* to May 16, 2005, the date on which Stanek, Barrows, and Flohe mailed the Stewart report.

Barrows denied knowing that the statements in the Stewart report regarding plaintiff were false. Yet Barrows's denial of such knowledge is not, in and of itself, sufficient to defeat plaintiff's claim that he had the requisite knowledge to support a defamation claim.[51] Not only was Barrows aware of Preston's initial hesitation to mail the Stewart report, but VanHuystee repeatedly told Barrows that he did not know of any illegal activity by plaintiff.

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of legitimate inferences from the facts,' " *id*. at 671 n 13 (citation omitted), the court explained that the United States Supreme Court had drawn a thin line "between highly deferential review of credibility determinations and less deferential review of the factfinder's evaluation of other evidence relevant to the actual malice issue," *id*. at 672.

[50] In response to a question asking whether Barrows recalled talking to VanHuystee on five different occasions and requesting information showing that plaintiff had done something illegal, Barrows answered, "It could have been more than five, I don't remember."

[51] See *St Amant*, 390 US at 730.

Indeed, Barrows's testimony provides a sound basis for the jury's finding of actual malice. The following exchange between plaintiff's counsel and Barrows is illustrative of Barrows's purposeful avoidance of the truth:

> *Q*. Did you hear Mr. Preston say that the group when he said don't send it, I'm going to go investigate, some of the group at least some members he didn't know how many, agreed that he should do that, did you hear him testify to that?
>
> *A*. Yes, I did.
>
> *Q*. And, did you agree, were you one of those people that Mr. Stewart agreed Mr. Stewart should go check—Mr. Preston should go check with Mr. Stewart, or didn't you agree with that?
>
> *A*. I think it was neutral, I didn't care whether he went or not.
>
> *Q*. You didn't disagree with him going?
>
> *A*. I didn't care. I said he was going to do it, it wasn't anything of real interest to me.
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> * * *
>
> *Q*. What I'm asking about the meeting, didn't [Preston] tell you at the meeting, you knew at the meeting he said don't send it I'm going to go investigate, right?
>
> *A*. That could very well be, I mean, that's something that—
>
> *Q*. And, that you know that those statements were made by Mr. Preston before the mailing went out, correct?
>
> *A*. Oh, yes, sure.
>
> *Q*. And, we know the mailing occurred on May 15 or 16, right?
>
> *A*. Right.
>
> *Q*. No doubt about that because we have the envelope, right?

A. That's right.

Q. So to wrap all those little beads together, you knew before you sent that mailing at least one person looked at it, said don't send it, I'm going to investigate, I'm going to go to the guy that wrote this memo, you knew that, right?

A. Yes.

After considering the evidence presented, including this testimony, the jury apparently found that Barrows acted with actual malice. This conclusion is eminently reasonable given that Barrows conceded that Preston had recommended that he not send the report because he wanted to verify its accuracy. Thus, there was sufficient evidence to support the jury's conclusion that Barrows acted with reckless disregard for the truth of the statements in the Stewart report. Although the evidence was controverted, we conclude that plaintiff sustained her burden of presenting the jury with clear and convincing proof that Barrows acted with actual malice when mailing the Stewart report.

We find further support for this conclusion in *Harte-Hanks*. In that case, the plaintiff, a candidate for an elective judicial office occupied by an incumbent, brought a defamation action against the defendant newspaper, which had published an article that damaged his personal and professional reputation. Shortly before the election, the plaintiff discovered evidence of a bribery scheme involving a member of the incumbent judge's staff. The plaintiff located a witness to that bribery, Patsy Stephens, and tape-recorded a four-hour interview of her during which she provided details of the bribery scheme. Eight people were present during that interview, including Stephens's sister, Alice Thompson.

The defendant endorsed the incumbent in the election and arranged a meeting with Thompson to discuss

the alleged bribery scheme. Thompson asserted that the plaintiff had promised her and Stephens gifts and other consideration in exchange for Stephens's statements implicating the incumbent's staff in the bribery scheme. Before printing an article concerning Thompson's allegations against the plaintiff, the defendant interviewed the plaintiff. The plaintiff categorically denied Thompson's assertion that he had offered an improper quid pro quo for Stephens' information, and provided the defendant with access to the tape recording of his interview with Stephens. The defendant did not listen to the recording. It nevertheless published a story alleging that the plaintiff had offered Thompson and Stephens jobs in exchange for their cooperation in building a bribery case against the incumbent's staff.

A jury returned a verdict for the plaintiff, and the United States Court of Appeals for the Sixth Circuit affirmed.[52] The United States Supreme Court granted certiorari to consider whether the lower courts had properly applied the *New York Times* actual malice standard and whether the plaintiff had presented clear and convincing evidence to support the jury's verdict.

The Court initially noted that the jury's verdict was largely premised on credibility determinations. In concluding that the plaintiff had satisfied his burden of proving his case by clear and convincing evidence, the Court relied heavily on circumstantial evidence of the defendant's actual malice. Notably, the Court cited the defendant's failure to review the tape recording of the plaintiff's interview with Stephens that would have confirmed or refuted portions of its article. The Court reasoned that "one might reasonably infer . . . that the decision not to listen to the tapes was motivated by a

[52] *Connaughton v Harte-Hanks Communications, Inc*, 842 F2d 825 (CA 6, 1988).

concern that they would raise additional doubts concerning Thompson's veracity."[53] The Court further stated:

> It is also undisputed that [the plaintiff] made the tapes of the Stephens interview available to the [defendant] and that no one at the newspaper took the time to listen to them. Similarly, there is no question that the [defendant] was aware that . . . Stephens was a key witness and that they failed to make any effort to interview her. Accepting the jury's determination that [the defendant's] explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.[54]

In this case, as in *Harte-Hanks*, Barrows could have readily confirmed the accuracy of the Stewart report by doing exactly what Preston had done—contact Stewart directly. It appears the jury found that Barrows made a conscious decision not to hear from the person most capable of confirming the truth or falsity of the report. This is significant in light of the fact that at a meeting, Preston impressed on Barrows (and others, including Stanek) that the report should not be distributed because its accuracy had not been verified. And given the fact that Barrows repeatedly sought out VanHuystee and VanHuystee told Barrows on at least five separate occasions that he did not know of anything illegal done by plaintiff, the jury had ample evidence from which it could conclude that Barrows acted in purposeful avoidance of the truth.

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[53] *Harte-Hanks*, 491 US at 684.

[54] *Id*. at 692 (citations omitted).

The Stewart report contained relatively specific allegations of wrongdoing by plaintiff, including allegations of acts that would clearly constitute a misuse of taxpayer funds. Barrows knew that VanHuystee did not know of anything illegal done by plaintiff and that members of the group of concerned citizens that Barrows belonged to expressed concern about mailing the Stewart report and a desire to verify its accuracy. Thus, the jury was presented with relevant evidence aside from a mere allegation that Barrows obtained the Stewart report and mailed it without any investigation. As in *Harte-Hanks*, on the basis of the evidence presented and the testimony apparently believed by the jury, the jury in this case most certainly could have inferred that Barrows's decision not to confirm the accuracy of the report was motivated by a concern that doing so would raise additional doubts concerning its veracity. Therefore, we do not find the jury's credibility determinations clearly erroneous, and we agree with the jury's finding with regard to Barrows's liability.[55]

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[55] The concurrence/dissent's claim that the Stewart report was available to the public under FOIA is inapposite to whether any of the defendants acted with actual malice. Moreover, the concurrence/dissent relies heavily on the fact that Barrows testified that he had no reason to investigate the veracity of the Stewart report. But it does not consider the central tenet of *St Amant*, 390 US at 732, that

> [t]he defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, reckless-

3. FLOHE

In contrast to the evidence against Stanek and Barrows, the evidence presented against Flohe is less convincing. Unlike for Stanek, there is no evidence indicating that Flohe was *ever* told that Stewart himself, as author of the report, confirmed that the report contained false information. In addition, unlike for Barrows, there is no evidence that VanHuystee had repeatedly informed Flohe that he had no knowledge of any illegal activity by plaintiff. Moreover, the evidence indicates that Flohe was not even present at the beginning of the meeting at which Preston expressed his reluctance to mail the report and indicated that he would verify its accuracy with Stewart. Thus, the record contains little, if any, evidence to counter Flohe's contention that he was unaware that the report contained false information. Accordingly, we conclude that while the jury apparently did not find Flohe's testimony to be credible, there was not clear and convincing evidence remaining to support its finding that Flohe acted with actual malice.

For these reasons, we reverse the Court of Appeals' conclusion that plaintiff presented insufficient evidence of actual malice as to Stanek and Barrows, but affirm its conclusion that plaintiff presented insufficient evidence of actual malice as to Flohe.

C. DEFAMATORY MEANING OF THE HANDWRITTEN CAPTION

Defendants additionally argue that they are not liable for the added handwritten caption because the caption is not defamatory.[56] The caption added to the

ness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

[56] All defendants deny responsibility for writing the caption on the Stewart report and deny knowing who wrote it. We note that this is

Stewart report states, "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?" and "Derrick [sic] Smith" written next to the line stating, "Subject: Personnel meeting scheduled for August 10, 2004." The Court of Appeals conclusively determined that the caption alone is incapable of defamatory meaning as a matter of law because the term "alleged" was used and a question mark was included, indicating that the caption was nothing more than an expression of opinion.

However, we note that a statement of "opinion" is not automatically shielded from an action for defamation because "expressions of 'opinion' may often imply an assertion of objective fact."[57] As explained by the United States Supreme Court, the statement "In my opinion Jones is a liar" may cause just as much damage to a person's reputation as the statement "Jones is a liar."[58] If a statement of opinion is about a matter of public concern, it is protected speech under the First Amendment, unless it can be objectively proven to be false.[59] Thus, a statement of opinion that can be proven to be false may be defamatory because it may harm the subject's reputation or deter others from associating with the subject. The dispositive question with regard to the handwritten caption is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning.[60]

The handwritten caption "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer

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irrelevant to our analysis, as defendants all admit to mailing the report and it is undisputed that the mailed copies included the handwritten caption.

[57] *Milkovich*, 497 US at 18.

[58] *Id.* at 18-19.

[59] *Id.* at 19-20.

[60] See *id.* at 21.

Funds?" and "Derrick [sic] Smith" may be defamatory if it implies that defendants have information that would indicate a misuse of taxpayer funds by plaintiff. The Court of Appeals noted that the caption is phrased in a manner that asserts that any misuse of funds is only alleged, and it is punctuated with a question mark, indicating that defendants are not conclusively stating that plaintiff misused taxpayer funds.

Nevertheless, even a statement of opinion may be defamatory when it implies assertions of objective facts. Noting that context matters in analyzing an allegedly defamatory statement, the United State Court of Appeals for the First Circuit has held that a statement must be examined "in its totality in the context in which it was uttered or published."[61] In addition, the First Circuit has explained that a court must consider all the words used in allegedly defamatory material, "not merely a particular phrase or sentence."[62] This Court has similarly supported the notion that "context" must be considered when an alleged defamatory statement is reviewed for a determination of whether it implies a defamatory meaning.[63]

We agree that allegedly defamatory statements must be analyzed in their proper context. To hold otherwise could potentially elevate form over substance. Thus, on remand, the handwritten caption in this case should be viewed in context with the Stewart report as a whole, instead of relying merely on the use of a question mark

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[61] *Amrak Productions, Inc v Morton*, 410 F3d 69, 72-73 (CA 1, 2005).

[62] *Id*. at 73.

[63] See, e.g., *Gustin v Evening Press Co*, 172 Mich 311, 314; 137 NW 674 (1912) (noting that a publication must be considered as a whole when testing its libelous quality); *O'Connor v Sill*, 60 Mich 175, 181; 27 NW 13 (1886) (noting that an allegedly defamatory article must be read as a whole, without severing parts of it).

as punctuation and use of the word "Alledged [sic]" to determine whether it is capable of defamatory meaning.

Finally, we note that the Court of Appeals failed to address the issue of the falsity of the handwritten caption. Such an inquiry is required for plaintiff to sustain her defamation claim, and must be addressed by the Court of Appeals on remand.

IV. CONCLUSION

Plaintiff presented clear and convincing evidence to support the jury's finding that both Stanek and Barrows acted with actual malice. We reach this conclusion after conducting an independent review of the record and giving due regard to the ability of the finder of fact—the jury—to view the witnesses' demeanor and to make appropriate credibility judgments. The concurrence/dissent's approach to the independent review function is mistaken and reaches out to conduct essentially a de novo review in order to replace, with the concurrence/dissent's own, *all* of the jury's findings as to the defendants' liability.[64]

Therefore, we reverse the Court of Appeals' conclusion that Stanek and Barrows are not liable for defam-

[64] The concurrence/dissent's approach does not acknowledge or apply the guidance provided by the United States Supreme Court and this Court regarding credibility determinations made by the fact-finder—the jury—in defamation cases. See *Bose Corp*, 466 US at 514 n 31. An appellate court should not conduct an independent review of credibility determinations, disregard findings of fact, or create new findings of fact. *Locricchio*, 438 Mich at 112 n 17. Credibility determinations made by the finder of fact must be examined to ascertain whether they are clearly erroneous. *Harte-Hanks*, 491 US at 688. The jury in this case was presented with conflicting testimony and was *required* to assess the credibility of the witnesses. Giving due regard to the jury's credibility determinations, we conclude that the evidence presented supports the jury's verdict with regard to Stanek and Barrows, but not with regard to Flohe.

ing plaintiff. However, we also conclude that the record does *not* contain sufficient evidence to support the jury's finding that Flohe acted with actual malice. Therefore, we affirm the Court of Appeals' conclusion that Flohe is not liable for defaming plaintiff.

Accordingly, we remand this matter to the Court of Appeals for consideration of defendants' additional arguments, including whether the added handwritten caption on the Stewart report constitutes a nondefamatory statement of opinion when considered in its context within the Stewart report as a whole, whether the caption is provable as false, and whether defendants are entitled to the protection afforded by Michigan's statutory fair reporting privilege.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

CORRIGAN, J. (*concurring in part and dissenting in part*). In this defamation action, we consider whether the Court of Appeals erred by determining that plaintiff Derith Smith, a public official, failed to present clear and convincing evidence to support a finding of actual malice at trial. I concur with the majority that plaintiff did not satisfy her evidentiary burden regarding defendant Noel Flohe. I dissent, however, from the majority's conclusion that plaintiff presented clear and convincing evidence that defendants John Stanek and Donald Barrows acted with actual malice when they mailed copies of a public record—a report critical of plaintiff's job performance written by her former supervisor, Suttons Bay Village Manager Charles Stewart (the Stewart report). I would affirm the result reached by the Court

of Appeals concerning each of the three individual defendants because my independent review of the record reveals that plaintiff failed to present clear and convincing evidence that Stanek and Barrows acted with actual malice.

I. ACTUAL MALICE STANDARD

As the majority explains, to prevail in a defamation action, a plaintiff who is a public official must establish that a defendant made a false and defamatory statement with "actual malice."[1] " 'Actual malice' exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth."[2] The Legislature codified the heightened actual malice standard in MCL 600.2911(6), which mandates that a plaintiff who is a public official sustain a defamation claim "by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false."[3] Clear and convincing proof is

> evidence that "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the factfinder] to

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[1] *New York Times Co v Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686 (1964).

[2] *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 731; 664 NW2d 728 (2003), citing *New York Times*, 376 US at 280.

[3] MCL 600.2911(6) provides:

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

> come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[4]

Application of the heightened actual malice standard in cases involving political speech reflects our "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 sharp attacks on government and public officials."[5] This Court has distinguished between regulation of political speech and commercial speech, stating:

> Political speech is " 'at the core of our electoral process and of the First Amendment freedoms' . . . an area of public policy where protection of robust discussion is at its zenith." Because the central purpose of the First Amendment speech clause is to protect core political speech, we determined that political speech may not be regulated in the same manner that commercial speech is regulated.[6]

"There is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule,' and the strongest possible case for independent review" of the actual malice determination.[7]

When determining whether a public official plaintiff has satisfied the heightened actual malice stan-

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[4] *In re Chmura (After Remand)*, 464 Mich 58, 72; 626 NW2d 876 (2001), quoting *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

[5] *New York Times*, 376 US at 270.

[6] *In re Chmura (After Remand)*, 464 Mich at 65, quoting *Meyer v Grant*, 486 US 414, 425; 108 S Ct 1886; 100 L Ed 2d 425 (1988).

[7] *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 686-687; 109 S Ct 2678; 105 L Ed 2d 562 (1989), quoting *Ocala Star-Banner Co v Damron*, 401 US 295, 300; 91 S Ct 628; 28 L Ed 2d 57 (1971).

dard, "the reviewing court must consider the factual record in full."[8] The requirement of independent review "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."[9] In *Locricchio v Evening News Ass'n*, this Court observed that the independent review requirement "reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context."[10] One year after *Locricchio*, this Court expanded its discussion about the importance of independent review, stating that "[w]e perceive an additional need for independent review grounded on the fear that juries may give short shrift to important First Amendment rights."[11]

In *New York Times Co v Sullivan*, the United States Supreme Court recognized that "erroneous statement[s] [are] inevitable in free debate, and that [these statements] must be protected if the freedoms of expression are to have the 'breathing space' that they

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[8] *Harte-Hanks*, 491 US at 688; see also *Locricchio v Evening News Ass'n*, 438 Mich 84, 110; 476 NW2d 112 (1991), quoting *New York Times*, 376 US at 285 ("[*New York Times*] mandate[s] that reviewing courts . . . 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' ") (quotation marks omitted).

[9] *Bose Corp v Consumers Union of United States, Inc*, 466 US 485, 501; 104 S Ct 1949; 80 L Ed 2d 502 (1984).

[10] *Locricchio*, 438 Mich at 114 n 20.

[11] *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992). *Rouch* further observed that "[e]ven Justice Rehnquist, who dissented in *Bose, supra,* conceded that the doctrine of independent review of facts 'exists . . . so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for.' " *Id*., quoting *Bose*, 466 US at 518.

'need . . . to survive.' "[12] Absent such protection, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[13] That is, not protecting false defamatory statements would "dampen[] the vigor and limit[] the variety of public debate."[14] Because such an outcome cannot be tolerated under the First Amendment, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct . . . ."[15] Instead, a plaintiff who is a public official must establish actual malice before recovering damages for a defamatory falsehood.[16]

The matters at issue here lie at the heart of our political discourse and are subject to the expansive protections enshrined in the First Amendment.[17] Nonetheless, the majority imposes liability on two of the three individual defendants because they failed to personally investigate information criticizing a political opponent contained in a public record. In so doing, the

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[12] *New York Times*, 376 US at 271-272, quoting *NAACP v Button*, 371 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 (1963).

[13] *New York Times*, 376 US at 279.

[14] *Id*.

[15] *Id*. at 273.

[16] *Id*. at 279-280.

[17] The constitutional right guaranteeing the freedom of speech is embodied explicitly in both the United States Constitution and the Michigan Constitution. US Const, Am I ("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."); Const 1963, art 1, § 5 ("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.").

majority punishes defendants' exercise of their First Amendment rights to engage in political speech and to distribute a public record, contrary to well-established United States Supreme Court precedent.[18] Moreover, the majority shirks its "constitutional responsibility" to independently review the whole factual record,[19] and the majority also wrongly defers to the jury's verdict when such deference is not owed.[20]

II. ACTUAL MALICE STANDARD AS APPLIED

In this case, all three individual defendants were politically active residents of Elmwood Township. Stanek, a township trustee from 1998 to 2004, survived a 2003 recall campaign in which plaintiff was involved. He lost his bid for reelection in 2004, and his slate was replaced by a group of candidates that included plaintiff. Flohe was the township supervisor until plaintiff was elected to replace him in 2004. Barrows, another political opponent of plaintiff's, expressed his concern that plaintiff's job performance in Elmwood Township would be similar to her previous tenure as clerk in the village of Suttons Bay. He sought information about

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[18] *Harte-Hanks*, 491 US 657; *Bose*, 466 US 485; *New York Times*, 376 US 254.

[19] *Bose*, 466 US at 501.

[20] The *Locricchio* Court explained:

> It is worth noting in this connection that the doctrine of independent review reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context. Thus, "much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech *from* the jury. . . . The common wisdom is that if juries were given more decisional power in [First Amendment cases], either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow." Schauer, *The role of the people in First Amendment theory,* 74 Cal L R 761, 765 (1986). [*Locricchio*, 438 Mich at 114 n 20.]

plaintiff's track record in the village from Jerry VanHuystee, Suttons Bay's appointed treasurer. VanHuystee furnished Barrows with the publicly available Stewart report, which criticized plaintiff's job performance in the village. Indeed, the Stewart report caused plaintiff's termination from her position in the village. Defendants subsequently mailed approximately 450 copies of the Stewart report to local residents, local government officials, and plaintiff. Before defendants mailed the Stewart report, someone had modified it with a handwritten caption stating "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?" and "Derrick [sic] Smith."

Plaintiff received a copy of the Stewart report on May 17, 2005, and filed suit in July 2005. Plaintiff's suit proceeded to trial, and the jury returned a verdict in favor of plaintiff. The jury ordered that Stanek pay plaintiff $40,000 in noneconomic damages and $4,000 in campaign expenses and that Barrows pay plaintiff $45,000 in noneconomic damages and $4,000 in campaign expenses. By contrast, the jury only assessed $10,000 in noneconomic damages and $4,000 in campaign expenses against Flohe. However, the jury also mandated that each individual defendant publish a public apology to plaintiff in the form of a legal notice to appear in two local newspapers: the *Traverse City Record-Eagle* and the *Leelanau Enterprise*.

Although I generally agree with the majority's explication of the actual malice standard, I disagree with the majority's application of that standard to defendants Stanek and Barrows on this record. The record does not show "with convincing clarity"[21] that defendants acted

[21] See *Bose*, 466 US at 514 ("Appellate judges . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.").

with actual malice when they mailed the Stewart report. The "clear and convincing" evidentiary standard requires that plaintiff satisfy "the most demanding standard applied in civil cases."[22] After performing an independent review of the record, I cannot conclude that plaintiff satisfied this exacting standard. While plaintiff proffered some evidence of actual malice, that evidence is not "so clear, direct . . . weighty and convincing" that I can unhesitatingly state that either Stanek or Barrows acted with actual malice when they disseminated the Stewart report.[23]

Suttons Bay Village Manager Charles Stewart, plaintiff's former supervisor, drafted the report about plaintiff's tenure with the village. Stewart addressed the report to the village's personnel committee, which voted to terminate plaintiff after reviewing it. The Stewart report remained on file thereafter. In the report, Stewart stated that (a) the village hired plaintiff as an independent contractor, but plaintiff received benefits available to full-time employees although she had not received W-2 forms; (b) when the village council declined to reappoint plaintiff as clerk, she delayed responding to the village's part-time job offer until Stewart was away from the office, at which time plaintiff directly contacted the council president without Stewart's knowledge to authorize a higher pay rate; (c) plaintiff did not exert more than the minimum effort necessary to perform her job; and (d) plaintiff was not a "team player."

At trial, Stewart acknowledged that the report contained misinformation. For example, Stewart eventually located plaintiff's W-2 forms, which confirmed her status as an employee, rather than an independent contractor. However, Stewart testified that other aspects

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[22] *In re Martin*, 450 Mich at 227.

[23] *Id.* (quotation marks and citations omitted).

of the report were true, including his belief that plaintiff took purposeful steps to avoid a reduction in pay by directly contacting the council president in Stewart's absence. Plaintiff did not dispute the basic facts involving her pay rate as described in the Stewart report. Nor did she dispute the specific facts surrounding the statements in the Stewart report that Stewart continued to maintain were true. Rather, plaintiff testified that she did not intend to circumvent efforts to lower her pay rate by directly contacting the council president in Stewart's absence. In its decision regarding defendants' motions for summary disposition, the trial court held that "[t]he Stewart report was not a disciplinary report, was not required to be destroyed, and was subject to disclosure under FOIA [the Freedom of Information Act]." Plaintiff never appealed this adverse ruling.

A. DEFENDANT JOHN STANEK

Plaintiff did not present clear and convincing evidence that defendant Stanek acted with actual malice. The testimony of retired police officer George Preston does not establish with convincing clarity that Stanek knew that the Stewart report contained defamatory falsities when he mailed it. Nor does Preston's testimony show that Stanek recklessly disregarded its truth or falsity, i.e., that he "entertained serious doubts as to the truth"[24] of the Stewart report or mailed the Stewart report despite having a "high degree of awareness of [its] probable falsity."[25]

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[24] See *St Amant v Thompson*, 390 US 727, 731; 88 S Ct 1323; 20 L Ed 2d 262 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

[25] See *Garrison v Louisiana*, 379 US 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964) (stating that "only those false statements made with the high

Preston testified that he attended an informal gathering of 10 or 12 people at Stanek's shop in early May 2005 "where some neighbors got together and were talking about current issues going on in Elmwood Township." At this gathering, copies of the Stewart report were distributed, and the attendees began discussing it. When Preston saw a copy of the Stewart report, he "became kind of interested, being a [retired] police officer." Preston volunteered to contact Suttons Bay Village Manager Charles Stewart and ask Stewart about "the contents of this information."[26] Preston wanted "to ensure that [Stewart] did type this and the information inside is what [Stewart] had put in." Preston testified that he waited a "[m]inimum [of] two weeks before I even talked to [Stewart] on the telephone." He also testified that Stewart never told him that the report contained falsities. As a result, Preston never told anyone else, including Stanek, that the Stewart report contained falsities.[27] Instead, Preston told Stanek that the Stewart report had "no substance

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degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions").

[26] When asked whether the other attendees heard him volunteer, Preston responded, "Definitely, yes." Barrows confirmed that he heard Preston say that he wanted to talk to Stewart, but Barrows did not think that he heard Preston make statements about not sending the report. By contrast, Stanek testified, "I did not hear [Preston] say he was going to talk to Mr. Stewart," and Flohe testified that he also did not hear any talk about Preston contacting Stewart.

[27] Preston testified in pertinent part:

> *Q*. You hadn't received any information from Mr. Stewart that anything in the memo was false?
>
> *A*. No, I did not.
>
> *Q*. So you did not have any knowledge that anything in the memo was false, to convey to Mr. Stanek or anyone else, correct?
>
> *A*. That's correct.

to it as far as the criminal aspect." Preston also informed Stanek that because there had been no criminal investigation, he personally "felt that it wasn't right to send that [report] out." Preston testified that he conveyed this message to Stanek at a monthly Elmwood Township meeting that occurred in "late spring, so that's May, June," but Preston did not recall the exact date of this conversation.[28]

Preston's testimony certainly does not establish with convincing clarity that Stanek acted with actual malice in disseminating the Stewart report. Although Preston told Stanek that the Stewart report had no substance "as far as the criminal aspect," Preston unambiguously testified that he never told Stanek or anyone else that the Stewart report contained falsities.[29] Stewart con-

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> *Q*. And, in fact, when you pulled Mr. Stanek aside after this meeting, where he spoke at length, you did not tell him anything in the memo was false, correct?
>
> *A*. That's correct.

[28] At trial, Preston vacillated about when he spoke with Stanek. When asked whether the conversation took place during the monthly Elmwood Township meeting in May 2005, Preston responded, "I couldn't tell you what month it is, but I know it was in late spring." Preston later testified, "I don't think it did go in the month of June. I think it was several weeks, so if that was May 2nd it would have probably been within the month of May."

[29] In response to another series of questions about his conversation with Stewart and his subsequent communication with others, Preston testified:

> *Q*. Sure, exactly. But [Stewart] never told you there was anything false in that memo, did he?
>
> *A*. He did not.
>
> *Q*. As a consequence you never told anybody after that, anybody you talked to, about the conversation with Mr. Stewart. You never said to them, Mr. Stewart said there is something false in the memo?

firmed that he "did not specify" to Preston what misinformation appeared in the report. Stewart also testified that he never spoke with Stanek about the report and that he never attempted to inform Stanek that the report contained falsities. The majority emphasizes Preston's concern with the "criminal aspect" of the Stewart report. However, the Stewart report does not address whether plaintiff engaged in criminal activity or should be criminally prosecuted. The five-page Stewart report does not contain the words "crime" or "criminal." Stewart testified that the report discussed perceived ethical violations by plaintiff. When asked whether he asserted that plaintiff had engaged in illegal conduct in the report, Stewart testified, "I don't believe that's even in the memo." In any event, Preston never told Stanek that the Stewart report contained falsities or that the veracity of the Stewart report had been called into question. Instead, Preston informed Stanek of his personal opinion about the "criminal aspect" of the Stewart report. Preston's act of volunteering to contact Stewart and later sharing his personal opinion about the Stewart report with Stanek does not supply clear and convincing evidence that Stanek mailed the Stewart report with actual malice, i.e., either knowing the report contained defamatory falsities or recklessly disregarding its falsity.

Moreover, the testimony concerning the timeline of events is anything but clear and convincing. The majority deduces that the conversation between Preston and Stanek occurred at the monthly Elmwood Township meeting on May 9, 2005, and not the monthly Elmwood Township meeting on June 13, 2005. The majority reasons that because Preston spoke to Stanek

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A. That's correct, I never said that.

on May 9, or before he mailed the Stewart report, Stanek mailed the Stewart report knowing that it contained defamatory falsities. Yet, Stanek testified with a firm recollection that this conversation occurred on June 13. Preston had no clear recollection of the date. But neither Preston nor Stanek testified in a manner that comports with the majority's dubious conclusion that the two men spoke on May 9—before the Stewart report was mailed.

It is undisputed that the informal gathering at Stanek's shop occurred during the first week of May 2005 and that plaintiff received the Stewart report in the mail on May 17, 2005. Several witnesses testified that the informal gathering at Stanek's shop occurred on May 2 or May 4. Preston testified that he waited a minimum of two weeks after the gathering before contacting Stewart. Preston further testified that after his telephone conversation with Stewart, he approached Stanek some time in "late spring, so that's May, June."[30] Thus, the earliest week in which Preston could have telephoned Stewart is the third week of May 2005—one week after the Elmwood Township meeting on May 9, 2005. That is, under Preston's timeline of events, Preston telephoned Stewart no earlier than May 16 or May 18, 2005, and Preston shared his personal opinion with Stanek some time thereafter. Consequently, Preston's testimony actually corroborates Stanek's recollection that the conversation took place on June 13, 2005. If the conversation between Preston and Stanek occurred on June 13, Preston did not speak to Stanek until after defendants disseminated the Stewart report, and there is no basis to conclude, as the majority summarily does, that Stanek knew that the

[30] Admittedly, Preston's testimony about when he spoke with Stanek varied. See note 28 of this opinion.

Stewart report contained defamatory falsities when he mailed it. The actual testimony on the record, and not the majority's distortion of it, provides yet another basis to conclude that plaintiff did not present clear and convincing evidence that Stanek acted with actual malice.

The majority also accords great weight to Preston's testimony that Stanek initially denied responsibility for the anonymous mailing. The majority's misplaced reliance on Preston's testimony about Stanek's initial denial of responsibility ignores the United States Supreme Court's observation that a defendant's repeated attempts to maintain that the inaccurate was accurate "does not establish that he realized the inaccuracy at the time of publication."[31] Stanek's after-the-fact denial of responsibility for the mailing is irrelevant in determining whether plaintiff presented clear and convincing evidence that Stanek acted with actual malice when he mailed the Stewart report.

B. DEFENDANT DONALD BARROWS

I also reject the majority's conclusion that plaintiff presented clear and convincing evidence that defendant Barrows acted with actual malice. The majority concedes that Barrows did not know that the Stewart report contained defamatory falsities at the time of its dissemination.[32] Therefore, the salient issue is whether

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[31] See *Bose*, 466 US at 512 ("[Defendant employee] had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made—that the inaccurate was accurate. *That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication*.") (emphasis added).

[32] When the trial court issued its bench ruling on Barrows's motion for a directed verdict, the court concluded that although the evidence permitted "an inference" that Barrows acted with reckless disregard,

plaintiff presented sufficient evidence to support a finding that Barrows recklessly disregarded the truth or falsity of the Stewart report. My independent review of the record reveals that plaintiff did not establish with convincing clarity that Barrows mailed the Stewart report "with reckless disregard of whether or not it was false."[33]

The majority relies on the testimony of Suttons Bay Village Treasurer Jerry VanHuystee to conclude that Barrows acted with actual malice. VanHuystee furnished the Stewart report to Barrows. However, VanHuystee's testimony does not establish with convincing clarity that Barrows acted with reckless disregard in disseminating the Stewart report. VanHuystee testified that as the appointed village treasurer, he never supervised plaintiff; moreover, he was not in contact with anyone who did supervise plaintiff. As the majority notes, Barrows asked VanHuystee at least five times whether plaintiff had engaged in illegal conduct during her tenure with the village. VanHuystee repeatedly responded that "as far as I know [plaintiff] hadn't done anything illegal," but VanHuystee also specifically told Barrows that he had no idea.[34] VanHuystee also testified

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there was no evidence that Barrows had actual knowledge of falsity. Plaintiff did not appeal this adverse ruling.

[33] MCL 600.2911(6).

[34] VanHuystee testified in pertinent part:

> *Q*. So when you say that Mr. Barrows asked you whether [plaintiff] had done anything illegal you didn't know one way or another, did you?
>
> *A*. That's correct.
>
> *Q*. You told him, I don't know of anything she did illegal?
>
> *A*. That's correct.
>
> *Q*. But you also told him I don't have any idea?

that he did not even know that the Stewart report existed when he responded to Barrows's questions about plaintiff. Significantly, VanHuystee never testified that he told Barrows that the Stewart report contained falsities or that it merited further investigation based on VanHuystee's review of the document. To the contrary, VanHuystee testified that he only procured a copy of the Stewart report "to stop [Barrows] from asking me" about plaintiff. Additionally, no evidence explains why VanHuystee, a disinterested party, would furnish the Stewart report to Barrows if VanHuystee doubted its veracity. Consequently, I cannot conclude that VanHuystee's testimony clearly established that Barrows mailed the Stewart report with reckless disregard of its falsity.

The majority's reliance on Preston's testimony to establish that Barrows mailed the Stewart report with actual malice is similarly misplaced. Barrows testified that he heard Preston say that he wanted to talk to Stewart during the informal gathering at Stanek's shop, but Barrows also testified that he did not think he heard Preston say "don't send the memo." Preston further testified that the only defendant with whom he spoke after his conversation with Stewart was Stanek. He never spoke to Barrows. Moreover, Preston testified that he had no knowledge of any falsities in the Stewart report, and as a result, he never told anyone else, including Barrows, that the Stewart report contained falsities. Stewart confirmed that he, too, had no contact with Barrows about the report before the mailing. The majority's reliance on Preston's testimony is misplaced because nothing in Preston's testimony demonstrates that Barrows "in fact entertained serious doubts as to

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A. That's correct.

the truth of his publication"[35] or that Barrows mailed the Stewart report with the requisite "high degree of awareness of [its] probable falsity."[36]

I also disagree with the majority's perplexing assertion that Barrows's testimony reveals his "purposeful avoidance of the truth" consistent with *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657; 109 S Ct 2678; 105 L Ed 2d 562 (1989). In *Harte-Hanks*, the United States Supreme Court concluded that "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."[37] The majority suggests that Barrows purposefully avoided the truth because he did not contact Stewart directly. In so doing, the majority conflates Barrows's failure to investigate with the "purposeful avoidance of the truth" illustrated by the unique facts in *Harte-Hanks*.

In *Harte-Hanks*, the defendant newspaper gathered the facts that were ultimately reported; drafted the offending statements; actually heard from the plaintiff himself and five other witnesses that the offending statements were untrue; failed to examine evidence in the defendant's possession corroborating plaintiff's story; and opted not to contact the key witness in the story it was creating, although it contacted the other parties involved. As the Supreme Court explained, "[i]t is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events."[38] "By the time the

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[35] *St Amant*, 390 US at 731.

[36] *Garrison*, 379 US at 74.

[37] *Harte-Hanks*, 491 US at 692 (citation omitted).

[38] *Id.* at 682.

November 1 story appeared, six witnesses had consistently and categorically denied Thompson's allegations, yet the newspaper chose not to interview the one witness that both Thompson and Connaughton claimed would verify their conflicting accounts of the relevant events."[39] In addition, the defendant newspaper had in its possession tapes that would have either verified or disproved its story and yet did not listen to these tapes before publishing its story.

In stark contrast to the defendants in *Harte-Hanks*, defendants here distributed a public record prepared by a government official in the course of his duties and available to the public under FOIA; defendants were never told by anyone that the contents of the report were untrue; they were not given any reason to believe that the contents of the report were untrue; and they did not fail to view evidence in their possession that indicated that the contents of the report were untrue. No evidence whatsoever reflects that Barrows entertained serious doubts about the veracity of the Stewart report before its publication or that he mailed the Stewart report with a high degree of awareness of its probable falsity. In fact, Barrows testified that he had no reason to investigate the Stewart report because he recognized that it came from a reliable source. When asked whether he would have treated the Stewart report differently if its origins appeared dubious, Barrows responded, "Certainly. You couldn't pay any credence to it." In this case, however, Barrows reiterated that "[t]he copy came to me through a reliable source, Mr. VanHuystee" and that "I had no doubt it was reliable."

Finally, it is axiomatic that the mere failure to investigate before publication will not support a finding

[39] *Id.* at 682-683.

of reckless disregard.[40] In the same fashion, the mere fact that Preston expressed his hesitance about mailing the Stewart report and chose to contact Stewart does not impose a similar requirement on Barrows because reckless disregard is "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."[41] Under these facts, plaintiff did not present clear and convincing evidence that Barrows either attempted to purposefully avoid the truth or that Barrows mailed the Stewart report in reckless disregard for its falsity.

III. CONCLUSION

After independently reviewing the record, I cannot conclude that plaintiff presented clear and convincing evidence that either Stanek or Barrows acted with actual malice in disseminating the Stewart report. There is no evidence that either defendant knew about the misinformation contained in the Stewart report regarding plaintiff's status as an employee, her W-2 forms, and her right to employee benefits when they mailed this public record. Accepting that Stanek and Barrows were political opponents who bore ill will toward plaintiff and knew that she had not been criminally prosecuted for any improprieties during her tenure in the village of Suttons Bay the record contains no evidence that either defendant entertained serious doubts about the truth of the Stewart report. Accordingly, I would affirm the result

[40] *Id.*; see also *St Amant*, 390 US at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.").

[41] *St Amant*, 390 US at 731.

reached by the Court of Appeals concerning each of the three individual defendants.

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

BRIGHTWELL v FIFTH THIRD BANK OF MICHIGAN
CHAMPION v FIFTH THIRD BANK OF MICHIGAN

Docket Nos. 138920 and 138921. Argued January 12, 2010 (Calendar No. 5). Decided July 30, 2010.

Brandon Brightwell brought an action in the Wayne Circuit Court against Fifth Third Bank of Michigan, alleging that it had terminated his employment in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Brightwell worked in Wayne County. Citing MCL 37.2801, the CRA venue statute, defendant moved for a change of venue to Oakland County, where defendant made the decision to terminate Brightwell's employment. The court, Prentis Edwards, J., denied the motion, and defendant sought leave to appeal.

Sharon Champion brought an action in the Wayne Circuit Court against Fifth Third Bank of Michigan, alleging that it had terminated her employment in violation of the CRA. Champion worked in Wayne County. Again citing MCL 37.2801, defendant moved for a change of venue to Oakland County, where it had made the decision to terminate Champion's employment. The court, Warfield Moore, Jr., J., denied the motion, and defendant sought leave to appeal. The Court of Appeals granted defendant's applications and consolidated the appeals. In three separate unpublished opinions, issued April 9, 2009 (Docket Nos. 280820 and 281005), the Court of Appeals, BANDSTRA, J. (TALBOT, P.J., concurring and GLEICHER, J., dissenting), reversed, concluding that venue was proper only in Oakland County, where defendant made the decisions to terminate plaintiffs' employment. In reaching this conclusion, the lead opinion and the concurrence relied on *Barnes v Int'l Business Machines Corp*, 212 Mich App 223 (1995). The Supreme Court granted plaintiffs' applications for leave to appeal. 485 Mich 902 (2009).

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

For purposes of venue under MCL 37.2801(2), a violation of the CRA in the employment context occurs when the discriminatory decision is made and the adverse employment actions are implemented. The CRA violation in a case alleging discharge from employment is the severance of the employment relationship. The decisions and actions constituting that violation are implemented when the employee is no longer entitled to enter the workplace and perform the responsibilities of employment.

1. MCL 37.2801(2) provides that a plaintiff alleging a violation of the CRA may bring the action in the circuit court of the county where the alleged violation occurred or the county where the defendant resides or has its principal place of business.

2. Plaintiffs alleged violations of MCL 37.2202(1), which in part prohibits employers from taking various adverse employment actions because of the employee's religion, race, color, national origin, age, sex, height, weight, or marital status. A violation of that statute, therefore, is equally dependent on an adverse employment action (in these cases the act of discharging from employment) and an improper motive for taking that action (a decision to discriminate because of a protected status). Thus, a violation of the CRA occurs when the discriminatory decision is made and adverse employment actions are implemented. *Barnes* is overruled to the extent that it held otherwise.

3. The adverse employment actions in these cases occurred where plaintiffs' places of employment were located. Plaintiffs worked in Wayne County, and defendant's allegedly unlawful actions in severing their employment relationships precluded plaintiffs from continuing to do so. Each plaintiff's employment relationship with defendant was based and severed in Wayne County. Thus, the CRA violations occurred in Wayne County, and venue was proper there. The Court of Appeals erred by concluding that the trial courts should have granted defendant's motions for a change of venue.

Reversed and remanded for further proceedings on plaintiffs' claims.

Justice YOUNG, joined by Justice CORRIGAN, concurring in part and dissenting in part, agreed with the majority that venue is proper under the CRA in the places where the allegedly discriminatory decision was made and implemented, but dissented from the majority's analysis regarding when the implementation occurs. A CRA violation occurs with the convergence of a prohibited act and a discriminatory intent, and a violation only occurs when an improper discriminatory intent is actually communicated within the context of the adverse employment action. Once an adverse employment action is actually communicated, a CRA violation has occurred and the plaintiff's claim becomes actionable, making venue proper only in those place(s) where the violation (the convergence of the act and the intent) occurred. The communication of the discriminatory decision does not cause some future CRA violation, one that only occurs when the employee is actually prevented from returning to work or performing that work. The time when a person is fired is inextricably linked to the places where the person is fired, given that the locations at the time the discharge occurs establish venue in those places.

Further, the place where an employee physically works does not automatically establish an independently proper venue when a CRA violation does not occur there.

Justice WEAVER, dissenting, would not have granted leave to appeal in this case because she was not persuaded that the Court of Appeals erred and because there was no material injustice.

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — VENUE — ADVERSE EMPLOYMENT ACTIONS.

A plaintiff may bring an action alleging a violation of the Civil Rights Act in the circuit court of the county where the alleged violation occurred; a violation in the employment context occurs when the discriminatory decision is made and the adverse employment actions are implemented; the violation of the act in a case alleging discharge from employment is the severance of the employment relationship, and the decisions and actions constituting that violation are implemented, and thus occur, when the employee is no longer entitled to enter the workplace and perform the responsibilities of employment (MCL 37.2202[1], 37.2801[2]).

Thomas E. Marshall, P.C. (by *Thomas E. Marshall*), for Brandon Brightwell and Sharon Champion.

Butzel Long (by *Daniel B. Tukel* and *Michael F. Smith*) for Fifth Third Bank of Michigan.

Amici Curiae:

Eardley Law Offices, P.C. (by *Eugenie B. Eardley*), for the Michigan Association for Justice.

Warner Norcross & Judd LLP (by *Matthew T. Nelson*, *Gregory M. Kilby*, and *Amanda M. Fielder*) for Michigan Trial Defense Counsel, Inc.

KELLY, C.J. In these consolidated cases, we must determine the proper interpretation of the venue statute[1] in the Civil Rights Act (CRA).[2] Specifically, we are asked to decide whether venue was proper in Wayne County under MCL 37.2801(2).

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[1] MCL 37.2801.

[2] MCL 37.2101 *et seq*.

Plaintiffs filed their suits in Wayne County, alleging that defendant terminated their employment in violation of the CRA. The Court of Appeals, relying on its decision in *Barnes v Int'l Business Machines Corp*,[3] concluded that venue was proper only in Oakland County, where defendant made the decisions to terminate plaintiffs' employment. Consequently, the Court of Appeals reversed the trial courts' orders denying defendant's motions to change venue to Oakland County.[4]

We disagree with the *Barnes* decision and overrule it.[5] In the cases before us, part of the alleged discrimination occurred in Wayne County, where plaintiffs worked and where the allegedly discriminatory actions were implemented. Therefore, we reverse the judgment of the Court of Appeals and remand these cases to the Wayne Circuit Court for further proceedings on plaintiffs' claims.

FACTS AND PROCEDURAL HISTORY

Plaintiffs are African-Americans formerly employed by defendant. They worked for defendant at banking centers in Wayne County. On or around May 17, 2007, defendant terminated their employment for alleged misconduct. Plaintiff Sharon Champion learned of her dismissal through a telephone call from defendant's office in Oakland County to her home in Wayne County. The parties dispute where plaintiff Brandon Brightwell

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[3] *Barnes v Int'l Business Machines Corp*, 212 Mich App 223; 537 NW2d 265 (1995).

[4] *Brightwell v Fifth Third Bank of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued April 9, 2009 (Docket Nos. 280820 and 281005).

[5] In *Barnes*, the Court of Appeals did not explicitly limit venue to the place where the employment decisions were made. However, later panels of the Court have interpreted it that way. See, e.g., *Green v R J Reynolds Tobacco Co*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 1998 (Docket No. 196355).

received notice of his dismissal.[6]

Plaintiffs filed separate lawsuits in Wayne County, each alleging that defendant had terminated their employment for reasons of racial discrimination in violation of the CRA.[7] Defendant moved in both lawsuits to change venue to Oakland County. It supported the motions with an affidavit from Michael Andrzejewski, an employee relations consultant who worked in defendant's Southfield regional office in Oakland County.

Andrzejewksi averred in his affidavit that he was personally involved in the final decisions to terminate plaintiffs' employment and that those decisions were made in the Southfield regional office. Defendant claimed that because it made the decisions in Oakland County, venue was proper only there. Both trial courts declined to change venue. Defendant sought interlocutory appeals in both cases.

The Court of Appeals granted both applications for leave to appeal, consolidated the appeals, and reversed the trial courts' rulings in a divided decision. Relying on *Barnes*, the lead opinion concluded that "the appropriate venue for a CRA cause of action . . . depends on where the defendant's violation occurred, not where the plaintiff was injured."[8] It noted that "[t]his Court has held that the alleged violation of the CRA is the action which gives rise to liability under the act, i.e., the corporate decision affecting the plaintiff's employment."[9]

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[6] Brightwell claims that defendant communicated his termination to him at his place of employment in Wayne County. Defendant asserts that Brightwell received notification of his termination at his home in Oakland County. This factual dispute is irrelevant to our conclusion in this case.

[7] We do not discuss the merits of plaintiffs' CRA claims here because they are not before us.

[8] *Brightwell*, unpub op at 3 (opinion by BANDSTRA, J.).

[9] *Id.* at 2.

The Court of Appeals concurrence agreed that "venue is appropriate where the CRA was violated through the use of improper characteristics in making an employment decision."[10] It criticized the dissenting opinion's discussion of the statutory tort venue provision, MCL 600.1629, as interpreted in our decision in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*.[11]

The Court of Appeals dissent argued that the employment decisions constituted only a "potential violation" of the CRA and that it was the actual discharges that constituted the adverse employment actions.[12] The dissent would have held that venue was proper in Wayne County.[13] Plaintiffs sought review in this Court, and we granted their applications for leave to appeal.[14]

ANALYSIS

An appellate court uses the clearly erroneous standard to review a trial court's ruling on a motion to change venue.[15] Statutory interpretation involves questions of law that are reviewed de novo.[16]

The relevant statutory provision, MCL 37.2801, provides in part:

> (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.
>
> (2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the

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[10] *Id.* at 4 (TALBOT, P.J., concurring).

[11] *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

[12] *Brightwell*, unpub op at 3-4 (GLEICHER, J., dissenting).

[13] *Id.* at 5.

[14] *Brightwell v Fifth Third Bank of Michigan*, 485 Mich 902 (2009).

[15] *Shock Bros, Inc v Morbark Industries, Inc*, 411 Mich 696, 698-699; 311 NW2d 722 (1981).

[16] *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009).

> person against whom the civil complaint is filed resides or has his principal place of business.

As always, our analysis begins with the language of the statute.[17] The primary goal of statutory interpretation is to give effect to the intent of the Legislature as expressed in the statute.[18]

These cases involve only the first clause of subsection (2), which makes venue proper "in the circuit court for the county where the alleged violation occurred."[19] In *Barnes*, the Court of Appeals held, without citation or analysis, that the "violations alleged are adverse employment decisions" and that "the place of corporate decision making is an appropriate venue."[20] Judge WHITE concurred separately, opining that "[d]iscrimination also 'occurs' in the county where the decision is implemented and the discrimination is inflicted."[21] She rejected the majority's implication that "venue of a civil rights action is proper only in the county where the

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[17] *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

[18] *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

[19] Defendant claims, and plaintiffs do not dispute, that it "resides" in Oakland County and that its principal place of business is in Kent County.

[20] *Barnes*, 212 Mich App at 226-227 & n 3. We note that *Barnes* relied heavily on the policy rationale articulated in *Gross v Gen Motors Corp*, 448 Mich 147, 164; 528 NW2d 707 (1995), that one of the goals of venue provisions is to discourage forum-shopping. *Barnes*, 212 Mich App at 226. As a general matter, this statement is correct.

However, *Gross* interpreted the tort venue provision, MCL 600.1629, which was added as part of the tort reforms enacted in 1986. One of the Legislature's explicit goals was to reduce forum-shopping by plaintiffs. *Gross*, 448 Mich at 157-158. By contrast, MCL 37.2801 has not been amended since it was enacted as part of the CRA in 1976. Thus, we find wanting *Barnes*'s determination that *Gross*'s reasoning was applicable to discrimination cases. On the contrary, much more persuasive reasons exist to interpret the CRA venue provision as we do today.

[21] *Barnes*, 212 Mich App at 227 (WHITE, P.J., concurring) (citation omitted).

discriminatory decision is made."[22]

The question of where venue properly lies for a lawsuit brought under the CRA turns on the meaning of the phrase "where the alleged violation occurred" found in MCL 37.2801(2). "Violation" is defined in part as "1. the act of violating or the state of being violated. 2. a breach or infringement, as of a law or promise."[23] Plaintiffs alleged that defendant violated MCL 37.2202(1), which provides in part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A "violation" of MCL 37.2202, therefore, is equally dependent on an adverse employment action (in these cases the act of "discharg[ing]") and an improper motive for taking that action (a decision to discriminate "because of" a protected status). We believe it logically follows that a violation of the CRA "occur[s]" when the discriminatory decision is made and adverse employment actions are implemented.

Thus, we agree with Judge WHITE's concurrence in *Barnes*, which is also consistent with other courts' interpretations of similar venue provisions. The majority in *Barnes* erred by restricting what constitutes a violation of the CRA to "adverse employment decisions."[24] Relying heavily on *Barnes*, the Court of Appeals lead and concurring opinions here reached the same erroneous conclusion.

We overrule *Barnes* because it restricted the analysis of a violation of the CRA to the adverse employment

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[22] *Id*.

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

[24] *Barnes*, 212 Mich App at 226.

decision. *Barnes* is inconsistent with MCL 37.2202(1)(a) and the meaning of "violation" and "occurred" in MCL 37.2801.

However, this determination does not fully resolve the issue before us. A remaining question is: What specific actions constitute the unlawful discharge that establishes the CRA violation? Venue in these cases was clearly proper in Oakland County because it is undisputed that defendant resides in Oakland County. However, plaintiffs filed suit in Wayne County. The Court of Appeals determined that the trial courts erred by denying defendant's motions to change venue to Oakland County because venue did not properly lie in Wayne County. Therefore, we must determine whether a CRA violation occurred in Wayne County that would provide a basis for venue in that location as well.

Defendant asserts that, even if *Barnes* is overruled, venue is proper only in Oakland County because that is where defendant completed several actions necessary to effectuate each plaintiff's discharge. For example, it removed plaintiffs from its payroll system at its Oakland County office. Plaintiffs counter that the only action that was relevant was the communication of the discharge decisions to them.

We reject both parties' arguments. It would be arbitrary to consider any of the suggested actions entirely dispositive of where the CRA violation occurred. Discrimination claims often involve numerous actions concerning employers' practices. Moreover, often it is unclear where the actions occurred that the parties claim are dispositive. Indeed, these cases provide a good illustration of the problem. If the location where the employment decision was communicated to a plaintiff is solely dispositive, a court must still determine where

that decision was "communicated."[25]

Finally, under this approach, defendants could unilaterally control venue by completing administrative tasks related to terminating a plaintiff's employment in their choice of locales. Or they could order an employee to report to a location in the venue they desire and fire the employee there. We believe these are not results that the Legislature intended in enacting the CRA.[26]

We conclude that the adverse employment actions in these cases occurred where plaintiffs' place of employment was located.[27] That is where most relevant actions involving the employer-employee relationship occur. Moreover, it is the severing of the employment relationship that is the truly adverse employment action. This action happens when the employee is no longer entitled to enter his or her place of work and perform the responsibilities of employment.

As Judge WHITE observed, it is also at this point that the allegedly unlawful discharge is fully "implemented

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[25] For example, was the decision in Champion's case communicated in Oakland County, where the phone call to her was placed, or in Wayne County, where she received it? In Brightwell's case, this burden is potentially even greater, as the facts regarding where Brightwell was informed of his termination are in dispute.

[26] We are not alone in that belief. The Massachusetts Appeals Court has written: "[T]he place where the employee is notified of his discharge does not necessarily establish the place where the alleged unlawful discharge occurred. To hold otherwise would allow employers to circumvent [Mass Gen L ch 151B] by simply notifying employees of their discharge when they are not in the Commonwealth." *Cormier v Pezrow New England, Inc*, 51 Mass App 69, 73; 743 NE2d 390 (2001), quoted with approval in *Cormier v Pezrow New England, Inc*, 437 Mass 302, 305-306; 771 NE2d 158 (2002).

[27] Judge WHITE's concurrence in *Barnes* implied a similar approach. She rejected the plaintiff's claim that venue was proper in Wayne County because Wayne County "was not the locus of his employment . . . ." *Barnes*, 212 Mich App at 227 (WHITE, P.J., concurring).

and the discrimination is inflicted."[28] Applying that logic to these cases, we note that plaintiffs worked in Wayne County. Because defendant's allegedly unlawful actions precluded plaintiffs from continuing to do so, the CRA violations occurred in Wayne County.[29]

The concurrence/dissent erroneously limits the occurrence of a violation solely to the place where a discriminatory decision is communicated to an employee. In doing so, it attaches too much significance to where the disclosure of the allegedly discriminatory discharge occurs. Indeed, the essence of the concurrence/dissent's conclusion is found in its statement that "it can only be the actual communication, which itself implements a discriminatory decision, that amounts to the actual 'discharge' . . . ."[30] Our reaction to this assertion is to ask: Why is this inherently so?

The concurrence/dissent offers no persuasive analysis to support its conclusion that the CRA violation must occur where the discharge is communicated. The right being violated under the CRA is not the right to be free from communication of adverse employment actions. Rather, it is the right to be free from actions that actually separate the employee from gainful employment for discriminatory reasons.[31] The justices joining the concurrence/dissent convey an incorrect interpretation of this opinion when they write "that scarcely one in a thousand people would believe that a person is not

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[28] *Id*. "Implement" is defined in part as "to fulfill; carry out [or] to put into effect according to a definite plan or procedure." *Random House Webster's College Dictionary* (2001). "Inflict" is defined in part as "1. to impose as something that must be borne or suffered: *to inflict punishment*. 2. to impose (anything unwelcome)." *Id.*

[29] Interpreting an almost identically worded statute, the Massachusetts Supreme Judicial Court similarly concluded that "an unlawful employment practice may occur where 'the core of the employment relationship' lies." *Cormier*, 437 Mass at 307.

[30] *Post* at 174 n 10.

[31] MCL 37.2102(1) makes this clear. It provides that

'discharged' from employment at the moment an employer says to the employee: 'You're fired.' "[32] In a world where snappy soundbites often distort the facts, this statement fits well and has face appeal. In truth, we justices do not disagree that "You're fired" means "You are discharged from your employment." Rather, this case addresses a quite different question, which is: If you are fired, in what location are you entitled to bring suit?

It is true that the *actus reus* and the *mens rea* of a CRA violation converge when a defendant communicates a discriminatory decision to an employee. But while that convergence causes the CRA violation, it does not settle the issue of what constitutes discharging the employee: the communication of the discriminatory decision or removing the employee's right to work at his or her place of employment.[33]

> [t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

The CRA prohibits discrimination in a variety of employment decisions, so this right implicitly includes the right to retain employment free from discrimination based on a protected status.

Therefore, an interpretation of MCL 37.2801(2) resulting in an outcome such as the one posited in the concurrence/dissent's hypothetical example, *post* at 177 n 17, does indeed find support in the statutory language. The concurrence/dissent's argument on this point is essentially that our approach would lead to inappropriate venues. It is in effect a policy argument asserting that the concurrence/dissent's approach is a preferable one; it is not an argument that the statutory language provides greater support for its approach.

[32] *Post* at 172.

[33] The concurrence/dissent correctly notes that the removal of an employee's right to work will usually occur simultaneously with the "the point of communication of a discriminatory decision . . . ." *Post* at 172 n 7.

Decisions from other jurisdictions involving similar statutes have generally taken a more nuanced approach in evaluating where an employment discrimination violation occurs.[34] Other jurisdictions have consistently

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However, our fundamental disagreement is about *where* (not when) the discharge takes place. We hold that it occurs at the place of employment because the removal of the right to work *at the workplace* constitutes a discharge. By contrast, the concurrence/dissent would hold that the discharge occurs wherever the communication of that discharge is uttered and heard.

Thus, because the disagreement between the majority and the concurrence/dissent does not relate to the timing of when a discharge occurs, the concurrence/dissent misses the mark with several of its criticisms of our analysis. *Post* at 169, 172-173. This misunderstanding of our approach is particularly evident in the last sentence of the concurrence/dissent. We do not "interpret[] this state's civil rights laws in a way that prevents a putative plaintiff's claims from becoming actionable the moment a violation of the CRA occurs . . . ." *Post* at 179. The pertinent question and point of disagreement between this opinion and the concurrence/dissent is where, not when, the violation is actionable.

[34] *Pope-Payton v Realty Mgt Servs Inc*, 149 Md App 393, 395; 815 A2d 919 (2003) (interpreting a statute providing for venue in the county "in which the alleged discrimination took place"); *Cormier*, 437 Mass at 305 (interpreting a statute providing for venue in the county "in which the alleged unlawful practice occurred"); *Passantino v Johnson & Johnson Consumer Prods, Inc*, 212 F3d 493, 504 (CA 9, 2000) (interpreting a Title VII provision making venue proper "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed"); *Cox v Nat'l Football League*, 1997 WL 619839; 1997 US Dist LEXIS 15307 (ND Ill, Sept 29, 1997) (same); *McDonald v American Federation of Musicians*, 308 F Supp 664 (ND Ill, 1970) (same).

Undoubtedly, as the concurrence/dissent observes, the venue provision in Title VII, 42 USC 2000e-5(f)(3), provides for venue in more locations than does MCL 37.2801(2). But that fact fails to undermine our interpretation of the statutory language. It is guesswork to conclude that "the Michigan Legislature declined to adopt comparable language when it crafted Michigan's CRA." *Post* at 177. The precursor of MCL 37.2801, enacted before Title VII, contained similar language allowing venue in "the county wherein the alleged unlawful discriminatory practice is alleged to have occurred . . . ." Former MCL 37.4, repealed by 1976 PA 453. One could just as easily surmise that the Legislature

analyzed similar statutory language as including " 'the place where the decisions and actions concerning the employment practices occurred.' "[35] We believe that it is the severance of the employment relationship that constitutes the actual discharge, not the mere communication of an adverse employment decision.[36]

The concurrence/dissent's definition of "discharge" provides greater support for our interpretation.[37] To "relieve of obligation," "deprive of . . . employment," or "dismiss from service" involves many decisions and

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recycled that language when it crafted MCL 37.2801. Again, absent clear indications of the Legislature's intent, this is an exercise in futility.

Whether our construction of MCL 37.2801(2) would render some provisions of Title VII "redundant" or "surplusage," *post* at 177 n 18, is irrelevant. The language of the CRA venue provision, as illustrated by the concurrence/dissent, is quite different from that used in Title VII.

[35] *Cox*, 1997 WL 619839, at *2; 1997 US Dist LEXIS 15307, at *6, quoting *Hayes v RCA Serv Co*, 546 F Supp 661, 663 (D DC, 1982).

[36] The concurrence/dissent cites one case from the United States District Court for the Southern District of New York that supports its position, but ignores contrary authority from the same district. *Lucas v Pathfinder's Personnel, Inc*, 2002 WL 986641, *1; 2002 US Dist LEXIS 8529, *3 (SD NY, 2002) ("The allegation that the decision to terminate Plaintiff was made in New York City . . . is insufficient to establish a violation of the [New York City human rights law] where, as here, the impact of that decision occurred outside of New York City."); *Wahlstrom v Metro-North Commuter R Co*, 89 F Supp 2d 506, 527 (SD NY, 2000) (stating that courts in the Southern District of New York "have held that the [New York City human rights law] only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City office"); *Duffy v Drake Beam Morin*, 1998 WL 252063, *12; 1998 US Dist LEXIS 7215, *35 (SD NY, 1998) ("[E]ven if, as [the plaintiffs] claim, the decision to fire them was made by [Drake Beam Morin] at its headquarters in New York City, that fact, standing alone, is insufficient to establish a violation of the City Human Rights Law when the employees affected by that decision did not work in New York City.").

[37] See *post* at 170 n 2 (" 'Discharge' is not defined in the statute, but is commonly defined, in relevant form, as 'to relieve of obligation, responsibility'; 'to relieve or deprive of office, employment, etc.; dismiss from service.' ").

actions. One is the communication of the dismissal to the employee, which the concurrence/dissent concludes is the basis for a CRA violation. However, it is not the communication of the discharge that violates the CRA, it is the actual discharge of the employee from his or her employment. This act occurs where the employee works because the employer has discharged the employee by removing his or her ability to work in that location.

The concurrence/dissent's determination of when a CRA violation occurs leads it to assert that the doctrine of *expressio unius est exclusio alterius* undermines our conclusion.[38] However, this argument is premised on the concurrence/dissent's erroneous construction of the term "discharge" and of the language "where the alleged violation occurred" in MCL 37.2801(2). Since the Legislature intended the interpretation we ascribe to the language, there was no reason to expressly include an employee's place of employment as an alternative basis for venue. Hence, if "where the

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[38] We disagree that the canon of *expressio unius est exclusio alterius* applies for two reasons. First, MCL 37.2801(2) lists only locations related to the person against whom the civil complaint is filed and makes no mention of the person filing the complaint. Thus, only locations related to the defendant in a CRA action could properly be considered excluded by implication under this canon. The lack of any reference in MCL 37.2801(2) to the plaintiff, the person filing the CRA complaint, undermines the concurrence/dissent's application of the canon to this statute.

Second, as the United States Supreme Court has observed, proper application of the canon requires the "essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand." *Chevron USA Inc v Echazabal*, 536 US 73, 80-81; 122 S Ct 2045; 153 L Ed 2d 82 (2002). Here, the provisions establishing venue where a defendant "resides" or has its "principal place of business" refer to fixed and readily ascertainable locations. By contrast, where "the alleged [CRA] violation occurred" is a more amorphous concept that does not go hand in hand with the others.

alleged violation occurred" encompasses acts precluding an employee from continuing to work at his or her place of employment, why would additional language be necessary?

Moreover, the last portion of the provision furnishing a basis for venue in MCL 37.2801(2) is explicitly tied to locations over which the employer has exclusive control; specifically, it provides for proper venue in "the county where the person against whom the civil complaint is filed resides or has his principal place of business." Presumably, if the Legislature had also intended that "where the alleged violation occurred" be a place over which a defendant had full control, it would have said so.

The Legislature certainly could have provided venue in "the county where the person against whom the civil complaint is filed resides, has its principal place of business, or communicates the alleged violation to the employee." It did not do so. This omission suggests that the phrase "where the alleged violation occurred" was not similarly meant to be limited to locations subject to a defendant's exclusive control.[39] In sum, there is no textual basis in the CRA for reading the language of MCL 37.2801(2) as the concurrence/dissent reads it.

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[39] It is irrelevant whether the concurrence/dissent "subscribe[s]" to the view that venue is limited to places over which defendant has exclusive control. *Post* at 175 n 12. The relevant point is that the concurrence/dissent's approach, equating communication of the discharge decision with the CRA violation, would place all the venue alternatives in MCL 37.2801(2) under defendant's exclusive control.

Consider the example of an employee who works for her employer exclusively in Wayne County. Under the concurrence/dissent's approach, venue for a discriminatory discharge case would not be proper in Wayne County if the employer invited her to lunch in Windsor, Canada to tell her she was discharged. Similarly, the employee might attend a work retreat in the Upper Peninsula at her employer's request and be informed there that she was discharged. The concurrence/dissent would find venue proper in the Upper Peninsula rather than in Wayne County, notwithstanding that the Upper Peninsula may have no other connection to either the employer or the employee.

Finally, our analysis avoids the arbitrariness of the approaches suggested by the parties and accepted by the concurrence/dissent. Employers and employees generally both have some influence in determining where an employment relationship is formulated. "Venue rules traditionally have served to ensure that proceedings are held in the most convenient forum,"[40] and it defies common sense to conclude that the county in which the employee actually worked for the employer would be an inconvenient forum for either party.

We again reject the concurrence/dissent's assertion that our decision is policy driven and that our analysis is merely justification for a predetermined interpretation. In fact, our decision is reasonably derived from the language of the statute. This decision invokes at least the following exercises in statutory interpretation: (1) an attempt to reasonably comprehend the meaning of "violation," "occurred," and "discharge" in the CRA, (2) an attempt to reasonably comprehend the meaning of these terms in the context of MCL 37.2801(2) as a whole, (3) an attempt to assess where the *actus reus* and the *mens rea* of the statute converge, (4) an attempt to compare the language of MCL 37.2801(2) with that of its predecessor statute, (5) an assessment of the relevance of traditional maxims of statutory construction, in this case *expressio unius est exclusio alterius*, (6) an attempt to assess alternative meanings of the relevant statutory terms, including those adopted by the concurrence/dissent, in light of the overall purposes of

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Moreover, the "parallel venue provisions" found in MCL 600.1629 that the concurrence/dissent cites are inapposite to MCL 37.2801(2). MCL 600.1629(1)(b) merely refers to a plaintiff's residence or place of business as an alternative venue to be invoked if venue cannot be established under MCL 600.1629(1)(a). MCL 37.2801 contains no such alternative venue provision.

[40] *Gross*, 448 Mich at 155.

the statute, and (7) an attempt to compare and contrast the caselaw of other states construing similar language. That we additionally point out that our interpretation results in a considerably more convenient forum than that of the concurrence/dissent does not detract from the focus of our interpretative approach.

APPLICATION

Plaintiffs both worked for defendant in Wayne County. Because adverse employment actions—the severance of plaintiffs' employment relationships—took place in Wayne County, the CRA violations occurred in Wayne County. Thus, venue properly lay in Wayne County under MCL 37.2801(2). Therefore, the Court of Appeals incorrectly held that the trial courts clearly erred by denying defendant's motions to change venue to Oakland County.

CONCLUSION

We conclude that, under MCL 37.2801(2), a violation of the CRA occurs when the alleged discriminatory decision is made and the allegedly adverse employment actions are implemented. We overrule the Court of Appeals' decision in *Barnes v Int'l Business Machines Corp* to the extent that it held otherwise.

We further conclude that the CRA violation in a case alleging discharge from employment is the severance of the employment relationship. The decisions and actions constituting that violation are implemented, and therefore occur, when the employee is no longer entitled to enter the workplace and perform the responsibilities of employment.

In these cases, each plaintiff's employment relationship with defendant was based and severed in Wayne County.

Thus, defendant's alleged violations of the CRA occurred in Wayne County. Accordingly, we reverse the judgment of the Court of Appeals and remand these cases to the Wayne Circuit Court for further proceedings there on plaintiffs' claims.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., concurred with KELLY, C.J.

YOUNG, J. (*concurring in part and dissenting in part*). I concur with the majority to the extent that it reverses the judgment of the Court of Appeals and instead holds that venue is proper under the Civil Rights Act (CRA) in the places where the allegedly discriminatory decision was made *and* implemented. I dissent, however, from the majority's analysis regarding *when* this implementation occurs. In order to justify its interpretation that venue is always proper at an employee's place of work, the majority holds that a violation of the CRA has not occurred at the moment when an employer communicates a discriminatory employment decision to an employee. This conclusion is contrary to the basic principle that the CRA violation occurs with the convergence of a prohibited act and a discriminatory intent. In light of that principle, I believe that the communication of the discriminatory decision *is itself* the CRA violation. Thus, once an adverse employment action is actually communicated, a violation has occurred and the plaintiff's claim becomes actionable, thereby making venue proper under the plain language of the CRA only in those places where the violation occurred. I also dissent from the majority's related holding that where an employee physically works provides an independently proper place of venue, even when a violation of the CRA did not occur in that location. While the location of employment may present a convenient or logical forum, because it is not necessarily where a statutory violation occurs for the purposes of the CRA's venue provision, I

dissent from the portion of the majority's opinion manufacturing it as a proper venue.

ANALYSIS

The venue provision within the CRA provides, in relevant part: "An action commenced pursuant to [MCL 37.2801(1)] may be brought in the circuit court for the county *where the alleged violation occurred*, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business."[1] The CRA itself describes what constitutes a violation. It provides, among other things, that an employer shall not "[f]ail or refuse to hire or recruit, *discharge*, or otherwise discriminate against an individual with respect to employment . . . because of . . . race . . . ."[2]

Our interpretation of this statute is governed by clear and uncontroversial rules of statutory construction. "In interpreting statutory language, this Court's primary goal is to give effect to the Legislature's intent. If the Legislature has clearly expressed its intent in the language of the statute, that statute must be enforced as written, free of any 'contrary judicial gloss.' "[3] In doing so, "[w]e first review the language of the statute itself. If it is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover."[4]

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[1] MCL 37.2801(2) (emphasis added). The word "occur" is defined as "to happen; take place; come to pass." *Random House Webster's College Dictionary* (2001).

[2] MCL 37.2202(1)(a). "Discharge" is not defined in the statute, but is commonly defined, in relevant form, as "to relieve of obligation, responsibility"; "to relieve or deprive of office, employment, etc.; dismiss from service." *Random House Webster's College Dictionary* (2001).

[3] *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010) (citation omitted).

[4] *Miller v Mercy Mem Hosp*, 466 Mich 196, 201; 644 NW2d 730 (2002). Similarly, this Court has held that "a court may read nothing into an

The language of the CRA clearly requires that a defendant commit an *actus reus* (an adverse employment action, such as a "discharge") with a specific *mens rea* (a discriminatory intent) in order to violate its provisions. Moreover, a violation of the CRA only occurs when an improper discriminatory intent is *actually communicated* within the context of the adverse employment action.[5] Stated otherwise, for venue purposes, I believe that a violation occurs under the statute *only* at the time and in the place or places where the *actus reus* and the *mens rea converge*: where the defendant *implements* the discriminatory adverse employment action.[6]

The majority disagrees with this straightforward understanding and application of the CRA's venue

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unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[5] This communication is an obvious and necessary element of the statutory violation and singularly demonstrates why the line of decisions from the Court of Appeals holding that a violation occurs only at the place where the employer makes a discriminatory decision (and thus forms the discriminatory intent) was in error. See *Barnes v Int'l Business Machines Corp*, 212 Mich App 223, 226; 537 NW2d 265 (1995). The making of the discriminatory decision represents only the *mens rea* element of a CRA violation, while the communication or other implementation provides the necessary *act* depriving an employee of his job, which completes the statutory violation.

[6] Because of modern technologies, a violation may occur simultaneously in multiple locations, as this case demonstrates. Plaintiff Sharon Champion alleged just such a simultaneous violation in multiple locations in the instant case: defendant fired Champion via telephone; at the time, defendant was in Oakland County, while Champion was in Wayne County. I note, however, that these multiple locations are explicitly related to the *communication, and thus implementation,* of the discriminatory discharge, which is itself the violation of the statute. Regarding plaintiff Brandon Brightwell, though, there is a factual dispute about his location when defendant communicated the adverse employment decision to him. If, as defendant says is the case, Brightwell was at home in Oakland County and the phone call terminating his employment was also

provision, although it cannot explain why the convergence of the *mens rea* and the *actus reus* does not equate with a statutory violation—here, two discharges. The majority confusingly explains that "it is not the communication of the discharge that violates the CRA, it is the actual discharge of the employee from his or her employment."[7] Yet when an employer fires an employee for a discriminatory purpose, as was alleged here, why is the communication of that adverse employment decision not *itself* the violation of the CRA?

I think that scarcely one in a thousand people would believe that a person is not "discharged" from employment at the moment an employer says to the employee: "You're fired." Yet in the context of discriminatory discharges under the CRA, the majority holds otherwise. The majority thus believes that the communication or implementation of a discriminatory decision only causes a *future* violation of the CRA at some later, indeterminate time (when an employee is actually prevented from returning to the workplace or performing his work duties) and is not itself the

placed from Oakland County, then the statutory violation occurred completely in Oakland County, irrespective of the fact that Brightwell worked in Wayne County.

[7] *Ante* at 165. This analysis is made even more confusing by the majority's admission that "the *actus reus* and the *mens rea* of a CRA violation converge when a defendant communicates a discriminatory decision to an employee" and that this "convergence causes the CRA violation . . . ." *This accepts precisely my stated formulation*. However the majority then states that "it does not settle the issue of what constitutes discharging the employee: the communication of the discriminatory decision or removing the employee's right to work at his or her place of employment." *Ante* at 162. I fail to see why not. If, as the majority *admits*, the convergence causes a violation at the time of convergence and the statute specifically and plainly defines "violation" as a "discharge," then the issue is settled: the discharge/violation occur at the point of communication of a discriminatory decision, which by definition, is *also* the same time as the employee's right to work has been removed.

actual violation of the CRA. I fail to see how this can be true. An employer who tells an employee that he is fired *actually* severs the employment relationship at that time; if he also communicates a discriminatory intent to the employee at this time, he has violated the CRA. Such a convergence is more than a mere discriminatory statement devoid of meaning or consequence until some later time. The majority fails to understand that the issue of *when* a person is fired is inextricably linked to *where* the person is fired, given that the location(s) at the time the discharge occurs establish the statutory venue.[8]

The majority's analysis on this point is also internally inconsistent. If the communication terminating employment only caused a later violation that occurred at the employee's place of work, then *only* the *place of employment* could ever be the locus of the violation that establishes venue under the CRA. However, the majority opinion also holds that a violation may occur elsewhere at some place other than the place of employment. Under the majority's theory, why would the place where the communication is received, if it is not the place of actual employment, *ever* be a proper venue if it were not the place where the *actus reus* and the *mens rea* converge to cause the violation? The majority cannot explain this anomaly.

Similarly, the majority opinion additionally provides that the "adverse employment actions in these cases occurred where plaintiffs' place of employment was located"[9]—that is, where plaintiffs physically worked. It is difficult to see how the majority's "place of employ-

[8] See *ante* at 162 & n 33. It is this failure that allows the majority simply to assert that this opinion's criticisms "miss[] the mark" rather than address the substance of those criticisms.

[9] *Ante* at 160.

ment" theory of violation relates in any relevant way to the occurrence of the *actual discharge*.[10] In effect, the majority's analysis establishes as a matter of law that venue is proper not only where the discriminatory communication terminating the employment occurred, but also where the "effects" of the discrimination occurred, namely at an employee's place of work.[11]

The majority's position is further undermined by the fact that the CRA explicitly makes the *defendant's* place of business a proper venue, while at the same time it

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[10] I agree with the majority that it is the *severance* of employment that amounts to a discriminatory discharge. *Ante* at 164. The CRA's venue provision only allows proper venue where the actual severance occurred, though, which need *not* necessarily be in the place where the employee worked.

To advance its argument, the majority erroneously relies on this dissent's definition of "discharge," which again is commonly defined as "to relieve of obligation, responsibility"; "to relieve or deprive of office, employment, etc.; dismiss from service." *Ante* at 164-165 & n 37. For our purposes, the relevant words here are the verbs "relieve," "deprive," and "dismiss" because they add context to the statutory verb "discharge," which is the prohibited ***act*** relevant here. Thus, it can only be the actual communication, which itself implements a discriminatory decision, that amounts to the actual "discharge" or relieving of, depriving of, or dismissing from employment. And, again, this ***act*** need not occur at the place of actual employment. Since, it is the very ***act*** of communicating a discriminatory discharge that constitutes a violation of the CRA, if that communication or implementation is not made at the workplace, then the workplace is not a proper venue for a CRA action.

[11] Cf. *Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 549 F Supp 2d 549, 554 (SD NY, 2008) (applying New York City's and New York State's human rights laws and making the distinction that "when an employee is terminated in a location other than his workplace, the act of termination is the original tortious act . . . and the experience of being removed from employment is the original event causing injury," only the latter of "which occurs at the employee's workplace"). Notably, unlike New York City's and New York State's laws, Michigan's CRA provision provides venue *only* in the place of the original tortious act, *and not* in the place of injury.

says nothing about the plaintiff's place of employment. The CRA's venue provision provides that a CRA action "may be brought in the circuit court for the county where . . . the person against whom the civil complaint is filed resides or has his principal place of business."[12] This language underscores the fact that the majority essentially creates a new venue provision that is contrary or in addition to the statutory language regarding where a violation occurs, as well as the structure and specific language chosen by the Legislature.[13]

If the Legislature had wished to make a plaintiff's place of employment a proper venue, it could have easily

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[12] MCL 37.2801(2). Because plaintiffs asserted that venue was proper in Wayne County, a place where defendant neither resides nor has its principal place of business, this portion of the CRA's venue provision was not relevant to venue for this action, which instead turned on whether a violation of the CRA had occurred in Wayne County. However, this language is instructive for our purposes in determining how to interpret the disputed language relevant here.

Additionally, I do not subscribe, as the majority curiously implies, to the view that venue is limited to the places over which defendant has exclusive control. See *ante* at 166 n 39. This is an altogether odd argument that, to the best of my knowledge, has not been advanced by any party or justice, and certainly not by me, as such a construction would be contrary to the language of the statute. Indeed, my construction of the statute permits what the wording explicitly provides: venue is proper in the place of the violation (here, a discharge), regardless under whose control that place falls. Accordingly, venue exists where the Legislature has stated that venue should exist, and "our judicial role 'precludes imposing different policy choices than those selected by the Legislature . . . .' " *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002), quoting *People v Sobczak-Obetts,* 463 Mich 687, 694; 625 NW2d 764 (2001).

[13] General rules of statutory construction support this position. "Michigan has recognized the principal of *expressio unius est exclusio alterious* [sic]—express mention in a statute of one thing implies the exclusion of other similar things." *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971), citing *Dave's Place, Inc v Liquor Control Comm*, 277 Mich 551; 269 NW 594 (1936), and *Sebewaing Indus, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953).

and explicitly done so.[14] Indeed, if the Legislature wishes to establish parallel venue provisions, it is capable of doing and has done so.[15] However, when the Legislature has not done so, this Court may not expand upon the clear language chosen by the Legislature. Simply put, the CRA's venue provision says nothing about the plaintiff's place or locus of employment as an independent site of proper venue.

That the majority is expanding the scope of the CRA is further underscored when considering potential violations that are *not* discriminatory *discharges*, but are nonetheless CRA violations that will therefore be implicated by this decision. As previously noted, the CRA prohibits discriminatory "fail[ures] or refus[als] to hire or recruit" and other unnamed types of general employment discrimination against a person.[16] Under the majority's formulation, venue would be proper in a plaintiff's place of *potential* employment even if the plaintiff *never worked* in that place because of a refusal

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[14] The majority contends that "[*s*]*ince* the Legislature intended the interpretation we ascribe to the language [regarding the terms 'discharge' and 'violation'], there was no reason to expressly include an employee's place of employment as an alternative basis for venue." *Ante* at 165 (emphasis added). There is no indication, however, that the Legislature intended the majority's broad construction that interprets "violation" as something other than where the *actus reus* and the *mens rea* come together. Moreover, if the Legislature intended to give those terms the meanings I have fairly ascribed to them, it *would* have needed to include additional language regarding the plaintiff's place of employment as an additional venue. Thus, the majority's assertion in this regard only advances its argument if one accepts its underlying premise that an overly broad reading of the statutory terms is required.

[15] See, e.g., MCL 600.1629. Michigan's general venue provision for torts explicitly makes distinctions between where the plaintiff and defendant reside in its framework establishing where venue is proper.

[16] MCL 37.2202(1).

to hire.[17] By way of contrast, my interpretation of the venue provision appropriately prevents venue from being established in such a location because neither the *actus reus* nor the *mens rea*—which together comprise a violation—would occur in that place. Moreover, whereas Title VII of the federal Civil Rights Act explicitly contemplates such a result,[18] the Michigan Legislature declined to adopt comparable language when it crafted Michigan's CRA.[19] Thus, the majority's con-

[17] Consider, for example, a hypothetical case analogous to the facts here: a large corporation with its principal place of business in Oakland County recruits a student who also lives in Oakland County for a position in Detroit (Wayne County), yet discriminatorily refuses to hire the student for the Detroit position in violation of the CRA. Even though the student never set foot or worked in Wayne County, venue would nonetheless be proper in Wayne County under the majority's theory that Detroit would have been the place of employment and thus the employer "remov[ed] the [potential] employee's right to work at his or her [never-established] place of employment." *Ante* at 162. Such a construction finds no support in the language of Michigan's CRA venue provision.

[18] See 42 USC 2000e-5(f)(3) ("Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed . . . or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice . . . .") (emphasis added). If one were to adopt the majority's reasoning when interpreting this federal venue provision, the resulting construction would either render these alternative clauses redundant or render the latter clause surplusage because under the first clause, venue would always be proper in the place of potential employment.

[19] The Missouri Supreme Court has come to a similar conclusion. See *Igoe v Dep't of Labor & Indus Relations*, 152 SW3d 284, 288-289 (Mo, 2005). Using language that is nearly identical to Michigan's CRA, the venue provision of Missouri's Human Rights Act provides venue where the "unlawful discriminatory practice is alleged to have occurred." The Missouri Supreme Court held that vacant positions in St. Louis to which plaintiff had applied did not establish St. Louis as a proper venue because "all of the acts—the receipt and review of applications, the interviews, and the decision making—all occurred" in a separate county and thus no discriminatory practice had occurred in St. Louis. *Id.* at 288. Most important, this was true notwithstanding the fact that venue would have been proper in St. Louis under the federal venue provision of Title VII.

struction ascribes additional meaning to the words of Michigan's CRA not contemplated by the Legislature.

Finally, the majority notes several policy considerations supporting its position, but I believe that each is unavailing to displace the clear language of the statute. The majority argues that its additional rule creates another convenient forum and that it also prevents an employer from controlling the place of venue by choosing where he fires an employee. First, the resort to "convenience" as a justification for the rule in this case conflates forum non conveniens theory with the statutory venue provision.[20] They are not based on similar principles—the latter being predicated on where the forum is *proper*, not convenient. Additionally, even if a defendant tries to control venue by firing the plaintiff from a place wholly unrelated to the actual place of employment, the plaintiff's remedy at *that* time is a motion for a change of venue based on forum non conveniens.[21] It is not this Court's duty to manufacture

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[20] The majority opinion states that "it defies common sense to conclude that the county in which the employee actually worked for the employer would be an inconvenient forum for either party." *Ante* at 167. The *convenience* of the forum is not at issue in this case. Moreover, when a statute makes clear where venue is proper, I am not sure why any argument that meets the low threshold of being "common sense" can vary this statutory determination. I believe that the Legislature's choice makes "sense"—even if the majority would prefer another or an additional choice.

[21] This is the precise response and remedy to the hypothetical example posed in the majority opinion regarding an employer who fires a Wayne County employee while on retreat in the Upper Peninsula. See *ante* at 166 n 39. Indeed, the majority's hypothetical only reaffirms and *proves* my criticism that the majority improperly conflates forum non conveniens theory with venue rules. Similarly, the majority's alternative hypothetical example regarding an employee who is fired while at lunch in Canada again does nothing to disprove the reality that a statutory violation occurs when the *mens rea* and the *actus reus* converge. In such a case, the CRA venue provision provides *alternative* venues to ensure

alternative forums as a matter of law merely because they would *also* be convenient to the parties.

For these reasons, I would restrict venue solely to the place of the violation, as defined by where the *mens rea* and the *actus reus* converge, in accordance with the clear terms of the statute. To the extent that the majority interprets this state's civil rights laws in a way that prevents a putative plaintiff's claims from becoming actionable the moment a violation of the CRA occurs, I dissent.

CORRIGAN, J., concurred with YOUNG, J.

WEAVER, J. (*dissenting*). I dissent. I would not have granted leave to appeal in this case because I am not persuaded that the Court of Appeals erred or that there was any material injustice.

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that the plaintiff would have *a* Michigan forum in which to litigate his claim. See MCL 37.2801(2). And again, this forum may be relocated if it is determined to be inconvenient pursuant to forum non conveniens theory.

Moreover, the mere fact that one can conceive of an exceptional hypothetical case does not mean that we should rewrite the general rule contrary to the plain meaning of the statute. I note that most cases will likely not implicate the distinction drawn between these opinions because many, if not most, employment violations occur at a person's place of employment. Thus, my interpretation of the venue provision does *not* lead to a situation that is contrary to common sense, that would deprive the parties of a convenient forum, or that will work a hardship against prosecuting potential CRA violations.

McCORMICK v CARRIER

Docket No. 136738. Argued January 12, 2010 (Calendar No. 1). Decided July 31, 2010.

Rodney McCormick brought an action in the Genesee Circuit Court against Larry Carrier and General Motors Corporation for injuries he suffered when he was struck and run over by a truck in the course of his employment. The trial court, Judith A. Fullerton, J., granted defendants' motion for summary disposition on the ground that plaintiff could not meet the "serious impairment of body function" threshold for tort liability for non-economic damages under MCL 500.3135 as interpreted by *Kreiner v Fischer*, 471 Mich 109 (2004). The Court of Appeals, WHITBECK, P.J., and JANSEN, J. (DAVIS, J., dissenting), affirmed, holding that, under *Kreiner*, plaintiff's impairment did not affect his ability to lead his normal life because he remained able to care for himself, pursue his hobbies, and work at the same rate of pay. Unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275888). After initially denying leave to appeal, the Supreme Court dismissed General Motors as a party, substituted its indemnitor, Allied Automotive Group, Inc., as a party. It further granted plaintiff's motion for reconsideration, vacated its prior order, and granted the application for leave to appeal. 485 Mich 851 (2009).

In an opinion by Justice CAVANAGH, joined by Chief Justice KELLY and Justices WEAVER (except part III[B][3]) and HATHAWAY, the Supreme Court *held*:

Kreiner's interpretation of the "serious impairment of body function" threshold for non-economic tort liability under MCL 500.3135 is overruled. Under the plain meaning of the statute, plaintiff has demonstrated that, as a matter of law, he suffered a serious impairment of body function.

1. MCL 500.3135(7) provides three prongs that are necessary to establish a serious impairment of body function: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life. Because the meaning of each prong is clear from the

plain and unambiguous statutory language, judicial construction is neither required nor permitted.

2. An objectively manifested impairment is one that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. Because MCL 500.3135(7) does not contain the word "injury," the proper inquiry does not relate to the injury or its symptoms but rather whether the impairment is objectively manifested.

3. A body function is important if it has great value, significance, or consequence. Whether a body function is important to a particular person is an inherently subjective inquiry that must be undertaken on a case-by-case basis.

4. A person's general ability to lead his or her normal life has been affected when some of the person's power, skill, or capacity to lead a normal life has been influenced. This prong also requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. Determining the effect or influence that the impairment has had on the plaintiff's ability to lead a normal life requires a comparison of the plaintiff's life before and after the incident. MCL 500.3135(7) requires only that a person's general ability to lead his or her normal life has been affected, not destroyed. The statute specifies no minimum percentage of a person's normal manner of living that must be affected, nor does it contain an express temporal requirement as to how long an impairment must last in order to have an effect on the person's general ability to live his or her normal life.

5. The evaluative criteria relevant to *Kreiner* indicate that it should be overruled. First, *Kreiner* has proven to be intolerable because it defies practical workability, as evidenced by the significant increase in appellate litigation it produced and inconsistent treatment of similarly situated plaintiffs that resulted from this litigation. Second, overruling *Kreiner* would cause no special hardship or inequity because the only people to whom it applies are those involved in motor vehicle accidents, who will not have altered their behavior in reliance on it. Third, overruling *Kreiner* is unlikely to result in serious detriment prejudicial to public interests given that the interpretation set forth in this case more closely reflects the policy balance struck by the Legislature than the extratextual interpretation adopted in *Kreiner*.

6. As a matter of law, plaintiff met the tort threshold under MCL 500.3135(7) as properly construed, because his broken ankle

was an objectively manifested impairment that affected his ability to do various activities that were important to him and his work.

Reversed and remanded to the trial court.

Justice WEAVER concurred in all of the majority opinion except part III(3)(b), pertaining to stare decisis, and fully supported the decision to overrule *Kreiner*. She wrote separately to state that establishing a standardized test regarding stare decisis is an impossible task, and that when deciding to overrule wrongly decided precedent, to serve the rule of law, each case should be looked at individually on its own facts and merits through the lens of judicial restraint, common sense, and fairness.

Justice HATHAWAY, concurring, wrote separately to state that any analysis of the impact of stare decisis must focus on the individual case and the reason for overruling precedent. She further stated that the reasons for overruling *Kreiner* are paramount to any articulated test and that the special and compelling justifications to do so are overwhelming.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, would have affirmed the Court of Appeals, and stated that the majority's decision to overrule *Kreiner*'s standards for determining whether an impairment affects the plaintiff's "general ability to lead his or her normal life" is at odds with the actual language of the no-fault act, resulting in a nullification of the legislative compromise that gave insureds the ability to obtain assured, adequate, and prompt reparation for certain economic losses regardless of fault, in exchange for a limitation on their ability to sue for noneconomic losses. He disagreed that temporal considerations, such as the duration of the impairment, are wholly or largely irrelevant in determining whether an impairment affected the plaintiff's "general ability to lead his or her normal life." He questioned how a court could possibly determine whether an impairment affects the person's "general ability to lead his or her normal life" without taking into account temporal considerations. In enacting the "serious impairment of body function" threshold, and in joining it with the "death" and "serious permanent disfigurement" thresholds, the Legislature was unlikely to have had in mind an impairment that only affected a plaintiff's ability to lead his or her normal life for a moment in time, with little or no consideration being given to the plaintiff's "general ability to lead his or her normal life" beyond that moment. In this case, the lower courts did not err in concluding that the impairment did not affect plaintiff's

"general ability to lead his normal life" and, therefore, that plaintiff did not meet the "serious impairment of body function" threshold.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — SERIOUS IMPAIRMENT OF BODY FUNCTION — OBJECTIVELY MANIFESTED IMPAIRMENTS.

An objectively manifested impairment, for purposes of the statutory threshold for recovering noneconomic tort damages resulting from a motor vehicle accident, is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function (MCL 500.3135[7]).

2. INSURANCE — NO-FAULT — WORDS AND PHRASES — SERIOUS IMPAIRMENT OF BODY FUNCTION — IMPORTANT BODY FUNCTIONS.

A body function is important for purposes of the no-fault tort threshold if it has value, significance, or consequence to the particular person at issue (MCL 500.3135[7]).

3. INSURANCE — NO-FAULT — WORDS AND PHRASES — SERIOUS IMPAIRMENT OF BODY FUNCTION — GENERAL ABILITY TO LEAD ONE'S NORMAL LIFE.

A person's general ability to lead his or her normal life has been affected for purposes of the no-fault tort threshold when an impairment has influenced some of the person's power, skill, or capacity to lead a normal life; there is no minimum percentage of a person's normal manner of living that must be affected, nor is there an express temporal requirement for how long the impairment must last (MCL 500.3135[7]).

Hilborn & Hilborn, P.C. (by *Craig E. Hilborn* and *David M. Kramer*), and *Bendure & Thomas* (by *Mark R. Bendure*) for Rodney McCormick.

Grzanka Grit McDonald (by *Michael P. McDonald* and *John W. Lipford*) for Allied Automotive Group, Inc.

Amici Curiae:

John A. Braden for himself.

Sinas Dramis Brake, Boughton & McIntyre, P.C. (by *George T. Sinas* and *Steven A. Hicks*), for the Coalition Protecting Auto No-Fault.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor*), for the Insurance Institute of Michigan.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for the Michigan Association for Justice.

Cline, Cline & Griffin, PC (by *José T. Brown*), and *David E. Christensen* for the Negligence Section of the State Bar of Michigan.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Suzan M. Sanford* and *Christopher L. Kerr*, Assistant Attorneys General, for the Office of Financial and Insurance Regulation.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Margaret Nelson* and *Ann M. Sherman*, Assistant Attorneys General, for the Attorney General.

CAVANAGH, J. The issue in this case is the proper interpretation of the "serious impairment of body function" threshold for non-economic tort liability under MCL 500.3135. We hold that *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), was wrongly decided because it departed from the plain language of MCL 500.3135, and is therefore overruled. We further hold that, in this case, as a matter of law, plaintiff suffered a serious impairment of a body function. Accordingly, we reverse and remand the case to the trial court for proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

This case arises out of an injury that plaintiff, Rodney McCormick, suffered while working as a medium-duty truck loader at a General Motors Corporation

(GM) plant.[1] Plaintiff's job mainly consisted of assisting in the loading of trucks, which required climbing up and around trucks and trailers, standing, walking, and heavy lifting. He generally worked 9- to 10-hour shifts, 6 days a week.

On January 17, 2005, a coworker backed a truck into plaintiff, knocking him over, and then drove over plaintiff's left ankle. Plaintiff was immediately taken to the hospital, and x-rays showed a fracture of his left medial malleolus.[2] Plaintiff was released from the hospital that day, and two days later metal hardware was surgically inserted into his ankle to stabilize plaintiff's bone fragments. Plaintiff was restricted from weight-bearing activities for one month after the surgery and then underwent multiple months of physical therapy. The metal hardware was removed in a second surgery on October 21, 2005.

At defendant's request, plaintiff underwent a medical evaluation with Dr. Paul Drouillard in November 2005. He indicated that plaintiff could return to work but was restricted from prolonged standing or walking. On January 12, 2006, the specialist who performed plaintiff's surgeries cleared him to return to work without restrictions. The specialist's report noted that plaintiff had an "excellent range of motion," and an x-ray showed "solid healing with on [sic] degenerative joint disease of his ankle."

Beginning on January 16, 2006, plaintiff returned to work as a medium-duty truck loader for several days,

[1] The only defendant remaining at this point in the case is GM's indemnitor, Allied Automotive Group, Inc, because the parties have stipulated the release of the other original defendants. For simplicity's sake, the opinion will use "defendant" to refer to this entity.

[2] The medial malleolus is the bony prominence that protrudes from the medial side of the ankle. *Stedman's Medical Dictionary* (26th ed).

but he had difficulty walking, climbing, and crouching because of continuing ankle pain. He requested that his job duties be restricted to driving, but defendant directed him to cease work.

Defendant required plaintiff to undergo a functional capacity evaluation (FCE) in March 2006. The FCE determined that plaintiff was unable to perform the range of tasks his job required, including stooping, crouching, climbing, sustained standing, and heavy lifting. This was due to ankle and shoulder pain,[3] a moderate limp, and difficulty bearing weight on his left ankle. The report stated that plaintiff's range of motion in his left ankle was not within normal limits and that difficulty climbing and lifting weights had been reported and observed.

In May 2006, Dr. Drouillard examined plaintiff again and reported that plaintiff could return to work. Dr. Drouillard's report stated that plaintiff complained of ankle and foot pain, but the doctor found "no objective abnormality to correspond with his subjective complaints." In June 2006, plaintiff also underwent a magnetic resonance imaging (MRI) test, which showed some postoperative scar and degenerative tissue formation around his left ankle. At plaintiff's request, another FCE was performed on August 1, 2006, which affirmed that plaintiff could return to work without restriction and was capable of performing the tasks required for his job. The report stated that plaintiff complained of "occasional aching" and tightness in his ankle, but it did not appear to be aggravated by activities such as prolonged standing or walking. It also noted that plaintiff's range of motion in his left ankle was still not within normal limits, although it had improved since the March 2006 FCE.

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[3] Plaintiff had a pre-existing back and shoulder injury that is unrelated to the incident in this case.

Plaintiff returned to work on August 16, 2006, 19 months after he suffered his injury. He volunteered to be assigned to a different job, and his pay was not reduced. He has been able to perform his new job since that time.

On March 24, 2006, plaintiff filed suit, seeking recovery for his injuries under MCL 500.3135. In his October 2006 deposition, plaintiff testified that at the time of the incident, he was a 49-year-old man and his normal life before the incident mostly consisted of working 60 hours a week as a medium-duty truck loader. He stated that he also was a "weekend golfer" and frequently fished in the spring and summer from a boat that he owns. He testified that he was fishing at pre-incident levels by the spring and summer of 2006, but he has only golfed once since he returned to work.[4] He stated that he can drive and take care of his personal needs without assistance and that his relationship with his wife has not been affected. He stated that he has not sought medical treatment for his ankle since January 2006, when he was approved to return to work without restriction. He further testified that his life is "painful, but normal," although it is "limited," and he continues to experience ankle pain.

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[4] There are no facts in the record regarding the extent to which plaintiff fished between January 2005 and January 2006 or the extent to which he was able to golf in the period between the incident and when he returned to work, despite the arguments to the contrary by both parties and the dissent. Defendant has alleged that plaintiff was able to fish while he was not working, but the only factual support it cites is plaintiff's statement that he fished in the six or seven months after January 2006, which was when he was initially cleared to return to work, and when he actually returned to work. Although plaintiff's counsel agreed in the arguments before the trial court that plaintiff had been fishing, it was unclear as to what time period he was referring. In plaintiff's brief to this Court, he alleges that by the time of his deposition, he had "returned" to fishing with the same frequency as before the accident, which suggests that plaintiff might be arguing that his fishing activities were interrupted.

The trial court granted defendant's motion for summary disposition on the basis that plaintiff had recovered relatively well and could not meet the serious impairment threshold provided in MCL 500.3135(1). The Court of Appeals affirmed, with one judge dissenting. *McCormick v Carrier*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275888). The majority held that, under *Kreiner*, plaintiff's impairment did not affect his ability to lead his normal life because he is able to care for himself, fish and golf, and work at the same rate of pay. The dissent disagreed, arguing that two doctors had determined that the impairment would cause problems over plaintiff's entire life and his employer had determined that he could not perform his work duties, the main part of his "normal" life.

After initially denying leave to appeal, this Court granted plaintiff's motion for reconsideration, vacated its prior order, and granted the application for leave to appeal. *McCormick v Carrier*, 485 Mich 851 (2009).

II. STANDARD OF REVIEW

This Court reviews a motion for summary disposition de novo. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). The proper interpretation of a statute is a legal question that this Court also reviews de novo. *Herman v Berrien Co*, 481 Mich 352, 358; 750 NW2d 570 (2008).

III. ANALYSIS

The issue presented in this case is the proper interpretation of MCL 500.3135. We hold that *Kreiner* incorrectly interpreted MCL 500.3135 and is overruled because it is inconsistent with the statute's plain language

and this opinion. Further, under the proper interpretation of the statute, plaintiff has demonstrated that, as a matter of law, he suffered a serious impairment of body function.

A. OVERVIEW OF MCL 500.3135

In 1973, the Michigan Legislature adopted the no-fault insurance act, MCL 500.3101 *et seq*. The act created a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard to fault, for qualifying economic losses arising from motor vehicle incidents. See MCL 500.3101 and 500.3105. In exchange for ensuring certain and prompt recovery for economic loss, the act also limited tort liability. MCL 500.3135. See also *DiFranco v Pickard*, 427 Mich 32, 40-41; 398 NW2d 896 (1986). The act was designed to remedy problems with the traditional tort system as it relates to automobile accidents. These included that "[the contributory negligence liability scheme] denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978).

Under the act, tort liability for non-economic loss arising out of the ownership, maintenance, or use of a qualifying motor vehicle is limited to a list of enumerated circumstances. MCL 500.3135(3). The act creates threshold requirements in MCL 500.3135(1), which has remained unchanged in all key aspects since the act was adopted. That subsection currently provides that "[a] person remains subject to tort liability for noneconomic

loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."

The threshold requirement at issue in this case is whether plaintiff has suffered "serious impairment of body function." The act did not originally define this phrase. Accordingly, it initially fell to this Court to do so, and the result was a series of differing opinions. In *Cassidy v McGovern*, 415 Mich 483, 502; 330 NW2d 22 (1982), this Court held that whether the serious impairment threshold is met is a question of law for the court to decide where there is no material disputed fact. It further held that in order to meet the threshold, the plaintiff must show an objectively manifested injury and an impairment of an important body function, which it defined as "an objective standard that looks to the effect of an injury on the person's general ability to live a normal life." *Id.* at 505. This Court later in part modified and in part affirmed *Cassidy* in *DiFranco*. The *DiFranco* Court agreed that a plaintiff had to suffer an objectively manifested injury, but it rejected the *Cassidy* Court's determination that the impairment needed to be "important" and its definition of "important." *DiFranco*, 427 Mich at 61-67, 70-75. The *DiFranco* Court further held that whether the threshold is met is a question of law for the court only if there are no material disputed facts and the facts could not support conflicting inferences. *Id.* at 53-54.

In 1995, however, the Legislature intervened. It amended MCL 500.3135 to define a "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). The Legislature also expressly

provided that whether a serious impairment of body function has occurred is a "question[] of law" for the court to decide unless there is a factual dispute regarding the nature and extent of injury and the dispute is relevant to deciding whether the standard is met. MCL 500.3135(2)(a). Thus, the Legislature incorporated some language from *DiFranco* and *Cassidy* but also made some significant changes.[5]

This Court interpreted the amended provisions in 2004, in *Kreiner*. The question before this Court is whether the *Kreiner* majority properly interpreted the statute, and, if not, whether its interpretation should be overruled.

B. INTERPRETATION OF MCL 500.3135

The primary goal of statutory construction is to give effect to the Legislature's intent. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. *Id.* Judicial construction of an unambiguous statute is neither required nor

[5] Some courts have broadly stated that the Legislature rejected *DiFranco* in favor of *Cassidy*, see *Kreiner*, 471 Mich at 121 n 8, but that is an oversimplification. Some of the language adopted by the Legislature was used consistently in *both DiFranco* and *Cassidy*, and the Legislature clearly rejected some elements of *Cassidy*. The similarities and differences between *DiFranco* and *Cassidy* and the amendments of MCL 500.3135 will be discussed below to the extent that they are significant. Although the dissent disagrees in the abstract with my statement that it is an oversimplification to state that the Legislature merely rejected *DiFranco* in favor of *Cassidy*, I can only conclude that it is unable to support this accusation with any specific, substantive arguments, given that it fails to expressly address or reject my more nuanced analysis of each of the specific phrases that the Legislature adopted or rejected from *Cassidy* and *DiFranco*.

permitted.[6] *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal, *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). A court should consider the plain meaning of a statute's words and their " 'placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). "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." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937). See also *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989).

1. A QUESTION OF LAW OR FACT UNDER MCL 500.3135(2)

The first step in interpreting MCL 500.3135 is to determine the proper role of a court in applying MCL 500.3135(1) and (7). The Legislature addressed this issue in the amended MCL 500.3135(2)(a), which states in relevant part:

> The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

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[6] This Court's members disagree on when a statute is ambiguous. See *Petersen v Magna Corp*, 484 Mich 300, 310-313; 773 NW2d 564 (2009) (opinion by KELLY, C.J.); *id*. at 339-342 (opinion by HATHAWAY, J.). We need not address that issue here because MCL 500.3135 is unambiguous under any of the views.

(*i*) There is no factual dispute concerning the nature and extent of the person's injuries.

(*ii*) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

Under the plain language of the statute, the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding "the nature and extent of the person's injuries" that is material to determining whether the threshold standards are met.[7] If there is a material

[7] Notably, MCL 500.3135(2)(a) could unconstitutionally conflict with MCR 2.116(C)(10) in those cases wherein a court is required to (1) resolve material, disputed facts with regard to issues *other* than the nature and extent of the injury, such as the extent to which the injury actually impairs a body function or the injured party relied on that function as part of his or her pre-accident life, or (2) decide whether the threshold is met even though reasonable people could draw different conclusions from the facts. See *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994), and *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 357; 596 NW2d 190 (1999).

Given that the allocation of decision-making authority between a judge and a jury is "a quintessentially procedural determination," *Shropshire v Laidlaw Transit, Inc*, 550 F3d 570, 573 (CA 6, 2008), this potential conflict raises questions as to whether the Legislature may have unconstitutionally invaded this Court's exclusive authority to promulgate the court rules of practice and procedure to the extent that MCL 500.3135(2)(a) is merely procedural. See *Perin v Peuler* (*On Rehearing*), 373 Mich 531, 541; 130 NW2d 4 (1964). We do not reach this issue today because we conclude that there are no material factual disputes affecting the serious impairment threshold determination in this case. Notably, however, the division of questions of law and fact between a judge and a jury is based on longstanding procedural rules, see *Mawich v Elsey*, 47 Mich 10, 15-16; 10 NW 57 (1881), that are intended to promote judicial efficiency, see *Moll v Abbott Laboratories*, 444 Mich 1, 26-28; 506 NW2d 816 (1993). Whether MCL 500.3135(2)(a) serves a purpose other than judicial dispatch is not clear, as the Legislature itself stated that the

factual dispute regarding the nature and extent of the person's injuries, the court should not decide the issue as a matter of law.[8] Notably, the disputed fact does not need to be outcome determinative in order to be material, but it should be "significant or essential to the issue or matter at hand." Black's Law Dictionary (8th ed) (defining "material fact").

2. A "SERIOUS IMPAIRMENT OF BODY FUNCTION" UNDER MCL 500.3135(1) AND (7)

In those cases where the court may decide whether the serious impairment threshold is met as a matter of law, the next issue is the proper interpretation of MCL 500.3135(7). It provides that, for purposes of the section, a "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to

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Insurance Code was intended, in part, "to prescribe certain procedures for maintaining [tort liability arising out of certain accidents]." See the title of 1956 PA 218 and the title of 1995 PA 222, an act amending the provision of MCL 500.5135 and reiterating the purposes expressed in the 1956 act. And, of course, the scope of the rules governing summary disposition are also supported—if not compelled—by the right to a jury trial in civil cases. See, generally, *Conservation Dep't v Brown*, 335 Mich 343, 346-347; 55 NW2d 859 (1952), and *Dunn v Dunn*, 11 Mich 284, 286 (1863). Accord *Byrd v Blue Ridge Rural Electric Coop, Inc*, 356 US 525, 537-538; 78 S Ct 893; 2 L Ed 2d 953 (1958). Interestingly, the dissent states that it disagrees with the majority that there could be a conflict between the statute and the court rule, but it also approvingly quotes *DiFranco* for the proposition that reasonable minds can often differ over the threshold issues in these cases.

[8] This plain reading of the statute is not necessarily inconsistent with the *Kreiner* majority's interpretation of MCL 500.3135(2)(a), see *Kreiner*, 471 Mich at 131-132, but neither the majority nor dissent in *Kreiner* discussed the constitutionality of this provision. As noted in footnote 7 of this opinion, however, the manner in which *Kreiner* interpreted the statute may be unconstitutional to the extent that it requires a court to usurp the role of the fact-finder. That issue is not presented on the facts of this case, however.

lead his or her normal life." On its face, the statutory language provides three prongs that are necessary to establish a "serious impairment of body function": (1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life.[9]

Overall, because we conclude that each of these prongs' meaning is clear from the plain and unambiguous statutory language, judicial construction is neither required nor permitted. *In re MCI*, 460 Mich at 411. Notably, however, a dictionary may aid the Court in giving the words and phrases in MCL 500.3135(7) their common meaning, and where the language used in MCL 500.3135(7) was originally adopted and interpreted in *Cassidy* and *DiFranco*, it may be presumed that the Legislature intended the previous judicial interpretation to be relevant. *Oakland Co Bd of Rd Comm'rs*, 456 Mich at 604; *Wright*, 432 Mich at 92. As will be discussed within, where the *Kreiner* majority's interpretation of these prongs is inconsistent with the clear language of the statute, we hold that *Kreiner* was wrongly decided. Most significantly, its interpretation of the third prong deviates dramatically from the statute's text.

a. AN OBJECTIVELY MANIFESTED IMPAIRMENT

Under the first prong, it must be established that the injured person has suffered an objectively manifested impairment of body function. The common meaning of "an objectively manifested impairment" is apparent

[9] The *Kreiner* majority first addressed whether the impaired body function was important and then analyzed whether the impairment was objectively manifested. *Kreiner*, 471 Mich at 132-133. We find it more consistent with the statutory text to first address the objectively manifested impairment requirement.

from the unambiguous statutory language, with aid from a dictionary, and is consistent with the judicial interpretation of "objectively manifested" in *Cassidy* and *DiFranco*. To the extent that the *Kreiner* majority's interpretation of this prong differs from this approach, it was wrongly decided.

To begin with, the adverb "objectively" is defined as "in an objective manner," *Webster's Third New International Dictionary* (1966), and the adjective "objective" is defined as "1. Of or having to do with a material object as distinguished from a mental concept. 2. Having actual existence or reality. 3. a. Uninfluenced by emotion, surmise, or personal prejudice. b. Based on observable phenomena; presented factually" *The American Heritage Dictionary*, *Second College Edition* (1982). It is defined specifically in the medical context as "[i]ndicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted." *Id.*[10] The verb "manifest" is defined as "1. To show or demonstrate plainly; reveal. 2. To be evidence of; prove." *Id.* Overall, these definitions suggest that the common meaning of "objectively manifested" in MCL 500.3135(7) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. In other words, an "objectively manifested" impairment is commonly understood as one observable or perceivable from actual symptoms or conditions.

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[10] See also *Webster's Third New International Dictionary* (1966), defining "objective," in relevant part, as "publicly or intersubjectively observable or verifiable especially by scientific methods: independent of what is personal or private in our apprehension and feelings: of such nature that rational minds agree in holding it real or true or valid." It also defines "objective" in the context "of a symptom of disease" as "perceptible to persons other than an affected individual." *Id.* (italics omitted).

Notably, MCL 500.3135(7) does not contain the word "injury," and, under the plain language of the statute, the proper inquiry is whether the *impairment* is objectively manifested, not the *injury* or its symptoms.[11] This distinction is important because "injury" and "impairment" have different meanings. An "injury" is "1. Damage of or to a person . . . . 2. A wound or other specific damage." *The American Heritage Dictionary*, *Second College Edition* (1982). "Impairment" is the "state of being impaired," *Webster's Third New International Dictionary* (1966), and to be "impaired" means being "weakened, diminished, or damaged" or "functioning poorly or inadequately," *Random House Webster's Unabridged Dictionary* (1998). These definitions show that while an injury is the actual damage or wound, an impairment generally relates to the effect of that damage. Accordingly, when considering an "impairment," the focus "is not on the injuries themselves, but how the injuries affected a particular body function." *DiFranco*, 427 Mich at 67.

Further, the pre-existing judicial interpretation of "objectively manifested" is consistent with the plain language of the later-adopted statute. In *Cassidy*, this Court explained that the serious impairment threshold was not met by pain and suffering alone, but also required "injuries that affect the functioning of the body," i.e., "objectively manifested injuries." *Cassidy*, 415 Mich at 505. In other words, *Cassidy* defined

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[11] Accordingly, the Court of Appeals decisions that have gone beyond the plain language of the statute and imposed an extra-textual "objectively manifested *injury*" requirement, in clear contravention of legislative intent, are overruled to the extent that they are inconsistent with this opinion. See, e.g., *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006) (holding that "the current meaning of 'objectively manifested' . . . requires that a plaintiff's injury must be capable of objective verification").

"objectively manifested" to mean affecting the functioning of the body.[12] *DiFranco* affirmed this and further explained that the "objectively manifested" requirement signifies that plaintiffs must "introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering" and that showing an impairment generally requires medical testimony. *DiFranco*, 427 Mich at 74.

The *Kreiner* majority's interpretation of this language was only partially consistent with the plain language of the statute. It addressed this issue briefly, stating that "[s]ubjective complaints that are not medically documented are insufficient [to establish that an impairment is objectively manifested]." *Kreiner*, 471 Mich at 132. To the extent that this is inconsistent with *DiFranco*'s statement that medical *testimony* will *generally* be required to establish an impairment, it is at odds with the legislative intent expressed by the adoption of the "objectively manifested" language from *DiFranco* and *Cassidy*. Thus, to the extent that *Kreiner* could be read to *always* require medical documentation, it goes beyond the legislative intent expressed in the plain statutory text, and was wrongly decided.

b. OF AN IMPORTANT BODY FUNCTION

If there is an objectively manifested impairment of body function, the next question is whether the impaired body function is "important." The common meaning of this phrase is expressed in the unambiguous statutory language, although reference to a dictionary and limited reference to *Cassidy* is helpful.

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[12] Although the Legislature plainly rejected that it is the *injury* that should be objectively manifested, as opposed to the *impairment*, the previous judicial construction of "objectively manifested" is still relevant.

The relevant definition of the adjective "important" is "[m]arked by or having great value, significance, or consequence." *The American Heritage Dictionary*, *Second College Edition* (1982). See also *Random House Webster's Unabridged Dictionary* (1998), defining "important" in relevant part as "of much or great significance or consequence," "mattering much," or "prominent or large." Whether a body function has great "value," "significance," or "consequence" will vary depending on the person. Therefore, this prong is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life.

The "important body function" language was originally adopted in *Cassidy*, where the Court stated that an "important" body function is not *any* body function but also does not refer to the *entire* body function. *Cassidy*, 415 Mich at 504. This pre-existing judicial construction of "important body function" is consistent with the common meaning of "important."[13]

For this prong, the *Kreiner* majority's interpretation appears to be consistent with the plain language of the statute, as it only briefly stated that "[i]t is insufficient if the impairment is of an unimportant

[13] *Cassidy* also held that the importance of a body function is an *objective* standard based on its effect on "the person's general ability to live *a* normal life." *Cassidy*, 415 Mich at 505 (emphasis added). As discussed below, however, the Legislature specifically rejected the idea that the normal life evaluation should be objective, and, thus, implicitly rejected *Cassidy*'s determination that whether a body function is "important" could be objectively determined outside the context of the person's actual life. Notably, *DiFranco* is inapposite because it rejected the "important body function" test. *DiFranco*, 427 Mich at 61-62.

body function." *Kreiner*, 471 Mich at 132.[14] If, however, the *Kreiner* majority's position has been construed in a manner that is inconsistent with this opinion, then we disapprove of those constructions.

c. THAT AFFECTS THE PERSON'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE

Finally, if the injured person has suffered an objectively manifested impairment of body function, and that body function is important to that person, then the court must determine whether the impairment "affects the person's general ability to lead his or her normal life." The common meaning of this phrase is expressed by the unambiguous statutory language, and its interpretation is aided by reference to a dictionary, reading the phrase within its statutory context, and limited reference to *Cassidy*.

To begin with, the verb "affect" is defined as "[t]o have an influence on; bring about a change in." *The American Heritage Dictionary*, *Second College Edition* (1982). An "ability" is "[t]he quality of being able to do something," *id.*, and "able" is defined as "having sufficient power, skill, or resources to accomplish an object," *Merriam-Webster Online Dictionary* <http://www.merriam-webster.com> (accessed May 27, 2010). The adjective "general" means:

> 1. Relating to, concerned with, or applicable to the whole or every member of a class or category. 2. Affecting or characteristic of the majority of those involved; prevalent: *a general discontent*. 3. Being usually the case; true or applicable in most instances but not all. 4. a. Not limited in scope, area, or application: *as a general rule.* b. Not limited to one class of things: *general studies*. 5. Involving only the main features of something rather than details or particu-

[14] The *Kreiner* majority also apparently agreed that this is a subjective, case-by-case inquiry. *Kreiner*, 471 Mich at 134 n 19.

> lars. 6. Highest or superior in rank. [*The American Heritage Dictionary*, *Second College Edition* (1982).]

The sixth definition is obviously irrelevant, and the first definition of "general" does not make sense in this context because a person's "whole" ability to live his or her normal life is surely not affected short of complete physical and mental incapacitation, which is accounted for in a different statutory threshold: death. The other definitions, however, more or less convey the same meaning: that "general" does not refer to only one specific detail or particular part of a thing, but, at least some parts of it. Thus, these definitions illustrate that to "affect" the person's "general ability" to lead his or her normal life is to influence some of the person's power or skill, i.e., the person's capacity, to lead a normal life.

The next question is the meaning of "to lead his or her normal life." The verb "lead," in this context, is best defined as "[t]o pass or go through; live." *The American Heritage Dictionary*, *Second College Edition* (1982). Although the verb "lead" has many definitions, some of which have similar nuances, this definition is the most relevant because it expressly applies in the context of leading a certain type of life. Indeed, other dictionaries provide a similar definition with the same context, using a "type of life" as an example.[15] Similarly, "life" has multiple meanings, but one specifically references the context of leading a particular type of life, which is "[a] manner of living: *led a good life*." *Id.* Other definitions are similar, such as "[t]he physical, mental,

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[15] See *Random House Webster's Unabridged Dictionary* (1998), defining "lead" as "to go through or pass (time, life, etc.): *to lead a full life*," and *Webster's Third New International Dictionary* (1966), defining it as "to go through (life or some other period of time): PASS, LIVE <there he *led* a very peaceful existence>."

and spiritual experiences that constitute a person's existence," or "[h]uman existence or activity in general." *Id.* Given the contextual examples used in the dictionary, the common understanding of "to lead his or her normal life" is to live, or pass life, in his or her normal manner of living.

Therefore, the plain text of the statute and these definitions demonstrate that the common understanding of to "affect the person's ability to lead his or her normal life" is to have an influence on some of the person's capacity to live in his or her normal manner of living. By modifying "normal life" with "his or her," the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident.

There are several important points to note, however, with regard to this comparison. First, the statute merely requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed. Thus, courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected.

Second, and relatedly, "general" modifies "*ability,*" not "affect" or "normal life." Thus, the plain language of the statute only requires that some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. Thus, while the extent to which a person's general ability to live his

or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.

Third, and finally, the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on "the person's general ability to live his or her normal life." To begin with, there is no such requirement in the plain language of the statute. Further, MCL 500.3135(1) provides that the threshold for liability is met "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." While the Legislature required that a "serious disfigurement" be "permanent," it did not impose the same restriction on a "serious impairment of body function." Finally, to the extent that this prong's language reflects a legislative intent to adopt this portion of *Cassidy* in some measure,[16] *Cassidy* expressly rejected a requirement of permanency to meet the serious impairment threshold. *Cassidy*, 415 Mich at 505-506 (noting that "two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function").

Despite the fact that the language of the statute was plain, the *Kreiner* majority deviated significantly from

[16] Although some of this prong's text is derived from *Cassidy*, the Legislature made important modifications. The *Cassidy* Court stated that the serious impairment threshold "looks to the effect of an injury on the person's general ability to live a normal life," *Cassidy*, 415 Mich at 505, and the Legislature rejected that the standard for "a" normal life was objective.

the statutory text in its interpretation of this prong. To begin with, the *Kreiner* majority erred in its interpretation of the phrase "that affects the person's general ability" for two reasons. First, it selectively quoted only the dictionary definitions of "general" that best supported its conclusions. It gave one definition for this word, " 'the whole; the total; that which comprehends or relates to all, or the chief part; a general proposition, fact, principle, etc.;—opposed to particular; that is, opposed to special,' " and then relied on definitions of "in general" and "generally" to conclude that "general" means " 'for the most part.' " *Kreiner*, 471 Mich at 130, quoting *Webster's New International Dictionary*. *Webster's*, however, offers *10* definitions of the adjective "general," many of which are similar to definitions quoted above from *The American Heritage Dictionary*. Moreover, of these 10 definitions, the majority chose the most restrictive, even though, as discussed above, it does not make the most sense in this context. And, even then, the *Kreiner* majority looked to other forms of the word. Second, the *Kreiner* majority stated that "[t]he starting point in analyzing whether an impairment affects a person's 'general,' i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long." *Kreiner*, 471 Mich at 131. Although other portions of the *Kreiner* majority opinion more carefully stated that the test was the effect on a person's general ability, this particular reasoning could be pulled out of context to suggest that courts should focus on how much the impairment affects a person's *life*, instead of how much it affects the person's *ability* to live his or her life.

Further, the *Kreiner* majority significantly erred in its interpretation of "to lead his or her normal life." It relied on a dictionary to define "lead" as "to conduct or bring in a particular course." Notably, depending on

how this definition is interpreted, it may have a similar meaning to "live" or "pass" when "conduct" and "course" are given a certain meaning. "Conduct" can mean "to behave or act," and "course" can mean "[a] mode of action or behavior" or "[a] typical or natural manner of proceeding or developing: customary passage . . . ." *The American Heritage Dictionary*, *Second College Edition* (1982). The meaning of "to behave or act in his or her typical or natural manner of proceeding" may be similar to "living in his or her normal manner of living."

Beyond this point, however, the *Kreiner* majority went astray and gave the statute a labored interpretation inconsistent with common meanings and common sense. Applying its chosen definition of "lead," the majority concluded that "the effect of the impairment on the course of a plaintiff's entire normal life must be considered," and if "the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected . . . ." *Kreiner*, 471 Mich at 131. In other words, the *Kreiner* majority held that the "common meaning" of whether an impairment has affected "the person's general ability to lead his or her normal life" is whether it has affected the person's general ability to conduct the course or trajectory of his or her entire normal life. This "common meaning" is quite different from the actual statutory text in form and substance. Significantly, the *Kreiner* majority's interpretation of the statute interjects two terms that are not included in the statute *or* the dictionary definitions of the relevant statutory language: "*trajectory*" and "*entire*." Both terms create ambiguity where the original statutory text had none, and the *Kreiner* majority thus erred by selectively defining the words used in definitions of statutory terms in order to shift away

from the common meaning that the words have in the context of MCL 500.3135(7).

As to the first addition, while "trajectory" is a synonym for "course" when "course" is defined as, for example, "[t]he direction of continuing movement," *The American Heritage Dictionary*, *Second College Edition* (1982), it is not a synonym for the definition of "course" that makes sense in the context of defining a "general ability to lead his or her normal life." When "conduct" is used with this definition of "course," it has the very different meaning of "[t]o direct the course of; control." *Id.* The plain language of the statute does not suggest that the Legislature's intent was to address the effect of an impairment on the person's ability to control the direction of their life, as opposed to its effect on the person's ability to live in his or her normal manner of living. Yet the majority managed to imply this meaning by inserting "trajectory" as a synonym for "course," thereby shifting the meaning of "course" from the most natural contextual reading of the word. The use of "trajectory" and the suggestion that "course" should be understood to mean "the direction of continuing movement," instead of "a mode of action or behavior," creates ambiguity by implying a sense of permanence that is inconsistent with, and does not make sense in the context of, the actual statutory language.

As to the second addition, the majority modified the statutory language "his or her normal life" with "entire," a modification that it apparently created out of thin air,[17] thereby creating an ambiguity that had not previously existed in the statutory text. The word "life"

[17] The *Kreiner* majority did define "in general" as "with respect to the entirety" when interpreting "general ability." *Kreiner*, 471 Mich at 130. But, even assuming that it is proper to use the definition of the phrase "in general" to define the adjective "general," the Legislature used general to modify *ability*, not life.

has more than one meaning. As noted, it can refer to the meaning that would be commonly understood to apply in the context of the statutory language, which is "a manner of living." It also can refer to "[t]he interval of time between birth and death; lifetime." *The American Heritage Dictionary*, *Second College Edition* (1982). The differences are significant: whereas the first meaning refers to the day-to-day process of living, the second is a finite measure that encompasses all of one's time on earth. Although "entire" could modify either meaning of "life," it is probably more commonly used to modify the second. Thus, by inserting "entire," the *Kreiner* majority created an ambiguity that is not present in the original statutory text because the second, finite definition of "life" does not make sense in the context of the actual statutory language. It would be unusual to refer to someone's general ability to lead his or her normal "lifetime" or "interval of time between life and death." At best, this would seem to refer to an effect on the person's life expectancy, but this would not be a subjective inquiry, and it is an impossible leap from any common understanding of the statutory language.[18] At a minimum, using the modifier "entire" reinforces the general sense of permanence that is also created by the insertion of "trajectory," but which, as explained, is not in the actual statutory text. Because the *Kreiner* majority created ambiguity where there was none, and crafted a statutory interpretation that is, in effect, a judicially constructed house of cards, we hold that it incorrectly interpreted the third prong of MCL 500.3135(7).

The *Kreiner* majority aggravated this error, and departed even more dramatically from the statutory text, by providing an extra-textual "nonexhaustive list

[18] It is also to some extent accounted for in another threshold in MCL 500.3135(1): death.

of objective factors" to be used to compare the plaintiff's pre- and post-incident lifestyle. These factors are: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Kreiner*, 471 Mich at 133.[19] The Legislature has unambiguously defined the "serious impairment of body function," and the role of this Court is to apply the plain language of that definition, not to improve it with a list of judicially created factors that are not necessarily based in the statute's text. In fact, at least some of the *Kreiner* majority's factors have no basis in the statutory text and are instead derived from its extra-textual and extra-definitional additions to the actual statutory language, "entire" and "trajectory," and serve to reinforce the ambiguity that its interpretation of the third prong created, especially given that all of the factors expressly or impliedly include a temporal component. Because the factors adopted by the *Kreiner* majority are not based in the statutory text, and this Court's role is to apply the unambiguous statutory language, not improve it, we hold that the majority erred by adopting them.[20]

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[19] The dissent correctly observes that I do not object to courts employing factors when applying statutes in many circumstances. I certainly object, however, to courts doing so in a manner that not only perverts the statutory language but is also unsupported by, and inconsistent with, the legislative intent expressed by the statutory language, as the *Kreiner* majority did.

[20] Indeed, the potential for the *Kreiner* majority's interpretation to be read in a manner that is inconsistent with the statute has been realized in lower court decisions. For example, in *Gagne v Schulte*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 264788), the Court of Appeals held that a plaintiff had not suffered a serious impairment of body function even though her knee injury resulted in surgery and severe restrictions on her movement for a year after the accident, indefinite continuing restrictions on her ability to perform her pre-accident job and other activities in which she participated before the accident, and a permanent loss of stability in her knee

In summary, the *Kreiner* majority's interpretation of the third prong departed from the idea that a court "should not casually read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute." *Kreiner*, 471 Mich at 157 (CAVANAGH, J., dissenting). Indeed, as I remarked in dissent, the *Kreiner* majority's "interpretation" of the plain language of MCL 500.3135(7) was a "chilling reminder that activism comes in all guises, including so-called textualism." *Id*. Therefore, we hold that the *Kreiner* majority's interpretation of this prong, including the list of non-exhaustive factors, is not based in the statute's text and is incorrect.

3. STARE DECISIS: SHOULD *KREINER* BE OVERRULED?

To the extent that the *Kreiner* majority's interpretation of the statute was inconsistent with the foregoing approach, and departed from the legislative intent expressed in the unambiguous language of the statute, we hold that it was wrongly decided. Given this conclusion, the question is whether it should be overruled. We hold that it should be.[21]

Under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of compe-

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and an increased risk of osteoarthritis. The majority reasoned that these impairments were insufficient to meet the threshold because she might someday be able to resume some activities with a knee brace and "there is no evidence that this period of decreased function affected her life so extensively that it altered the trajectory or course of her entire normal life." *Id*., unpub op at 2. Indeed, the majority's reasoning seemed to consider whether the plaintiff's ability to control the direction of her entire life had been altered, rather than her ability to live her life in a normal manner, given that it found the threshold was not met despite evidence that the plaintiff had continuing restrictions on movement, activities, and work, and medically documented long-term damage.

[21] The dissenters' stare decisis protestations should taste like ashes in their mouths. To the principles of stare decisis, to which they paid

tent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (citations and quotation marks omitted). Indeed, in order to " 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .' " *Petersen v Magna Corp*, 484 Mich 300, 314-315; 773 NW2d 564 (2009) (opinion by KELLY, C.J.), quoting The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961). As the United States Supreme Court has stated, the doctrine "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." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991).

Despite its importance, stare decisis is neither an "inexorable command," *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering v Hallock*, 309 US 106, 119; 60 S

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absolutely no heed as they denigrated the wisdom of innumerable predecessors, the dissenters now would wrap themselves in its benefits to save their recent precedent.

Ironically, the very doctrine and approach that the dissent vehemently claims to adhere to today, from *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), was not so faithfully applied by the members of the dissent in the past. Indeed, the members of the dissent have overruled caselaw without even paying lip service to *Robinson*, see, e.g., *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006), or after engaging in a cursory or limited analysis of the factors that they claim fidelity to today, see, e.g., *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 91 n 13; 746 NW2d 847 (2008); *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 297 n 10; 731 NW2d 29 (2007); *Neal v Wilkes*, 470 Mich 661, 667 n 8; 685 NW2d 648 (2004); *People v Hickman*, 470 Mich 602, 610 n 6; 684 NW2d 267 (2004); *Mack v Detroit*, 467 Mich 186, 203 n 19; 649 NW2d 47 (2002).

Ct 444; 84 L Ed 604 (1940). Ultimately, it is an attempt "to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors." *Petersen*, 484 Mich at 314. As a reflection of this balance, there is a presumption in favor of upholding precedent, but this presumption may be rebutted if there is a special or compelling justification to overturn precedent. *Id.* at 319-320. In determining whether a special or compelling justification exists, a number of evaluative criteria may be relevant, *id.*, but overturning precedent requires more than a mere belief that a case was wrongly decided, see *Brown*, 452 Mich at 365.[22]

In determining whether *Kreiner* should be overruled, I find several evaluative criteria particularly relevant: (1) "whether the rule has proven to be intolerable because it defies practical workability," (2) "whether reliance on the rule is such that overruling it would cause a special hardship and inequity," (3) "whether upholding the rule is likely to result in serious detriment prejudicial to public interests," and (4) "whether the prior decision was an abrupt and largely unexplained departure from precedent." *Petersen*, 484 Mich at 320. As applied here, on the balance, these criteria weigh in favor of overturning *Kreiner*.

The first criterion weighs heavily in favor of overruling *Kreiner* because the *Kreiner* majority's departure from the plain language of MCL 500.3135(7) defies practical workability. As discussed above, the majority took unambiguous statutory text and, through linguistic gymnastics, contorted it into a confusing and am-

[22] In *Petersen*, Chief Justice KELLY provided a non-exhaustive list of criteria that may be considered, but none of the criteria is determinative, and they need only be evaluated if relevant. See *Petersen*, 484 Mich at 320.

biguous test. Appellate litigation arising out of MCL 500.3135(7) has greatly increased since *Kreiner*[23] and has resulted in confusion. To begin with, the lower courts' application of *Kreiner* has led to inconsistent interpretation of the statutory language, with similarly situated plaintiffs being treated differently by different courts.[24] Further, some courts have interpreted *Kreiner* as having created a threshold that is higher than that in *Cassidy* or *DiFranco*, primarily by reading the *Kreiner* majority's interpretation of the statute to effectively create a permanency requirement.[25] As discussed, this is contrary to the legislative intent expressed by the plain language of the statute. Because the *Kreiner* majority's interpretation of the third prong of MCL

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[23] In the six years since *Kreiner* was decided, there have been *three times* as many Court of Appeals cases citing MCL 500.3135(7) as there were in the nine years between when the amendment was enacted and *Kreiner* was decided. In the nine years between when the amendment became effective and *Kreiner* was decided, only 86 Court of Appeals cases cited MCL 500.3135(7). As of May 27, 2010, in the six years since the *Kreiner* decision was issued, there have been *254* Court of Appeals cases citing MCL 500.3135(7).

[24] For example, in *Luther v Morris*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 244483), the Court held that the plaintiff had suffered a serious impairment of body function where a dislocated elbow caused her to miss 52 days of work and significantly interfered with her ability to perform daily personal tasks for a while, but her life returned to normal within a couple of months after the accident. In contrast, in *Guevara v Martinez*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260387), the Court held that there was no serious impairment where the plaintiff suffered a dislocated right shoulder and a torn anterior rotator cuff that significantly interfered with his ability to perform daily personal tasks for a couple of months and prevented him from continuing work as a part-time construction worker during at least the surgery and multiple months of rehabilitation. The outcomes in these cases are difficult to reconcile.

[25] See footnote 20 of this opinion summarizing *Gagne v Schulte*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 264788).

500.3135(7) has created ambiguity where there was none, and increased litigation and confusion, the first factor weighs heavily in favor of overruling *Kreiner*.

Second, correcting the errors in the *Kreiner* majority's interpretation of MCL 500.3135(7) would not present an undue hardship to reliance interests, and this factor weighs in favor of overruling *Kreiner*. As this Court has explained when evaluating a similar factor in the past, "the Court must ask whether the previous decision has 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." *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000). It further stated that this factor applies to cases that if overruled, "even if they were wrongfully decided, would produce chaos." *Id.* at 466 n 26. *Kreiner* is not "so" embedded, accepted, or fundamental to expectations that chaos will result from overruling it. To begin with, *Kreiner* was decided only six years ago, and, while it was the first opinion from this Court interpreting MCL 500.3135(7), it was contrary to the plain text of the statute, which had been in place since 1995. As the *Robinson* majority explained, people normally rely on the words of the statute itself when looking for guidance on how to direct their actions. *Robinson*, 462 Mich at 467. Further, it is unlikely that motor vehicle drivers, and the victims of motor vehicle accidents, have altered their behavior in reliance on *Kreiner*. As noted by the *Robinson* majority, where a statute deals with the consequences of accidents, "it seems incontrovertible that only after the accident would . . . awareness [of this Court's caselaw] come," and "after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id*. at 466-467. Similarly, this

statute generally involves motor vehicle accidents, and it strains credibility to think that the average driver and the average future injured party have altered their behavior in reliance on *Kreiner*.

The third criterion, the effect on the public interest, also weighs in favor of overruling *Kreiner*. Although there may be policy arguments on both sides regarding the costs and benefits of having a more or less difficult threshold for recovery under MCL 500.3135, our interpretation of the statute in this case is truer to the statute's text than that of the *Kreiner* majority, and, thus, our interpretation most closely reflects the policy balance struck by the Legislature.[26] In contrast, *Kreiner* altered the balance from that intended by the Legislature by imposing extra-textual burdens to meeting the threshold, and, as a result, it is difficult to argue that overruling *Kreiner* to restore the balance intended by the Legislature would hurt the public interest (or that affirming *Kreiner* serves it).

Finally, the fourth criterion is neutral. *Kreiner* was not an abrupt change from precedent, but it did provide an interpretation of the statute that was not obvious from the statute's text.

On the basis of these evaluative criteria, we hold that *Kreiner* should be overruled.

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[26] The dissent devotes a significant amount of time conducting what is essentially a policy analysis hypothesizing about the disastrous effects that this opinion will have on the insurance industry and, thus, concluding that we are undoing the legislative compromise that was the general backdrop of the no-fault act. While I am cognizant of the legislative compromise, I am less convinced than the dissent that this Court's role is to conduct an independent policy analysis to determine whether the plain language of an amendment adopted by the Legislature, 20 years after the no-fault act was originally adopted, is inconsistent with the overall act's general purposes. Even assuming arguendo that it could be, I do not believe that broad statements regarding the general purpose of the act's adoption in 1973 trump the intent expressed by the Legislature in the plain language of a later amendment to the act.

4. SUMMARY OF LEGISLATIVE TEST

On the basis of the foregoing, the proper interpretation of the clear and unambiguous language in MCL 500.3135 creates the following test.

To begin with, the court should determine whether there is a factual dispute regarding the nature and the extent of the person's injuries and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met. MCL 500.3135(2)(a)(*i*) and (*ii*).[27] If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court. *Id*.

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a "serious impairment of body function": (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living).

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, "[t]he

[27] As discussed in footnotes 7 and 8 of this opinion, this provision may unconstitutionally conflict with MCR 2.116(C)(10) in certain cases. If it does, then a court should only apply MCL 500.3135(2) to the extent that it is consistent with MCR 2.116(C)(10). We do not reach this issue today, however, because there is no material factual dispute over any fact necessary to determining whether the serious impairment threshold has been met.

Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect." *Kreiner*, 471 Mich at 145 (CAVANAGH, J., dissenting). As such, the analysis does not "lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors," particularly where there is no basis in the statute for such factors. *Id.* Accordingly, because "[t]he Legislature avoided drawing lines in the sand . . . so must we." *Id.*

C. APPLICATION OF MCL 500.3135

Under the facts of this case, we hold that plaintiff has met the serious impairment threshold as a matter of law.

To begin with, there is no factual dispute that is material to determining whether the serious impairment threshold is met. The parties do not dispute that plaintiff suffered a broken ankle, was completely restricted from bearing weight on his ankle for a month, and underwent two surgeries over a 10-month period and multiple months of physical therapy. The parties do dispute the extent to which plaintiff continues to suffer a residual impairment and the potential for increased susceptibility to degenerative arthritis. Plaintiff has provided at least some evidence of a physical basis for his subjective complaints of pain and suffering,[28] but defendant disputes whether there is persuasive evidence of impairment beyond plaintiff's subjective complaints. This dispute is not significant or essential to determining whether the serious impairment threshold

[28] The FCEs reported that plaintiff's range of motion in his ankle is not within normal limits, and the MRI and two doctors' reports suggested at least some scarring and degenerative tissue damage around plaintiff's left ankle.

is met in this case, however, because plaintiff has not alleged that the residual impairment, to the extent that it exists, continues to affect his general ability to lead his pre-incident "normal life,"[29] the third prong of the analysis. Moreover, it is not necessary to establish the first two prongs. Therefore, the dispute is not material and does not prevent this Court from deciding whether the threshold is met as a matter of law under MCL 500.3135(2)(a).

The other facts material to determining whether the serious impairment threshold is met are also undisputed.[30] Before the incident, plaintiff's "normal life" consisted primarily of working 60 hours a week as a medium-duty truck loader. Plaintiff also frequently fished in the spring and summer and was a weekend golfer. After the incident, plaintiff was unable to return to work for at least 14 months and did not return for 19 months. He never returned to his original job as a medium-duty truck loader, but he suffered no loss in pay because of the change in job. He was able to fish at pre-incident levels by the spring of 2006 and is able to take care of his personal needs at the same level as before the incident. There is no allegation that the impairment of body function has affected his relationship with his significant other or other qualitative aspects of his life.

Next, in light of the lack of a factual dispute that is material to determining whether the threshold is met,

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[29] Plaintiff stated that his life is "painful, but normal." He does not allege that any residual impairment has a significant effect on his ability to participate in or enjoy activities to the extent that he could before the accident.

[30] If there had been other disputed facts that were material to this determination, we would have to reach the question whether MCL 500.3135(2)(a) is unconstitutional to the extent that it requires a court to decide material disputed facts as a matter of law. See footnote 7 of this opinion.

under MCL 500.3135(2)(a), this Court should decide as a matter of law whether plaintiff suffered a serious impairment of body function under the three prongs of MCL 500.3135(7).

With regard to the first prong, plaintiff has shown an objectively manifested impairment of body function. There is no dispute that plaintiff has presented evidence that he suffered a broken ankle and actual symptoms or conditions that someone else would perceive as impairing body functions, such as walking, crouching, climbing, and lifting weight. Even 14 months after the incident, an FCE report observed that ankle pain and a reduced range of motion inhibited these body functions. Thus, plaintiff has satisfied this prong.

With regard to the second prong, the impaired body functions were important to plaintiff. His testimony establishes that being unable to walk and perform other functions were of consequence to his ability to work. Thus, the second prong of MCL 500.3135(7) is met.

The next question in this case is whether the third prong is met, but we hold that plaintiff has shown that the impairment affected his general ability to lead his normal life because it influenced some of his capacity to live in his normal, pre-incident manner of living. Before the incident, plaintiff's normal manner of living consisted primarily of working, for 60 hours a week, and secondarily of enjoying his hobbies of fishing and golfing. After the incident, at least some of plaintiff's capacity to live in this manner was affected. Specifically, for a month after the incident, plaintiff could not bear weight on his left ankle. He underwent two surgeries over a period of 10 months and multiple months of physical therapy. Moreover, his capacity to work, the central part of his pre-incident "normal life," was

affected.[31] Whereas before the incident he spent most of his time working, after the incident he was unable to perform functions necessary for his job for at least 14 months, and he did not return to work for 19 months.[32] On the basis of these facts, we conclude that some of plaintiff's capacity to live in his pre-incident manner of living was affected, and the third prong of MCL 500.3135(7) is satisfied.[33]

Because all three prongs of MCL 500.3135(7) are satisfied, we hold, as a matter of law, that plaintiff has met the serious impairment threshold requirement under MCL 500.3135(1).

D. RESPONSE TO THE DISSENT

Despite the dissent's length, it provides very little substantive disagreement or criticism of the statutory interpretation presented in this opinion and very little response to our criticisms of the statutory interpretation in *Kreiner*. Where the dissent does actually address the substance of the opinion, its criticisms are often

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[31] As noted, it is unclear from the record the extent to which the impairment affected plaintiff's ability to fish in the first year after the incident or his ability to golf in the first year and a half after the incident, or the extent to which he actually undertook either activity in those periods.

[32] It could be significant that plaintiff's job has changed, even though his pay is the same, but there is no evidence suggesting that this was an effect of impairment. Therefore, this fact is not relevant to the "normal life" inquiry here.

[33] Our analysis focuses on plaintiff's pre- and post-incident activities and the extent to which he was able to participate in them after the incident because those are the facts in the record. The facts that the parties considered relevant in developing the record were, no doubt, influenced by the *Kreiner* majority's erroneous deviation from the statutory language. As noted, however, many other considerations could typically be relevant to determining how an impairment affects a person's ability to live in his or her pre-incident normal manner of living.

based not on the *actual* holdings of the majority opinion but, instead, on the dissent's misunderstandings or overgeneralizations of those holdings.

For example, the dissent complains that the majority "resuscitate[s]" my opinion in *DiFranco*.[34] As a result, the dissent resuscitates old criticisms of *DiFranco* and attacks the majority for failing to recognize the Legislature's intent, as expressed in the statute's legislative history, to reject *DiFranco* in favor of *Cassidy*.[35] As is plainly evident in the analysis, however, this opinion faithfully applies the text of the statute, even where that text is inconsistent with *DiFranco*. The opinion fully recognizes the Legislature's adoption of *Cassidy* where the Legislature indicated an intent to do so *through the text of the statute* and "resuscitates" *DiFranco* only in the narrow places where, similarly, the statutory text indicates a legislative intent to do so.[36]

Additionally, the dissent's comments on the majority's lack of use of legislative history are ill-founded on two levels. First, contrary to the dissent's assertion that I have "never questioned [the] utility" of legislative history and that "there is no principled reason" not to use it in this case, I have repeatedly stated that legislative

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[34] The only explanation that I can discover for the dissent's reaching this conclusion is its baseless accusation that the majority is essentially reading the third prong out of the statute. It is unclear to me, however, how reading and applying the plain text of the statute, instead of enhancing and extending the statute through creative use of a thesaurus and extra-textual factors, could equate with reading that language out of the statute.

[35] Interestingly, while criticizing the majority for supposedly reviving *DiFranco*, the dissent also criticizes us for not going far enough in its revival by not adopting the factors that I used in *DiFranco*.

[36] It appears that the dissent itself does not actually believe that we are resuscitating *DiFranco*, given that it so vigorously, albeit erroneously, argues that the only difference between our decision today and *Kreiner* is that *Kreiner* adopted temporal requirements.

history should only be used to interpret a statute when statutory language is ambiguous. See, e.g., *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008) (CAVANAGH, J., dissenting); *Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007) (CAVANAGH, J., concurring); *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 174; 680 NW2d 840 (2004) (CAVANAGH, J., dissenting).[37] The statutory language at issue here is not ambiguous.[38] Second, even if legislative history should be used, our application of the plain language of the statute is consistent with the House legislative analysis's statement that the amendments were intended to return the law to a threshold "resem-

[37] To the extent the dissent insinuates that I have relied on legislative history to interpret an unambiguous statute, it is reaching. None of the cases that the dissent cites involves instances where I relied on legislative history to identify an ambiguity or give unambiguous text a meaning inconsistent with the plain language of the statute. In most, I merely emphasized that the legislative history *confirmed* the meaning in the unambiguous text. See, e.g., *Jackson v Green Estate*, 484 Mich 209, 230; 771 NW2d 675 (2009) (CAVANAGH, J., dissenting); *Koester v City of Novi*, 458 Mich 1, 16; 580 NW2d 835 (1998); *People v Sloan*, 450 Mich 160, 183-184; 538 NW2d 380 (1995); *Grand Trunk W R Co v City of Fenton*, 439 Mich 240, 247; 482 NW2d 706 (1992).

[38] The dissent references Judge Leventhal's remark that using legislative history for statutory interpretation is the equivalent of walking into a crowded room and looking for one's friends. Similar to my approach, however, this analogy has been used by justices of the United States Supreme Court to explain why legislative history should not be used to interpret clear and *unambiguous* statutory language. See *Exxon Mobil Corp v Allapattah Servs, Inc*, 545 US 546, 568-570; 125 S Ct 2611; 162 L Ed 2d 502 (2005), using the criticism to explain that legislative history should not be used to determine whether Congress intended an otherwise unambiguous statute to overrule a court's interpretation of an earlier version of the statute because "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." See also *Conroy v Aniskoff*, 507 US 511, 518-519; 113 S Ct 1562; 123 L Ed 2d 229 (1993) (Scalia, J., concurring) (using the criticism to explain why the majority should have stopped its analysis after concluding that a statute was unambiguous).

bling" *Cassidy*. House Legislative Analysis, HB 4341, December 18, 1995. The dissent's statements to the contrary are, again, largely based on its mistaken characterization of the majority opinion as resuscitating *DiFranco* and ignoring *Cassidy*.

The dissent also repeatedly states that the majority opinion holds that temporal considerations are "wholly or largely irrelevant" to the serious impairment threshold, and, accordingly, it spends a significant amount of energy explaining why temporal considerations are relevant and accusing the majority of holding that the threshold is met if the "plaintiff's general ability to lead his normal life has been affected for even a single moment in time . . . ." Contrary to the dissent's cries, there is simply no basis in our analysis for concluding that we hold that temporal considerations are irrelevant or that a momentary impairment is sufficient. This opinion merely notes that there is no specific *express* temporal requirement in the text of the statute and rejects *Kreiner*'s strained attempts to insert what was essentially a permanency requirement into the statute.[39] The dissent's mistaken characterizations of this opinion amount to nothing more than, like *Kreiner* itself, yet another attempt to distract courts and parties from the *actual* text of MCL 500.3135.

IV. CONCLUSION

We hold that *Kreiner* should be overruled because the *Kreiner* majority's interpretation of MCL 500.3135 departed from the statute's clear and unambiguous text.

[39] Indeed, the dissent is so blindly intent on concluding that the majority must be rejecting temporal considerations that it fails to consider that its triumphant discovery of the majority's hypocrisy in referencing time periods in our application of MCL 500.3135(2) is nothing more than a reflection of the fact that we are *not* holding that temporal considerations are irrelevant.

Applying the unambiguous statutory language, we hold that as a matter of law, in this case, plaintiff established that he suffered a serious impairment of body function. Thus, we reverse the Court of Appeals and remand the case to the trial court for proceedings consistent with this opinion.

KELLY, C.J., and WEAVER (except for part III[B][3]) and HATHAWAY, JJ., concurred with CAVANAGH, J.

WEAVER, J. (*concurring*). I concur in and sign all of the majority opinion except part III(B)(3), regarding stare decisis. I fully support the decision to overrule *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). As I wrote in *Jones v Olson*, 480 Mich 1169, 1173 (2008):

> By importing the concept of permanency of injury into MCL 500.3135—a concept that is nowhere referenced in the text of the statute—the majority of four (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN), in *Kreiner v Fischer*, 471 Mich 109 (2004), actively and judicially legislated a permanency and temporal requirement to recover noneconomic damages in automobile accident cases. The *Kreiner* interpretation of MCL 500.3135 is an unrestrained misuse and abuse of the power of interpretation masquerading as an exercise in following the Legislature's intent.

With regard to the policy of stare decisis, my view is that past precedent should generally be followed but that to serve the rule of law, in deciding whether wrongly decided precedent should be overruled, each case should be looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness. I agree with the sentiment recently expressed by Chief Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v Fed*

Election Comm, 558 US ___, ___; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010), when he said that

> *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 [123 S Ct 2472; 156 L Ed 2d 508] (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 [60 S Ct 444; 84 L Ed 604] (1940) . . . . If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967).

Chief Justice Roberts further called stare decisis a "principle of policy" and said that it "is not an end in itself." *Id*. at ___; 130 S Ct at 920; 175 L Ed 2d at 807. He explained that "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id*. at ___; 130 S Ct at 921; 175 L Ed 2d at 807.[1]

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[1] It appears that the dissent in this case does not agree with Chief Justice Roberts. The dissent lists 12 cases that have been overruled by this Court in the past 18 months. While the dissenting justices may feel aggrieved by this Court overruling those 12 cases, amongst those cases were some of the most egregious examples of judicial activism that did great harm to the people of Michigan. Those decisions were made by the "majority of four," including the dissenting justices, under the guise of ideologies such as "textualism" and "judicial traditionalism." One of the

I agree with Chief Justice Roberts that stare decisis is a policy and not an immutable doctrine. I chose not to sign Chief Justice KELLY's lead opinion in *Petersen v Magna Corp*, 484 Mich 300, 316-320; 773 NW2d 564 (2009), because it proposed to create a standardized test for stare decisis. Likewise, I do not sign the majority opinion's stare decisis section in this case because it applies *Petersen*. There is no need for this Court to adopt any standardized test regarding stare decisis. In fact, it is an impossible task. There are many factors to consider when deciding whether or not to overrule precedent, and the importance of such factors often changes on a case-by-case basis.[2]

In the end, the consideration of stare decisis and whether to overrule wrongly decided precedent always

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dissenting justices, Justice YOUNG, expressed his apparent contempt for the common law and common sense in his 2004 article in the Texas Review of Law and Politics, where Justice YOUNG stated:

> Consequently, I want to focus my remarks here on the embarrassment that the common law presents—or ought to present—to a conscientious judicial traditionalist. . . .
>
> To give a graphic illustration of my feelings on the subject, I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party. Grandpa's presence is undoubtedly a cause of mortification to the host. But since only the most ill-bred of guests would be coarse enough to comment on Grandpa's presence and condition, all concerned simply try ignore him. [Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 301-302 (2004).]

[2] Over the past decade, the principal tool used by this Court to decide when a precedent should be overruled is the set of guidelines that was laid out in *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), an opinion written by former Justice TAYLOR that Justices CORRIGAN, YOUNG, MARKMAN and I signed, and that I have used numerous times. By no means do I consider the *Robinson* guidelines a "be-all, end-all test" that constitutes precedent of this Court to be used whenever this Court considers overruling precedent. I view *Robinson* as merely providing guidelines to assist this Court in its legal analysis when pertinent.

includes service to the rule of law through an application and exercise of judicial restraint, common sense, and a sense of fairness—justice for all.

In serving the rule of law and applying judicial restraint, common sense, and a sense of fairness to the case at hand, I agree with and join the majority opinion's holding that *Kreiner* is overruled.

HATHAWAY, J. (*concurring*). I fully concur with Justice CAVANAGH's analysis and conclusion in this matter and I support overruling *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). I write separately to express my thoughts on the doctrine of stare decisis. Any analysis of the impact of stare decisis must focus on the individual case and the reason for overruling precedent.[1] The reasons for overruling *Kreiner* are paramount to any articulated test, and the special and compelling justifications to do so are overwhelming in this case. I agree with the well-articulated reasons expressed by Justice CAVANAGH, and I fully support overruling *Kreiner*.

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority's decision to overrule *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The no-fault automobile insurance act, in MCL 500.3135(1), provides that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." The issue here is whether plaintiff has suffered a serious impairment of body function. " '[S]erious im-

[1] For further discussion of my views regarding stare decisis, please see my concurring opinion in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 314; 791 NW2d 897 (2010).

pairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

In *Kreiner*, 471 Mich at 132-133, this Court held that in determining whether an impairment affects the plaintiff's general ability to lead his normal life, "a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." In addition, *Kreiner* indicated that certain factors, such as the duration of the impairment, may be of assistance in evaluating whether the plaintiff's general ability to lead his normal life has been affected. *Id.* at 133.

The majority overrules *Kreiner*, rejecting these factors and holding that temporal considerations are wholly or largely irrelevant in determining whether an impairment affects the plaintiff's general ability to lead his normal life. The majority instead holds that, as long as the plaintiff's general ability to lead his normal life has been affected, apparently for even a single moment in time, the plaintiff has suffered a "serious impairment of body function." This conclusion is at odds with the actual language of the no-fault automobile act and nullifies the legislative compromise embodied in that act. I continue to believe that *Kreiner* was correctly decided, and that temporal considerations are highly relevant—indeed necessary—in determining whether an impairment affects the plaintiff's general ability to lead his normal life. By nullifying the legislative compromise, which was grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance, the Court's decision today will resurrect a legal environment in which each of these hazards reappears and threatens the continued fiscal integrity of our no-fault system.

Because I do not believe that the lower courts erred in concluding that plaintiff in this case has not suffered a serious impairment of body function, I would affirm the judgment of the Court of Appeals.

I. FACTS AND HISTORY

Because the majority opinion provides only a cursory presentation of the facts, in a case requiring a fact-intensive analysis, I find it necessary to set forth a more thorough discussion of these facts. Beginning in August 2002, plaintiff was employed by Allied Systems, and over the years, he has held various positions with the company.[1] On January 17, 2005, approximately six months after beginning his position as a medium-duty truck loader, plaintiff was struck by a truck driven by plaintiff's co-worker and co-defendant, Larry Carrier, while shuttling vehicles at a General Motors plant. Plaintiff was knocked down, and the wheels of the truck ran over his left ankle, fracturing his medial malleolus. Plaintiff was immediately taken to the hospital and was released that same day. Two days later, he underwent surgery for the implantation of a device to stabilize his ankle fracture. Immediately following surgery, plaintiff was on crutches and in a boot for approximately four weeks and, during this time, he was restricted from bearing weight on his left leg. Additionally, plaintiff underwent physical therapy.[2]

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[1] Before plaintiff began working for Allied, he installed windows. When he first began working for Allied, he loaded trains, and after approximately six months, he took a "utility job," providing support to other departments as needed. In June 2004, he began working as a medium-duty truck loader.

[2] It is not altogether clear how long plaintiff's physical therapy actually lasted. In plaintiff's deposition, he indicated that he underwent "many months" of therapy. However, in his response to defendant's motion for summary disposition, plaintiff indicated that he had six weeks of therapy.

On October 21, 2005, plaintiff again underwent surgery on his ankle, this time to remove the implanted device. The surgeon reported that plaintiff's ankle had "healed nicely." On November 5, 2005, at the request of Allied, plaintiff was examined by Dr. Paul Drouillard, who stated that plaintiff could return to work with restrictions of no prolonged standing or walking for three weeks, after which time plaintiff could return to work with no restrictions. On November 17, 2005, plaintiff was examined by his surgeon, who observed that plaintiff's "wound is healed very nicely" and that plaintiff "needs to be in seated work for approximately six weeks."

On January 12, 2006, plaintiff's surgeon examined him and cleared him to return to work with no restrictions. At this examination, plaintiff reported to his surgeon that "[h]is medial malleolus is not giving him any pain." The surgeon observed that plaintiff had an "excellent range of motion with no specific tenderness." Upon returning to work for several days, however, plaintiff indicated that performing the physical tasks that his job required, such as walking, climbing, and crouching, caused his ankle to hurt. After plaintiff's request for a different assignment was denied, plaintiff went back on workers' compensation.

On March 16, 2006, Allied required plaintiff to undergo a functional capacity evaluation (FCE),[3] which showed that plaintiff could not fully perform all of his

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And, during plaintiff's oral argument opposing defendant's motion for summary disposition, plaintiff's counsel claimed that plaintiff underwent 18 weeks of therapy.

[3] An FCE is "an all-encompassing term to describe the physical assessment of an individual's ability to perform work-related activity." American Occupational Therapy Association <http://www.aota.org/Consumers/WhatisOT/WI/Facts/35117.aspx> (accessed July 1, 2010).

previous job duties.[4] During this evaluation, when asked what his goal was in returning to work, plaintiff responded, "I don't want to go back to work; there is talk about a buyout and I think I want to do that." Plaintiff also reported that his ankle pain was 3 on a scale of zero to 10, with 10 being the highest.

On May 31, 2006, Dr. Drouillard again examined plaintiff, at the request of Allied. Dr. Drouillard found no objective abnormality to correspond to plaintiff's complaints and opined that plaintiff was magnifying his symptoms. Dr. Drouillard also observed that, although plaintiff claimed that he had been wearing an ankle brace for the last two weeks, the tan lines on plaintiff's left and right feet were symmetrical, consistent with wearing flip-flops, with no break in his tan lines to indicate that he had been wearing the brace at all. Dr. Drouillard believed that plaintiff could return to work unrestricted and that plaintiff's ankle required no further treatment.

On June 12, 2006, plaintiff underwent an MRI test; the physiatrist who reviewed the MRI and performed a follow-up examination found that there was some evidence of ligamentous injury, but he did not establish a plan to decrease plaintiff's pain because there was little the physiatrist could do.[5] At this examination, plaintiff reported that his pain was 6 on a scale of zero to 10, that the pain was worse with "any movement," and that nothing alleviated that pain. On June 20, 2006, Dr. Drouillard reviewed the MRI results and found that

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[4] This was due in part to shoulder pain resulting from a preexisting and unrelated shoulder injury.

[5] A physiatrist is a medical doctor who practices physiatry, "a medical specialty for the treatment of disease and injury by physical agents, as exercise or heat therapy." *Random House Webster's College Dictionary* (1991).

plaintiff's ankle had healed well and that his opinion from May 31, 2006, had not changed.

Shortly thereafter, plaintiff's workers' compensation benefits were terminated.[6] At this point, *plaintiff* sought another FCE so that he could return to work. On August 1, 2006, the FCE indicated that plaintiff was able to perform essential job demands without restriction. At this FCE, plaintiff reported that he experienced "occasional aching" in his ankle, and that there were no "activities that aggravated his symptoms in the left ankle (including prolonged standing, prolonged walking)." Plaintiff reported that his pain level was 2 on a scale of zero to 10 and, during the two weeks immediately preceding the FCE, his highest pain level had been 3 and his lowest pain level had been 1. By the completion of the FCE, plaintiff reported his pain level as zero. On August 16, 2006, approximately 17 months after the accident, plaintiff returned to work and Allied assigned him to a new job with different physical requirements, and with no reduction in pay. Plaintiff volunteered to be assigned to this other job, and has been able to perform his new job duties since that time.

During his recuperation, plaintiff did not require any assistance with normal household tasks. Additionally, he was able to drive and his injuries have not affected his relationship with his wife in any way.[7] Outside of work, plaintiff was able to engage in most of the

[6] Plaintiff began receiving workers' compensation in January 2005. Plaintiff claims that he lost $66,000 in wages, the difference between his salary and his workers' compensation benefits for the time he was not working. However, the instant case only involves noneconomic damages. Lost wages are economic damages and are compensable as personal protection insurance benefits, MCL 500.3107(1)(b), and/or through a tort claim against the party at fault to recover excess economic losses, MCL 500.3135(3)(c).

[7] Plaintiff's wife has not brought a loss-of-consortium claim.

activities in which he had engaged before his injury, such as fishing.[8] Importantly, by plaintiff's own admission at his deposition in October 2006, his life was "normal" despite some "occasional aching."

On March 24, 2006, plaintiff filed a third-party action against Carrier (the driver of the truck) and General Motors Corporation (GM).[9] Carrier was later released by stipulation of the parties, and the trial court granted GM's motion for summary disposition, finding that plaintiff had undergone a relatively good recovery and could not meet the "serious impairment of body function" threshold.

The Court of Appeals affirmed, with one judge dissenting, concluding that the impairment did not affect plaintiff's general ability to lead his normal life. *McCormick v Carrier*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275888). The majority cited various facts to support its

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[8] Although the majority suggests that plaintiff returned to fishing at pre-injury levels by the spring and summer of 2006, the record indicates that plaintiff's fishing activities had never been interrupted. Plaintiff was asked if he "[s]till fish[ed] the same amount of time as [he] fished before the accident when [he] get[s] a chance," to which plaintiff replied, "When I get a chance." Furthermore, defendant argued in its motion for summary disposition that plaintiff's fishing activities were uninterrupted by the injury, and plaintiff did not dispute this. Plaintiff essentially conceded this fact and instead argued that the disruption in his life as a result of his injuries was centered on his inability to work. Plaintiff also was a weekend golfer. The record reflects that since plaintiff returned to work in August 2006, he had only golfed once, using a golf cart. We do not know whether plaintiff was able to golf during the time between his accident in January 2005 and August 2006. Defendant argued in its motion for summary disposition that plaintiff continued to engage in his pre-accident level of golfing activity, and again plaintiff did not argue to the contrary.

[9] With GM's bankruptcy, the parties stipulated to a change in case caption and a change of party, adding Allied Automotive Group, Inc., indemnitor of GM; plaintiff's employer, Allied Systems, is a subsidiary of Allied Automotive Group, Inc. This Court entered an order in accordance with this stipulation. 485 Mich 851 (2009).

conclusion, such as plaintiff's golfing, fishing, driving, caring for himself, and returning to work without restriction. The dissent would have reversed for two reasons: first, on the basis that plaintiff's entire life, including the possibility of future problems, must be considered; and, second, on the basis that there was evidence to indicate that plaintiff's life was not currently normal. The evidence that the dissent relied on to reach this conclusion was that plaintiff was assigned to a job with reduced physical requirements and the doctors had identified "some indication of degenerative joint disease in [plaintiff's] ankle." *Id.,* unpub op at 2 (DAVIS, J., dissenting).

On October 22, 2008, this Court denied plaintiff's application for leave to appeal, although Chief Justice KELLY and Justices CAVANAGH and WEAVER would have granted leave to appeal. 482 Mich 1018 (2008). However, after the composition of this Court changed when Justice HATHAWAY replaced former Chief Justice TAYLOR on January 1, 2009, this Court granted plaintiff's motion for reconsideration, even though such motion had not raised any new legal arguments. 485 Mich 851 (2009).

II. STANDARD OF REVIEW

This case presents issues of statutory interpretation, which this Court reviews de novo. *Dep't of Transp v Tompkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). We also review rulings on motions for summary disposition de novo. *Spiek v Dep't of Transp,* 456 Mich 331, 337; 572 NW2d 201 (1998).

III. ANALYSIS

A. HISTORY OF NO-FAULT INSURANCE ACT

In Michigan, before the enactment of the no-fault insurance act, the only available recourse to victims of

motor vehicle accidents seeking to recover damages was to file a common-law tort action. "[U]nder [this] tort liability system[,] the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). In response to these deficiencies, the Legislature enacted the no-fault automobile insurance act, MCL 500.3101 *et seq.*, effective March 30, 1973. The primary goal of the no-fault act is "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers,* 402 Mich at 579. In order to meet this objective, the Legislature decided to make no-fault insurance compulsory, i.e., "whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state." *Id.* In addition, "[i]n exchange for the payment of . . . no-fault economic loss benefits from one's own insurance company, the Legislature limited an injured person's ability to sue a negligent operator or owner of a motor vehicle for bodily injuries." *Kreiner*, 471 Mich at 115. That is, with the enactment of the no-fault act, "the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault." *Id.* at 114.[10] In

[10] The injured person's insurance company is responsible for all expenses incurred for medical care, recovery, and rehabilitation as long as the service, product, or accommodation is reasonably necessary and the charge is reasonable. MCL 500.3107(1)(a). There is no monetary limit on

exchange for economic loss benefits regardless of fault, "the Legislature significantly limited the injured person's ability to sue a third party for noneconomic damages, e.g., pain and suffering." *Id.* at 115. More specifically, no tort suit against a third party for noneconomic damages is permitted unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).[11]

The Legislature did not initially define the language that is in dispute in this case—"serious impairment of body function"—and this Court itself struggled in the process of giving reasonable meaning to this language. In *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 481; 208 NW2d 469 (1973), we held that whether the plaintiff has suffered a "serious impairment of body function" is "within the province of the trier of fact . . . ." However, in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), noting that an advisory opinion " 'is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits,' " *id.* at 495 (citation omitted), this Court held:

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such expenses, and this entitlement can last for the person's lifetime. An injured person is also entitled to recover from his own insurance company up to three years of earnings loss, i.e., loss of income from work that the person would have performed if he had not been injured. MCL 500.3107(1)(b). An injured person can also recover "replacement" expenses, i.e., expenses reasonably incurred in obtaining ordinary and necessary services that the injured person would otherwise have performed. MCL 500.3107(1)(c). Further, an at-fault driver is still liable in tort for an injured person's excess economic damages. MCL 500.3135(3)(c).

[11] In its entirety, MCL 500.3135(1) provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

> [W]hen there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement . . . has been met. [*Id.* at 502.]

In addition, *Cassidy* held that the phrase "serious impairment of body function" refers to "objectively manifested injuries" that impair "important body functions." *Id.* at 504-505. *Cassidy* also held that "the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life." *Id.* at 505. Finally, *Cassidy* held that although "an injury need not be permanent to be serious," "[p]ermanency is, nevertheless, relevant" because "[t]wo injuries identical except that one is permanent do differ in seriousness." *Id.* at 505-506.

However, only four years later, in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), this Court overruled *Cassidy*. *DiFranco* held that "[i]f reasonable minds can differ as to whether the plaintiff suffered a serious impairment of body function, the issue must be submitted to the jury, even if the evidentiary facts are undisputed." *Id.* at 58. In addition, *DiFranco* held that the "impairment need not be of . . . an important body function," and it is unnecessary to look to the effect of the injury on the person's " 'general ability to live a normal life.' " *Id.* at 39. *DiFranco* also held that, although the plaintiff must prove a "medically identifiable injury," this can be done on the basis of "the plaintiff's subjective complaints or the symptoms of an injury." *Id.* at 75. Finally, *DiFranco* held that the following factors should be considered when determining whether the impairment was serious:

> The extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. [*Id.* at 69-70.]

In 1995, the Legislature amended the no-fault act. In particular, it amended MCL 500.3135(2)(a), which provides:

> The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> *(i)* There is no factual dispute concerning the nature and extent of the person's injuries.
>
> *(ii)* There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

In addition, the Legislature defined "serious impairment of body function" to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). In other words, the Legislature essentially rejected *DiFranco* and, with one exception, codified *Cassidy*.[12]

B. *KREINER v FISCHER*

In *Kreiner*, this Court for the first time interpreted the Legislature's definition of "serious impairment of

[12] That one exception is that while *Cassidy*, 415 Mich at 505, required an evaluation of "the effect of an injury on the person's general ability to live *a* normal life," MCL 500.3135(7) requires an evaluation of the effect of an injury on "the person's general ability to lead *his or her* normal life." (Emphasis added.) That is, while the *Cassidy* test was exclusively objective, the MCL 500.3135(7) test is at least partially subjective.

body function." Because "generally" means " 'for the most part,' " *Kreiner* held that "determining whether a plaintiff is 'generally able' to lead his normal life requires considering whether the plaintiff is, 'for the most part' able to lead his normal life." *Kreiner*, 471 Mich at 130, quoting *Random House Webster's College Dictionary* (1991). In addition, because "lead" means " 'to conduct or bring in a particular course,' " *Kreiner* held that "the effect of the impairment on the course of a plaintiff's entire normal life must be considered." *Id.* at 130-131, quoting *Random House Webster's Unabridged Dictionary* (2001). Therefore, *Kreiner* concluded,

> [a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold." [*Id.* at 131.]

Kreiner established a "multi-step process . . . for separating out those plaintiffs who meet the statutory threshold from those who do not." *Id.* First, the court must determine whether there is a factual dispute that is material to the determination whether the person has suffered a serious impairment of body function.[13] Second, the court must determine whether an important body function has been impaired. Third, the court must determine whether the impairment is objectively manifested.[14] Finally, the court must determine whether the

[13] If there is such a dispute, the court cannot decide the issue as a matter of law; however, if there is no such dispute, the court can so decide.

[14] "Subjective complaints that are not medically documented are insufficient." *Kreiner*, 471 Mich at 132.

impairment affects the plaintiff's general ability to lead his or her normal life. "In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id.* at 132-133. *Kreiner* indicated that the following factors may be of assistance in evaluating whether the plaintiff's general ability to conduct the course of his normal life has been affected:

> (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment,[15] (d) the extent of any residual impairment,[16] and (e) the prognosis for eventual recovery. [*Id.* at 133.]

Although the dissent in *Kreiner* essentially agreed with the majority's analysis of the language "an objectively manifested impairment of an important body function," it disagreed with the majority's analysis of the language "that affects the person's general ability to lead his or her normal life." Most significantly in this regard, the dissent rejected the factors set forth by the majority on the basis that "time or temporal considerations" are inappropriate considerations. *Id.* at 147 (CAVANAGH, J., dissenting).

C. MAJORITY'S NEW TEST

It is appropriate that Justice CAVANAGH, the authoring justice of the majority opinion in *DiFranco*, which

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[15] "While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life." *Id.* at 135.

[16] "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Id.* at 133 n 17.

was rejected by the Legislature, and also the authoring justice of the dissent in *Kreiner*, which was rejected by this Court, is now the authoring justice of the majority opinion, in which *Kreiner* is overruled. While to some there may be a sense of justice, or at least a sense of irony, in this sequence of events, to others, including those of us in dissent in this case, such sequence embodies all that is wrong when a judiciary confuses its own preferences with those of the people's representatives in the Legislature. While it is intriguing that Justice CAVANAGH now is able to transform his dissent in *Kreiner* into a majority opinion, and thereby resuscitate his earlier opinion in *DiFranco*, this has been achieved only after the people of this state, through their Legislature, have made clear that *DiFranco* did *not* reflect what ought to be the policy of this state. Therefore, just as he did in his dissent in *Kreiner*, Justice CAVANAGH, now with majority support, rejects *Kreiner*'s analysis of the language "that affects the person's general ability to lead his or her normal life." The worm has turned, and never mind what the people and their Legislature have sought to accomplish in establishing as the law.

Before proceeding too far into where our substantive disagreements lie, I would be remiss not to point out where we are in agreement. First, the majority, just as did the *Kreiner* dissent, largely agrees with *Kreiner*'s analysis of MCL 500.3135(2)(a), i.e., if there is no material factual dispute, whether a person has suffered a serious impairment of body function should be determined by the court as a matter of law.[17] The majority

[17] However, the majority indicates that this statute "could unconstitutionally conflict with MCR 2.116(C)(10) . . . ." Because I see no conflict between the statute and the court rule, i.e., each allows the court to determine as a matter of law whether a person has suffered a serious impairment of body function *only* if there are no material factual disputes, I do not believe the statute is in any way unconstitutional.

also largely agrees with *Kreiner*'s analysis of the language "an objectively manifested impairment of an important body function."[18] In addition, the majority

Moreover, the case cited by the majority in support of its suggestion that jury trials "promote judicial efficiency" actually stands for the exact opposite proposition. See *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993) ("Both our court rules and case law recognize the desirability of allowing summary disposition, regardless of a jury request, when uncontroverted facts are presented to the court. This promotes efficiency and preservation of judicial resources."). It is interesting that, although the majority acknowledges that the constitutionality of MCL 500.3135(2)(a) is not at issue here, it repeatedly implies that MCL 500.3135(2)(a) "could" be unconstitutional, thus, making it obvious that MCL 500.3135(2)(a) will also likely fall within the majority's effort to expunge the jurisprudence of the past decade.

I also disagree with the majority that "the disputed fact does not need to be outcome determinative in order to be material . . . ." MCL 500.3135(2)(a)(*ii*) states that "whether an injured person has suffered serious impairment of body function . . . [is a] question[] of law for the court if the court finds . . . [that the] factual dispute . . . is not material to the determination as to whether the person has suffered a serious impairment of body function . . . ." That is, "[a]bsent an *outcome-determinative* genuine factual dispute, the issue of threshold injury is now a question of law for the court." *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000) (emphasis added). Although the majority cites Black's Law Dictionary (8th ed) in support of its proposition that "the disputed fact does not need to be outcome determinative in order to be material," Black's Law Dictionary (6th ed) states the very opposite—"[m]aterial fact is one upon which outcome of litigation depends." See also Black's Law Dictionary (8th ed), which defines "material" as "[h]aving some logical connection with the consequential facts," and *Random House Webster's College Dictionary* (1991), which defines "material" as "likely to influence the determination of a case[.]"

[18] The majority does take issue with *Kreiner*'s conclusion that "[s]ubjective complaints that are not medically documented are insufficient" to establish that an impairment is "objectively manifested." *Kreiner*, 471 Mich at 132. However, given that the majority agrees that "plaintiffs must 'introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering,' " quoting *DiFranco*, 427 Mich at 74, and I am uncertain what evidence *other* than medical documentation would establish such a "physical basis," it is not clear why

agrees with *Kreiner*'s conclusion that the serious impairment of body function threshold entails a subjective analysis, i.e., "[w]hether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a 'serious impairment of body function' may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while." *Kreiner,* 471 Mich at 134 n 19. The majority also agrees with *Kreiner*'s conclusion that determining whether a plaintiff's general ability to lead his or her normal life has been affected "necessarily requires a comparison of the plaintiff's life before and after the incident."[19] Finally, the majority agrees with *Kreiner*'s conclusion that permanency is not required.[20]

1. *DiFRANCO* VERSUS *CASSIDY*

However, this is where our agreements end. First, the majority takes issue with *Kreiner*'s statement that "the Legislature largely rejected *DiFranco* in favor of *Cassidy*." *Kreiner,* 471 Mich at 121 n 8. As explained earlier, the Legislature adopted *Cassidy* with a single exception. That single exception pertains to the fact that *Cassidy*, 415 Mich at 505, required an evaluation of "the effect of an injury on

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the majority objects to *Kreiner*'s statement that medical documentation is required. See also *DiFranco*, 427 Mich at 75 ("The 'serious impairment of body function' threshold requires the plaintiff to prove that his noneconomic losses arose out of a *medically identifiable* injury which seriously impaired a body function.") (emphasis added).

[19] The majority also indicates that "many other considerations could typically be relevant to determining how an impairment affects a person's ability to live in his or her pre-incident normal manner of living." The majority does not offer any further explanation as to what these "many other considerations" might conceivably be.

[20] Although *Kreiner*, 471 Mich at 135, specifically held that "an injury need not be permanent," the majority nonetheless criticizes it for "effectively creat[ing] a permanency requirement."

the person's general ability to live *a* normal life," while MCL 500.3135(7) requires an evaluation of the effect of an injury on "the person's general ability to lead *his or her* normal life." (Emphasis added.) That is, while the *Cassidy* test was entirely objective, the MCL 500.3135(7) test is at least partially subjective. As this Court explained in *Kreiner*, 471 Mich at 121 n 7:

> [T]he Legislature modified the entirely objective *Cassidy* standard to a partially objective and partially subjective inquiry. Thus, what is "normal" is to be determined subjectively on the basis of the plaintiff's own life and not the life of some objective third party. However, once that is fixed as the base, it is to be objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life.

Nevertheless, given that: (a) *Cassidy*, 415 Mich at 505, held that courts *should* "look[] to the effect of an injury on the person's general ability to live a normal life"; (b) *DiFranco*, 427 Mich at 39, held that courts *should not* look to the effect of the injury on the person's " 'general ability to live a normal life' "; and (c) the Legislature subsequently and affirmatively directed the courts to look to the effect of an injury on "the person's general ability to lead his or her normal life," MCL 500.3135(7), the Legislature obviously preferred the policy of *Cassidy* to that of *DiFranco*. In addition, in contrast to *DiFranco*, and consistent with *Cassidy*, the Legislature expressly adopted an "important body function" requirement, MCL 500.3135(7), and amended MCL 500.3135 to make clear that whether a serious impairment of body function has occurred is a question of law unless there is a material factual dispute. MCL 500.3135(2)(a). Thus, contrary to the majority's understandably defensive posture, it is hardly an "oversim-

plification" to conclude that the Legislature essentially rejected *DiFranco* in favor of *Cassidy*.[21]

Moreover, the Legislature's action of amending MCL 500.3135 following *DiFranco* is an example of legislative history that has genuine utility in the interpretative process. This Court has emphasized that "not all legislative history is of equal value," and has specifically noted that "[c]learly of the highest quality is legislative history that relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent . . . ." *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). The instant case presents an ideal "[e]xample[] of legitimate legislative history," i.e., the recitation of "actions of the Legislature intended to repudiate the judicial construction of a statute . . . ." *Id*. And yet, not altogether inexplicably, the majority entirely disregards these legislative actions.

Defendant and the Attorney General as amicus curiae have presented the Court with legislative analyses, committee reports, and other materials to support their argument that, in enacting the amendments, the Legislature intended to repudiate *DiFranco* and restore *Cassidy*, just as *Kreiner* held. Even the most cursory review of these documents demonstrates that defendant and the Attorney General's reading has merit. For example, the original draft of House Bill 4341 was accompanied by a memorandum from its sponsor that stated that the bill's *first* goal was to "[r]eestablish the two-part *Cassidy* standard of: (1) definition of 'serious impairment of body function,' and (2) make the determination of whether an injury is a serious impairment

[21] Contrary to the majority's contention, this dissent very clearly provides in the above language "specific, substantive arguments" in support of this conclusion.

of body function a question of law (judge) rather than of fact (jury)." Memorandum of Representative Harold J. Voorhees, enclosing the original draft of HB 4341 as introduced, February 8, 1995, available in defendant's appendix on appeal, p 8b. Similarly, the House legislative analysis expressly set forth the chronology of *Cassidy* and *DiFranco*, noting that *DiFranco* had "rejected" *Cassidy* and that the bill "would return to a tort threshold resembling that provided by the *Cassidy* ruling . . . ." House Legislative Analysis, HB 4341, December 18, 1995. The analysis provided to the Senate Financial Services Committee likewise explained *in the first sentence of the bill's description* that it "would put into law the *Cassidy* standards for meeting the serious impairment of body function threshold." Department of Commerce Bill Analysis of HB 4341, February 14, 1995. And finally, it is apparent from the statements of protest of the bill's opponents that they also clearly understood House Bill 4341 to be a "return to the Cassidy standard . . . ." Statement of Senator Henry E. Stallings II, 1995 Journal of the Senate 1784 (October 12, 1995); see also statement of Senator John D. Cherry, Jr., *id*. at 1785.

While on several occasions I have explained why I do not find all forms of legislative history to be useful tools in the interpretative process, see, e.g., *Petersen v Magna Corp*, 484 Mich 300, 381-382; 773 NW2d 564 (2009) (MARKMAN, J., dissenting), the author of the majority opinion has never questioned their utility.[22] Thus, there

[22] The authoring justice states, "I have repeatedly stated that legislative history should only be used to interpret a statute when statutory language is ambiguous." Although, in some cases, he has asserted this, see, for example, *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008) (CAVANAGH, J., dissenting); *Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007) (CAVANAGH, J., concurring); *People v Derror,* 475 Mich 316; 715 NW2d 822 (2006) (CAVANAGH, J., dissenting); *Lansing Mayor v Pub Serv*

is no apparent reason why the majority "turn[s] a blind eye to the wealth of extrinsic information available" on the history of the 1995 amendments. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 95 n 34; 748 NW2d 524 (2008) (KELLY, J., dissenting). Rather, the only, quite obvious explanation for the majority's selective silence is that it can find *nothing* in this "wealth of extrinsic information available" to support its interpretation. One of the most common and compelling critiques of the use of legislative history is that a judge can almost always find *something* in the legislative history to support the interpretation he personally wishes to give to a law. To borrow an analogy invoked by United States Supreme Court Justice Antonin Scalia, using legislative history is like entering a room, looking over the assembled multitudes in the crowd, and picking out

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Comm, 470 Mich 154; 680 NW2d 840 (2004) (CAVANAGH, J., dissenting), in other cases, he has suggested that legislative history can be considered even though the statute is not ambiguous, see, for example, *Jackson v Green Estate*, 484 Mich 209, 230; 771 NW2d 675 (2009) (CAVANAGH, J., dissenting) ("Not only is this interpretation consistent with the *plain* language of the statute, it is also consistent with the *legislative history* of the statute.") (emphasis added); *Koester v City of Novi*, 458 Mich 1; 580 NW2d 835 (1998); *Elias Bros Restaurants v Treasury Dep't*, 452 Mich 144; 549 NW2d 837 (1996) (CAVANAGH, J., concurring); *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996); *People v Sloan*, 450 Mich 160; 538 NW2d 380 (1995); *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995); *Gardner v Van Buren Pub Sch*, 445 Mich 23; 517 NW2d 1 (1994); *Grand Trunk W R Co v Fenton*, 439 Mich 240; 482 NW2d 706 (1992); *Romein v Gen Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990). Further, given the definition of "ambiguous" supported by the authoring justice, see *Petersen*, 484 Mich at 329 (KELLY, C.J., lead opinion) (quoting *Yellow Freight Sys, Inc v Michigan*, 464 Mich 21, 38; 627 NW2d 236 [2001], for the proposition that " '[w]hen a statute is capable of being understood by reasonably well-informed persons in two or more different senses, [a] statute is ambiguous' "), and the different understandings given to the statute here by the majority and dissenting justices, I fail to see how, *by his own standards*, the authoring justice can conclude that the statute is unambiguous, unless, of course, he does not believe that the dissenting justices are "reasonably well-informed persons."

your friends. See Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), p 36. In its near silence, the majority places a new twist on this analogy, and illustrates another fundamental problem with the use of legislative history. Here, the majority enters a room and, finding *no* friends in sight, makes a quick exit. Considering the quality and quantity of the legislative history available here, the majority's "quick exit" and its selective silence on the subject speaks volumes. It should not go unremarked that it is this dissent that cites legislative history—albeit a uniquely persuasive and bona fide form of legislative history—as a relevant factor in interpreting MCL 500.3135, while the justices of the majority, the supposed advocates of this mode of interpretation, exclude this from their consideration. Apparently, legislative history is to be considered when it supports a justice's preferred interpretation, and ignored when it does not.

Indeed, the problem with this approach of *sometimes* relying on legislative history and sometimes not is, as I explained in my dissent in *Petersen*, 484 Mich at 381-382, that

> it is a process in which judges in the very guise of selecting the tools and factors to be employed in "interpreting" the law are effectively its formulators—in short, judges who are wielding the legislative, not the judicial, power.
>
> A critical strength of a judicial philosophy committed to exercising only the constitution's "judicial power" is that reasonably clear rules of decision-making are established *before the fact*. That is, a judge essentially promises the parties that he or she will decide their case, as with all others, by attempting to discern the reasonable meaning of relevant statutes or contracts and that this will be done by relying upon recognized rules, and tools, of interpretation. By contrast, under the [majority's] approach . . . , in which there is essentially a limitless array of rules, and tools, that may be employed for "defining" the law apart from its

> language, there is no consistently applied interpretative process with which the judge promises beforehand to comply. He or she may promise to be "fair," and he or she may seek to be fair, but there are no rules for how this fairness is to be achieved. There is only the promise that the judge will address each dispute on a case-by-case basis, using whatever rules, and whichever tools, he or she believes are required in that instance. And the suspicion simply cannot be avoided that these varying and indeterminate rules, and tools, may be largely a function of the outcome preferred by the judge and by his or her personal attitudes toward the parties and their causes. Any interpretative rules will be identified only *after the fact*, and these "rules" may or may not have been invoked in resolving yesterday's dispute, and may or may not be employed in resolving tomorrow's dispute. Any judge can concoct an *after-the-fact* rationale for a decision; the *judicial* process, however, is predicated upon *before-the-fact* rationales. An *ad hoc* process is not a judicial process at all. In the place of predetermined rules—otherwise understood as the rule of law—the [majority] would substitute rules to be determined later. [Emphasis in the original.]

2. "TRAJECTORY" AND "ENTIRE"

Next, the majority peremptorily rejects *Kreiner*'s use of the words "trajectory" and "entire." Again, the pertinent statutory language being defined here is, "that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). "Lead" is defined as "to conduct or bring . . . in a particular course," and, as the majority acknowledges, " 'trajectory' is a synonym for 'course' . . . " See *Random House Webster's College Dictionary* (1991). In addition, contrary to the majority's contention, *Kreiner*'s use of the word "entire" was not "created out of thin air . . . ." Instead, the use of the word "entire" derived from the Legislature's use of the word "general" because "in general" means "with respect to the *entirety*." *Random House Webster's College*

Dictionary (1991) (emphasis added). More accurately, it is the meaning that the majority gives to "general" that is "created out of thin air." The majority concludes that the word "general" means "some," even though the definition that the majority itself relies upon does not even include "some," but instead indicates that "general" means "whole," "every," "majority," "prevalent," "usually," "in most instances," "not limited," and "main features." Nowhere among these possible meanings can a reader sight the word "some."[23]

3. TEMPORAL CONSIDERATIONS

Finally, the majority rejects the non-exhaustive list of factors that *Kreiner* set forth for consideration in evaluating whether the plaintiff's general ability to lead his normal life has been affected. The majority asserts that *Kreiner* "departed . . . from the statutory text, by providing an extra-textual 'nonexhaustive list of objective factors' to be used to compare the plaintiff's pre- and post-incident lifestyle." This critique is quite surprising given that it is not uncommon for courts in general, and for this Court in particular, to provide "extra-textual" factors to be considered in interpreting a statute that

[23] I find it interesting that the justice authoring the majority opinion once chastised me for "leav[ing] no dictionary unturned," with regards to an opinion in which I cited *two* different dictionaries, *People v Raby*, 456 Mich 487, 501; 572 NW2d 644 (1998) (CAVANAGH, J., dissenting), and, here, he cites *seven* different dictionaries and still cannot quite find a definition that serves his purpose. While considering relevant dictionary definitions can be a valuable tool of interpretation, the majority's generous use of dictionaries here is noteworthy because the majority has questioned the propriety and usefulness of this tool in the past. *Jones v Olson*, 480 Mich 1169, 1176 (2008) ("In the legal context, using a dictionary to unwaveringly determine the legislative intent behind a statute is nothing more than barely hidden judicial activism.") (WEAVER, J., dissenting, joined by then-Justice KELLY and Justice CAVANAGH).

demands a fact-specific analysis.[24] To the best of my knowledge, members of this majority have never before complained about this practice, but consistency in the application and non-application of interpretative factors is hardly a preoccupation of this majority.[25]

Indeed, in *DiFranco* itself, Justice CAVANAGH provided numerous "extra-textual" factors to be considered in determining whether a plaintiff has established a serious impairment of body function. *DiFranco*, 427 Mich at 69-70, states:

> In determining whether the impairment of body function was serious, the jury should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors.

Indeed, these "extra-textual" factors are remarkably similar to the *Kreiner* factors: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Kreiner*, 471 Mich at

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[24] I use the phrase "extra-textual" factors only because this is the phrase the majority uses. However, in truth, I do not believe that the factors articulated in *Kreiner* are at all "extra-textual," because these have been derived directly from the text of the statute itself.

[25] Indeed, as I explained in my dissent in *Petersen*, 484 Mich at 380, the majority's "interpretative" process seems to consist of "picking and choosing at [its] discretion from among some uncertain array of tools lying 'beyond the plain language of the statute [or contract].' " (Citation omitted.) The problem with this approach is that "[t]he litigants will, of course, have no notice beforehand of which tools are to be employed, for the justices themselves will not know this beforehand." *Id*. The rule gleaned from the instant case is apparently that it is appropriate to employ "extra-textual" factors, but only where the majority wishes to do so. The parties will be made aware of the majority's inclinations, but only after a decision has been issued.

133. It not clear why the authoring justice thought it acceptable to list "extra-textual" factors in *DiFranco*, but unacceptable to cite virtually the same factors in *Kreiner*. In addition, in *Wexford Med Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), he listed "extra-textual" factors a court should consider in determining whether an entity is a "charitable institution" and thus exempt from ad valorem property taxes. Also, in *Chmielewski v Xermac, Inc*, 457 Mich 593, 633; 580 NW2d 817 (1998), the Court considered the Handicapper's Civil Rights Act requirement that to be handicapped one must be "substantially limited in a major life activity." MCL 37.1103(e)(*i*)(A). Then-Justice KELLY, joined by Justice CAVANAGH, stated in dissent:

> I would hold that the following factors should be considered to determine whether an individual is substantially limited in a major life activity: (1) the nature of the impairment, (2) its severity, (3) its duration or expected duration, and (4) its long-term effect. [*Chmielewski*, 457 Mich at 633.]

See, also, *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), listing several "extra-textual" factors a court should consider in awarding "reasonable" attorney fees under MCL 500.3148(1);[26] *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496-497; 274 NW2d 373 (1979), adopting a four-factor test to determine whether for purposes of the no-fault act a person is "domiciled in the same household" as a relative pursuant to MCL 500.3114; *Stewart v Michigan*, 471 Mich 692, 698-699; 692 NW2d 376 (2004), stating that "extra-textual" "factors such as the manner, location, and fashion in which a vehicle is parked"

[26] In his dissent in *Smith v Khouri*, 481 Mich 519, 544; 751 NW2d 472 (2008), Justice CAVANAGH affirmed his satisfaction with the *Wood* "factors," even though these factors are obviously "extra-textual."

are material to determining whether the parked vehicle poses an unreasonable risk under MCL 500.3106(1); and *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005), utilizing an "extra-textual" multifactor economic-reality test to determine who is an employer for purposes of the Worker's Disability Compensation Act.

As should be readily apparent, the majority's claim that *Kreiner* erred by including "extra-textual" factors to consider in interpreting a statute is a wholly manufactured concern. The statute *requires* a fact-specific analysis. As Justice CAVANAGH's *DiFranco* opinion and numerous other decisions of this Court have recognized, such factors assist courts in applying the statutory language on a case-by-case basis. To date, none of the members of the majority have objected to the inclusion of such factors in any other of this Court's decisions.

Nevertheless, the majority rejects *Kreiner*'s "extra-textual" factors on the basis that they all "include a temporal component," reiterating the argument made by the *Kreiner* dissent that "the statute does not create an express temporal requirement as to how long an impairment must last . . . ." *Ante* at 203, 208; see also *Kreiner*, 471 Mich at 147 (CAVANAGH, J., dissenting) ("[T]he serious impairment of body function threshold does not suggest any sort of temporal limitation. . . . Therefore, the duration of the impairment is not an appropriate inquiry."). Indeed, the majority now holds that it is unnecessary to consider whether the impairment even "*continues* to affect [plaintiff's] general ability to lead his pre-incident 'normal life' . . . ." (Emphasis added.)

The majority, not surprisingly, claims that this dissent mischaracterizes its holding when we conclude that temporal considerations are wholly or largely irrel-

evant in the majority's holding. Not only, as explained above, is my characterization of their holding supported by the actual language of the majority opinion, but it is also dictated by simple *logic*. That is, given that the majority rejects *Kreiner*'s factors because they all "include a temporal component," given that it feels passionately enough about this to write a lengthy opinion overruling *Kreiner*, and given that we can discern no other significant departure from *Kreiner* in the majority's new test than that of the temporal component,[27] it is difficult to escape the conclusion we reach here, that the majority believes that temporal considerations are wholly or largely irrelevant.

I am reminded of a famous Sherlock Holmes line:

> "How often have I said to you that when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth?" [A. Conan Doyle, *The Sign of the Four*, from *The Complete Sherlock Holmes* (New York: Doubleday, 1890), ch 6, p 111.]

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[27] As explained above, there are other discrepancies between *Kreiner* and the majority's opinion, i.e., the *DiFranco*/*Cassidy* and the "trajectory/entire" discrepancies. However, these two discrepancies are intertwined with our disagreement about whether temporal considerations should be considered. By returning our law to *DiFranco*, at which time the plaintiff's "general ability to lead his or her normal life" was not at issue, it is much easier for the majority to claim that temporal considerations are wholly or largely irrelevant. In addition, because the majority believes that it is inappropriate to consider either the "trajectory" or the "entire" person's life, it believes that temporal considerations, such as the duration of the impairment, are wholly or largely irrelevant. However, because we conclude that the statute clearly precludes a return to *DiFranco*, since the Legislature has very clearly indicated that the plaintiff's "general ability to lead his or her normal life" is at issue, we believe that temporal considerations are relevant. Similarly, because we believe that the "trajectory" or the "entire" person's life should be considered, we believe that temporal considerations, such as the duration of the impairment, are, in fact, highly relevant.

That is, given that the majority essentially agrees with everything in *Kreiner* but its temporal considerations,[28] *Kreiner*'s temporal considerations are all that remain as to our disagreement. Therefore, that the majority disagrees with *Kreiner*'s temporal considerations, such as the duration of the impairment, "must be the truth." In other words, when comparing the *Kreiner* test and the majority's new test—whatever that is intended to be—the only apparent substantive difference is that, while *Kreiner* expressly includes temporal considerations, the majority's test does not. Given that the majority essentially agrees with everything in *Kreiner* but its temporal considerations, and given that the only reason it gives for rejecting these considerations is that they all "include a temporal component," how can we deduce anything *other* than that the majority holds that temporal considerations, such as the duration of the impairment, are irrelevant? Furthermore, if temporal considerations are not irrelevant, why does the majority not explain *in what way* these *are* relevant, or how, in fact, the majority views the relevancy of temporal considerations, and how these views differ from those expressed in *Kreiner*? This glaring void in explanation of its own test in the majority opinion can only be explained by the fact that the majority is holding that temporal considerations are wholly or largely irrelevant.

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[28] The majority essentially agrees with: (1) *Kreiner*'s analysis of MCL 500.3135(2)(a), i.e., if there is no material factual dispute, whether a person has suffered a serious impairment of body function should be determined by the court as a matter of law; (2) *Kreiner*'s analysis of the language "an objectively manifested impairment of an important body function"; (3) *Kreiner*'s conclusion that the serious impairment of body function threshold entails a subjective analysis; (4) *Kreiner*'s conclusion that determining whether a plaintiff's general ability to lead his or her normal life has been affected "necessarily requires a comparison of the plaintiff's life before and after the incident"; and (5) *Kreiner*'s conclusion that permanency is not required.

In sum, if temporal considerations are relevant: (1) why *is* the majority overruling *Kreiner*; (2) why does the majority reject *Kreiner*'s factors, such as the duration of the impairment; (3) why does the majority not include temporal considerations within its new test; (4) why does the majority fail to explain the relevancy of temporal considerations; (5) why does the majority conclude that it is unnecessary to consider whether the impairment "*continues* to affect [plaintiff's] general ability to lead his pre-incident 'normal life' "; and (6) perhaps most tellingly, why does not the majority clarify its position, whatever it may be, in light of this dissent? Simply saying that our conclusion is "erroneous" does not make it so, and, even more to the point, will hardly assist the bench and bar of this state in determining whether, and how, temporal considerations somehow remain relevant after today's decision.

For these reasons, we are unable to avoid the conclusion that the majority is, indeed, holding that temporal considerations are wholly or largely irrelevant, even though this "improbable" result constitutes a departure from *Cassidy*, *DiFranco*, and *Kreiner*, and makes utterly no sense. How can it possibly be determined whether an impairment "affects the person's general ability to lead his or her normal life" without taking into account temporal considerations? As *Kreiner*, 471 Mich at 133 n 18, inquired:

> Does the dissent [now the majority] really believe that an impairment lasting only a few moments has the same effect on a person's "general ability to lead his or her normal life" as an impairment lasting several years or that an impairment requiring annual treatment has the same effect on a person's "general ability to lead his or her normal life" as an impairment requiring daily treatment?

Does the majority really believe that the Legislature intended for the serious impairment threshold to be met in every instance where an objectively manifested impairment of an important body function affected a person's ability to lead his normal life for a mere moment in time? What if a person gets hit in the head and passes out for five minutes, but after those five minutes is completely unaffected by the impairment? If all temporal considerations are irrelevant, would not this person satisfy the majority's threshold, because his general ability to lead his normal life was certainly affected for those five minutes of unconsciousness? Under the majority's rule, it is apparently irrelevant that the person arose after those five minutes and led a completely normal life thereafter. The majority asserts that all that matters is that for that moment in time, the person's general ability to lead his normal life had been affected. I am not sure that the majority's new threshold can even be called a "threshold" when it can be satisfied in virtually every automobile accident case that results in injury.[29] As long as the plaintiff has suffered an objectively manifested impairment of an important body function, that plaintiff will have satisfied the majority's threshold, because the majority has essentially read the third criterion, i.e., "that affects the person's general ability to lead his or her normal life," out of the statute.

The clearest illustration of the difficulty in determining whether an impairment "affects the person's general ability to lead his or her normal life" without taking into account temporal considerations is the

[29] It certainly is a "threshold" bearing no resemblance to the other two thresholds—"permanent serious disfigurement" and "death." See MCL 500.3135(1).

majority's *own* inability to do so.[30] In determining whether the plaintiff in the *instant* case suffered an impairment that affects his general ability to lead his normal life, the majority itself repeatedly cites temporal considerations. For example, the majority indicates that "for *a month* after the incident, plaintiff could not bear weight on his left ankle"; "[h]e underwent two surgeries over a period of *10 months* and *multiple months* of physical therapy"; "after the incident he was unable to perform functions necessary for his job for at least *14 months*"; and "he did not return to work for *19 months*." (Emphasis added.) Are such temporal considerations irrelevant or relevant? Do we interpret the words or the actions of the majority? And, if temporal considerations are irrelevant, how are we to determine whether an impairment affects a plaintiff's "general ability to lead his or her normal life"? The majority does not appear to know the answers, and it appears not to care that it does not know.

Indeed, under the majority's new threshold, it would seem that the moment the plaintiff in this case went to

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[30] The majority criticizes *Kreiner* as "def[ying] practical workability" on the basis that "*Kreiner* has led to inconsistent interpretation of the statutory language, with similarly situated plaintiffs being treated differently by different courts." However, in his opinion in *DiFranco*, 427 Mich at 56-57, Justice CAVANAGH has already provided an explanation for why this might be the case:

> Conflicting results have also arisen among cases involving similarly injured plaintiffs. This is undoubtedly because no two plaintiffs are injured or recover in precisely the same manner. These conflicting results indicate that threshold issues are often questions upon which reasonable minds can differ.

Moreover, *if* the Court of Appeals is inconsistently or incorrectly applying *Kreiner*, this Court has a mechanism to rectify such errors—reversing such decisions, not overruling precedent and substituting an incomprehensible new standard bearing no relationship to the law being interpreted.

the emergency room and it was determined that he had broken his ankle, the threshold was met. For at that moment, plaintiff could not work. While at the emergency room, and for some measurable time afterwards, plaintiff's broken ankle affected not just some, but all of his capacity to live his normal life. Under the majority's non-temporal test, there is apparently no need to consider anything beyond the emergency room visit. If this reading of its decision is wrong, once again, the majority might wish to explain why this is so for the benefit of the bench, the bar, and the public.

In crafting its new threshold, the majority would also have been wise to consider the larger no-fault statute. Recall that the Legislature has decided that an injured plaintiff should only be allowed to sue to recover noneconomic damages resulting from an automobile accident where he or she has suffered: (a) death; (b) permanent serious disfigurement; or (c) serious impairment of body function. MCL 500.3135. It is well established that " '[w]hen construing a series of terms . . . we are guided by the principle that words grouped in a list should be given related meaning.' " *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 114; 754 NW2d 259 (2008) (citation omitted). "In other words, this Court applies the doctrine of *noscitur a sociis*, which 'stands for the principle that a word or phrase is given meaning by its context of setting.' " *Id.* (citation omitted). Therefore, as this Court explained in *Cassidy*, 415 Mich at 503:

> In determining the seriousness of the injury required for a "serious impairment of body function", this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135 . . . . The Legislature clearly did not intend to

> erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.[31]

In addition, the Legislature defined "serious impairment of body function" to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Obviously, in enacting this threshold language, and in joining it with "death" and "serious permanent disfigurement," the Legislature was unlikely to have had in mind an impairment that only affected a plaintiff's ability to lead his normal life for a moment in time, with no consideration being given to the plaintiff's general ability to lead his normal life beyond that moment. Indeed, it is quite certain that this is not what the Legislature had in mind, given that the very premise of the no-fault act, and the core of the accompanying legislative compromise, was that *some* injured persons would *not* be able to recover *noneconomic* damages, so that *all* injured persons *would* be able to recover *economic* loss benefits regardless of fault.

D. APPLICATION

As explained earlier, both *Kreiner* and the majority agree that the court must first determine whether there is a factual dispute that is material to the determination whether plaintiff has suffered a serious impairment of body function. Here, there are no material factual

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[31] See also *DiFranco*, 427 Mich at 95 (WILLIAMS, C.J., concurring in part and dissenting in part) ("In the statutory language, 'serious impairment of body function' appears with the other threshold requirements of 'permanent serious disfigurement' and 'death,' leaving the strong implication, under the rule of ejusdem generis, that while the impairment need not be permanent or fatal, it was not to be transient or trivial either.").

disputes. Before the accident, plaintiff worked approximately 60 hours a week and for the six months immediately before the accident, plaintiff's position was that of a medium-duty truck loader. Additionally, plaintiff fished and golfed. Twelve months after the accident, plaintiff's surgeon cleared him to return to work with no restrictions. Seventeen months after the accident, plaintiff returned to work and has been able to perform all of his job duties since then. During the entire time he was recuperating, plaintiff could tend to his needs and there was no effect on his relationship with his then-fiancée. Additionally, plaintiff continued to fish and golf. Thus, I agree with the majority that there are no factual disputes that are material to the determination of whether plaintiff suffered a serious impairment of a body function. The facts are clear.

I also agree with the majority that the "body function" that was "impaired," the ability to walk, was "important," and that the impairment was "objectively manifested." Although plaintiff was able to walk to some extent, his ability to do so was impaired, and his impairment, a broken ankle, was recognized by his doctors. The final, and critical, inquiry in this case concerns whether the impairment affected plaintiff's general ability to lead his normal life. This is where the majority and I depart. The *Kreiner* analysis requires a comparison of plaintiff's life before the accident and after the accident, including "the significance of any affected aspects on the course of the plaintiff's overall life." *Kreiner*, 471 Mich at 132-133. To aid in this analysis, the following factors may be considered:

> (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.* at 133.]

Plaintiff's ability to walk, as just noted, was impaired by a broken ankle. However, once plaintiff's ankle was placed in a cast at the emergency room, he was able to walk with the aid of crutches. And, immediately following his initial surgery in which a device was implanted to stabilize his ankle, plaintiff was still able to walk with crutches, although he was instructed not to place any weight on his ankle for one month. Plaintiff underwent physical therapy and nine months later, in October 2005, plaintiff again underwent surgery to remove the device. By January 2006 (one year after the accident), plaintiff's surgeon had cleared plaintiff to return to work with no restrictions. However, plaintiff claimed that he could not keep up with the demands of his job and thus was placed back on workers' compensation. Although plaintiff's subjective reports of his pain from January 2006 forward varied greatly,[32] the March 2006 FCE supported plaintiff's claim that he could not fully perform all of his previous job duties; however, this was due in part to a preexisting and unrelated shoulder injury. After plaintiff's workers' compensation benefits were terminated, however, plaintiff requested another FCE, and, on August 1, 2006, the FCE showed that plaintiff was able to perform essential job demands with no restrictions. Plaintiff returned to work on August 16, 2006, and has been able to perform his job duties since that time.

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[32] As already discussed, in January 2006, plaintiff reported to his surgeon that his ankle was not giving him any pain; in March 2006, plaintiff reported during his FCE that his pain was 3 out of 10; in June 2006, plaintiff reported to his physiatrist that his pain was 6 out of 10; in August 2006, plaintiff reported during his FCE that his pain was as low as zero out of 10 (at which point, he returned to work); and in October 2006, plaintiff reported during his deposition that his life was "normal" with some pain. These drastically inconsistent reports of pain demonstrate why, with regard to the "extent of any residual impairment," "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Kreiner*, 471 Mich at 133 n 17.

Although plaintiff was assigned to a position that was less physically demanding than the position he had been performing before he was injured, plaintiff did this voluntarily and he suffered no loss in pay. Moreover, at the time plaintiff was injured, he had only been in that position for six months and, since he began to work for Allied in 2002, he had worked in three different positions. Thus, the fact that defendant was assigned to a different position upon his return is not particularly significant in this Court's analysis.

Plaintiff's only argument regarding his inability to lead his normal life is that he was unable to work at certain times. During the time he was recuperating, plaintiff could care for himself and tend to his household chores without assistance. His relationship with his fiancée/wife was unaffected. And he was able to enjoy his recreational activities without interruption. By plaintiff's own admission, his life was "normal" with some "occasional aching" that was not aggravated by any activities, including standing or prolonged walking. It is fair to say that by August 2006 plaintiff had fully recovered from his broken ankle. Because only plaintiff's ability to work was affected and because this only lasted, at most, 17 months, the lower courts did not err in concluding that the impairment did not affect plaintiff's general ability to lead his normal life and, therefore, that plaintiff did not meet the "serious impairment of body function" threshold.

E. STARE DECISIS

The majority overrules *Kreiner* while paying its usual lip service to stare decisis.[33] My fundamental disagree-

[33] It is of interest that this is the *second* time the authoring justice has authored an opinion overruling an earlier case and thus made it easier for a plaintiff to establish a serious impairment of body function. In

ment with the majority's application of the stare decisis doctrine is quite easily summarized. In *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000), this Court drew on past caselaw and identified several relevant considerations in determining whether a case should be overruled under stare decisis.[34] As explained

DiFranco, he authored an opinion overruling *Cassidy*. Chief Justice WILLIAMS complained: "Four years after this Court issued its opinion in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), the majority sees fit to overrule the decision of five members of a six-member court and adopt the position of the dissent in that case." *DiFranco*, 427 Mich at 92 (WILLIAMS, C.J., concurring in part and dissenting in part). In this case, the authoring justice again sees fit to overrule a case that was decided only six years ago and to adopt his own dissenting opinion from that case. While it is by now clear what the authoring justice believes the no-fault policies of this state ought to be, it is considerably less clear what connection these views bear to those of the people and their Legislature.

[34] The fact that the lead opinion relies far more on Chief Justice KELLY's opinion in *Petersen*, which only Justice CAVANAGH joined, than on the majority opinion in *Robinson* should not go unnoticed. For a discussion of Chief Justice KELLY's *Petersen* standard for overruling precedent, see my dissent in *Petersen*, 484 Mich at 350.

Concerning the statements of Justices HATHAWAY and WEAVER about stare decisis:

> Justice HATHAWAY contends that stare decisis constitutes a "policy consideration" and that the "particular analytical approach will differ from case to case." Similarly, Justice WEAVER contends that stare decisis constitutes a "principle of policy" and that there is no need for a "standardized test for stare decisis," as long as justices exercise "judicial restraint, common sense, and a sense of fairness . . . ." The problem with these "approaches" is that "litigants will, of course, have no notice beforehand of which ["analytical approach"] will be employed, for the justices themselves will not know this beforehand." *Petersen*, 484 Mich at 380 (MARKMAN, J., dissenting). . . . Although Justice WEAVER is correct that "[t]here are many factors to consider when deciding whether or not to overrule precedent," and Justice HATHAWAY is equally correct that the application of stare decisis must take place on a "case-by-case basis," this does not obviate the need to at least reasonably *attempt* to apprise the parties, and the citizens of this state, *before the fact* what some factors might be, as this Court did in *Robinson* and as the Chief Justice and Justice CAVANAGH did in *Petersen*. And whatever else can be understood of Justice HATHAWAY's and Justice WEAVER's "approaches" to stare decisis, the application of

herein, *Kreiner* was the first occasion on which this Court was called upon to interpret the 1995 amendments to MCL 500.3135. *Kreiner* gave effect to the legislative intent as expressed in the language of the amended statute and was not, in my judgment, wrongly decided. Nonetheless, my disagreement with the majority on this point is not the thrust of this section. Rather, it is to remind the majority "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." *Paige v Sterling Hts*, 476 Mich 495, 543; 720 NW2d 219 (2006) (CAVANAGH, J., concurring in part and dissenting in part).

Indeed, the author of the majority opinion, as one who subscribes to the doctrine of legislative acquiescence, has often argued that principles of stare decisis are *especially strong* in matters of statutory interpretation.[35] Accordingly, his own words are relevant here:

> these "approaches" has resulted in 13 precedents of this Court being overruled during this term alone and 6 other precedents being teed up for possible overruling during the next term, doubtless a record pace for dismantling the caselaw of this state. [*Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 340 n 10; 791 NW2d 897 (2010) (MARKMAN, J., dissenting).]

[35] "[P]rinciples 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." *Paige*, 476 Mich at 540-541 (CAVANAGH, J., concurring in part and dissenting in part) (emphasis added); see also *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 v DaimlerChrysler Corp*, 465 Mich 732, 767-768; 641 NW2d 567 (2002) (CAVANAGH, J., dissenting). Significantly, the authoring justice has gone so far as to suggest that "when this Court first

"[T]he 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 [six] years to correct [*Kreiner*'s] allegedly incorrect interpretation." *Id.* at 536. To be fair, it is not only the author of the majority opinion, but *all* the justices who comprise the majority who should more clearly recognize the consequences of what they are doing. Even a cursory analysis of the majority's treatment of precedent since it ascended to power in January 2009 reveals a lack of sufficient regard for recent precedents that is directly contrary to their own previous assertions of the need not to needlessly overrule cases on account of stare decisis. Past complaints on

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interprets a statute, then the statute becomes what this Court has said it is," and that, absent further legislative action, " '[h]aving given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances.' " *Paige*, 476 Mich at 537 (CAVANAGH, J., concurring in part and dissenting in part), quoting *Boys Markets, Inc v Retail Clerks Union*, 398 US 235, 257-258; 90 S Ct 1583; 26 L Ed 2d 199 (1970) (Black, J., dissenting) (emphasis omitted). One cannot reconcile this view of legislative acquiescence and stare decisis with the majority's decision to overrule *Kreiner*. *Kreiner* was this Court's first interpretation of the amended MCL 500.3135, and, although bills were subsequently introduced that would have abolished *Kreiner*, such bills were repeatedly rejected by the Legislature. See, e.g., SB 1429 (2004); SB 618, HB 4846, and HB 4940 (2005); SB 445, HB 4301, and HB 4999 (2007); and SB 83 and HB 4680 (2009). Therefore, what is the majority's "sound and specific justification" for departing from *Kreiner*? *Paige*, 476 Mich at 541 (CAVANAGH, J., concurring in part and dissenting in part). What are the "extraordinary circumstances" that make it appropriate to do so? *Id.* at 538 (citation, quotation marks, and emphasis omitted). While, in my view, this Court has correctly repudiated the doctrine of legislative acquiescence, see *Donajkowski v Alpena Power Co*, 460 Mich 243, 258-261; 596 NW2d 574 (1999), there is no principled reason why the *majority*, whose members are convinced advocates of this doctrine, chooses to ignore the Legislature's repeated rejection of attempts to abolish *Kreiner*, just as there is no principled reason why the majority chooses to ignore the Legislature's actions in amending MCL 500.3135 and the other forms of available legislative history.

their part that cases should not be overruled when the only thing that has changed is the membership of the Court have gone by the wayside.[36]

1. MAJORITY AND PRECEDENT IN 2009

The new majority assumed power in January 2009, and wasted little time in beginning its efforts to "undo" decisions of the previous majority.[37] On December 29, 2008, the former majority issued its opinion in *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n*, 482 Mich 414, 417; 759 NW2d 154 (2008). Soon after Justice HATHAWAY replaced former Chief Justice TAYLOR on January 1, 2009, the plaintiffs filed motions for rehearing. The new majority granted the plaintiffs' motions for rehearing, and the cases were resubmitted for decision "without further briefing or oral argument." 483 Mich 918 (2009). Then, in *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 26; 795 NW2d 101 (2009), the new majority reversed the former majority's decision.

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[36] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 256; 731 NW2d 41 (2007) (KELLY, J., concurring in part and dissenting in part) ("The law has not changed. Only the individuals wearing the robes have changed."); *Paige*, 476 Mich at 532-533 (CAVANAGH, J., concurring in part and dissenting in part) ("The only 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."). As observed, after the composition of this Court changed when Justice HATHAWAY replaced former Chief Justice TAYLOR on January 1, 2009, this Court granted plaintiff's motion for reconsideration even though such motion had not raised any new legal arguments. 485 Mich 851 (2009).

[37] See Detroit Free Press, December 10, 2008, p A2, where Chief Justice KELLY promised to "undo . . . the damage that the Republican-dominated court has done."

In *Bush v Shabahang*, 484 Mich 156, 175 n 34; 772 NW2d 272 (2009), the majority stated that it "question[ed] whether *Roberts I* [*Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002)] and *Boodt* [*v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008)] were correctly decided . . . ." And, in *Potter v McLeary*, 484 Mich 397, 424 n 32; 774 NW2d 1 (2009), the majority said: "We question whether *Roberts II* [*Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004)] was correctly decided . . . ."

The majority's treatment of precedent in the seven-month period from when it took power until the end of the Court's term in July 2009 was well explained in earlier statements of mine and of Justices CORRIGAN and YOUNG. For example, in *Henry v Dow Chem Co*, 484 Mich 483, 528 n 28; 772 NW2d 301 (2009), Justice YOUNG observed in his partial dissent:

> The majority's determination to ignore facts and precedent inconvenient to its desired outcome has become its *modus operandi*. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hospitals at Niles & St Joseph, Inc*, 479 Mich 243, 244; 736 NW2d 561 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Line*s, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471; 592 NW2d 46 (1999); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008);[38] *Chambers v Wayne Co Airport Auth*,

[38] I dissented in *Juarez*, 483 Mich at 971, stating:

> [T]he majority's disdain for *Smith* [*v Khouri*, 481 Mich 519; 751 NW2d 472 (2008)] is apparently viewed as adequate justification for ignoring *Smith*. Rather than forthrightly overruling this

483 Mich 1081 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007);[39] and *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009), where it failed to enforce *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997).

And, as Justice CORRIGAN stated in her dissenting statement in *Beasley v Michigan*, 483 Mich 1025, 1029-1030 (2009):

> [T]he new majority's failure to abide by *Rowland* continues a growing and troubling trend. Rather than forthrightly overruling that decision, it is increasingly becoming the practice of this Court to simply ignore precedents with which it disagrees. . . .
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> On this Court, the new majority offers no articulable reasons whatsoever for its apparent detours from stare decisis. Instead, the majority declines to explain whether—and, if so, why—it is overruling precedent despite the obvious appearance that it is doing so. If it intends to alter legal principles embedded in this Court's decisions, then the new majority should explain its reasons clearly and intelligibly. Instead, the new majority overrules by indirection, or at least leaves the impression that it is doing so, thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our caselaw requires. This appears to be an unfortunate return to our predecessors' past practice of

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decision, something the new majority is apparently loath to do (perhaps because several majority justices repeatedly and loudly proclaimed fealty to stare decisis, and dissented, whenever the former majority overruled a precedent), it is increasingly becoming the modus operandi of this Court that relevant precedents simply be ignored.

[39] The majority also failed to follow *Rowland* in *Ward v Mich State Univ*, 485 Mich 917 (2009).

> "frequently pa[ying] little attention to the inconsistencies among its cases and declin[ing] to reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 571 n 19 [702 NW2d 539] (2005).[40]

Additionally, in *Petersen*, 484 Mich at 313-326, Chief Justice KELLY authored an opinion, joined only by Justice CAVANAGH, in which she indicated that she wanted to overrule *Robinson* and *Lansing Mayor v Pub Serv Comm*, 470 Mich 154; 680 NW2d 840 (2004). In my dissent, I stated:

> Given that in this case the Chief Justice would expressly overrule, not one, but two of this Court's prior decisions,
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> "one is naturally tempted to re-inquire, see *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 223-228; 731 NW2d 41 (2007) (MARKMAN, J., concurring), whether the ongoing dispute between the [former] majority and Justice KELLY over overrulings of precedent truly concerns attitudes toward stare decisis or merely attitudes toward particular previous decisions of this Court." [*People v Smith*, 478 Mich 292, 322-323 n 17; 733 NW2d 351 (2007).]
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> "A justice's perspective on stare decisis is not evidenced by her willingness to maintain precedents with which she *agrees*, but by her willingness to maintain precedents with which she *disagrees*." *Rowland*, 477 Mich at 224-225 n 3 (MARKMAN, J., concurring). Now that the Chief Justice is positioned to overrule decisions with which she disagrees, her actions increasingly demonstrate that her former claims of fealty toward stare decisis were considerably overstated. Despite all her rhetoric concerning the impor-

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[40] On the other hand, as I stated in *Rowland*, 477 Mich at 226-227:

> [T]he [former] majority has been disciplined in stating expressly when a precedent has been overruled. The [former] majority has never attempted to obscure when a precedent was overruled or to minimize the number of such precedents by dubious "distinguishing" of prior caselaw. Rather, it has been forthright in identifying and critiquing precedents that were viewed as wrongly decided and warranting overruling.

> tance of stare decisis for the exercise of the judicial power, see, e.g., her hollow claim that she possessed a "differing [and elevated] esteem for stare decisis" than another justice, *People v Gardner*, 482 Mich 41, 88 n 31; 753 NW2d 78 (2008), such rhetoric was in reality little more than a means of communicating her opposition to overruling particular past decisions with which she agreed. [*Petersen*, 484 Mich at 389-390 (MARKMAN, J., dissenting) (emphasis in the original).]

One other practice to which the new majority began to adhere in 2009 was requesting that the parties brief whether a decision of the former majority should be overruled. See, e.g., Justice YOUNG's partial dissent in *Potter*, 484 Mich at 450 n 43, in which he stated:

> It is quickly becoming a new favored practice of the majority to flag decisions of the past decade and invite challenges to those decisions. It is difficult to reconcile this practice with the majority's previous claims of fidelity to stare decisis. See, e.g., . . . *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *Devillers, supra* at 620 (WEAVER, J., dissenting) ("Under the doctrine of stare decisis, it is necessary to follow earlier judicial decisions when the same points arise again in litigation."); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) ("Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent and should not be lightly departed. Absent the rarest circumstances, we should remain faithful to established precedent.") . . . . See also Todd C. Berg, Esq., *Hathaway Attacks*, Michigan Lawyers Weekly, October 27, 2008, in which Justice HATHAWAY was quoted: "I believe in stare decisis. Something must be drastically wrong for the court to overrule"; *Lawyers' Election Guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in

> which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted: "Too many appellate decisions are being decided by judicial activists who are overturning precedent."

Thus, from January 2009 through July 31, 2009, the new majority reversed an opinion on rehearing, sowed seeds of confusion by questioning three cases decided by the former majority, i.e., *Roberts I*, *Roberts II*, and *Boodt*, failed to follow numerous other precedents, as cited above, and began to issue orders requesting that the parties brief whether decisions made by the former majority should be overruled.[41] And Chief Justice KELLY and Justice CAVANAGH went on record urging the express overruling of two cases: *Robinson* and *Lansing Mayor*.

2. MAJORITY AND PRECEDENT IN 2010

In 2010, the majority has accelerated efforts to "undo" numerous cases decided by the former majority through express overrulings and additional orders asking parties to brief whether a case should be overruled.

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[41] The *Detroit Free Press* took note of the majority's actions and stated as follows in an October 11, 2009, editorial, *Restoring judicial restraint*:

> Even before the new term began, the new Democratic majority (buttressed by the renegade Weaver) had signaled its own impatience to begin dismantling the Engler Court's legacy when it agreed to reconsider an appeal the court rejected just a month before Taylor's departure. The revived appeal appears to hinge on the court's willingness to reverse two of the Engler court's more recent decisions.
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> * * *
>
> Democrats can hardly reinvigorate stare decisis — the reasonable conviction that the rules of the game shouldn't change every time a new referee takes the field — by reversing every questionable call its predecessors made.

In *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010), the majority expressly overruled *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the majority overruled *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), *Crawford v Dep't of Civil Serv,* 466 Mich 250; 645 NW2d 6 (2002), *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117; 693 NW2d 374 (2005), *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006), *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007), *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007), and *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008). In *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010), the majority expressly overruled the limited retroactive effect of *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007). In *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), the majority expressly overruled *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006). In *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 506 n 22; 791 NW2d 853 (2010), the lead opinion authored by Justice HATHAWAY indicated its agreement with Justice CAVANAGH's partial dissent in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 63-67; 631 NW2d 686 (2001), which already had the support of three justices (Chief Justice KELLY and Justices CAVANAGH and WEAVER). And, of course, in the case at bar, the majority has expressly overruled *Kreiner*. Finally, by amending MCR 2.112 and MCR 2.118 to allow amendments of affidavits of merit to

relate back to the of the original filing of the affidavit, the majority effectively overruled *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007). 485 Mich cclxxv, cclxxvi (2010).

3. OVERRULINGS OF PRECEDENT TO COME

The majority's work, however, has apparently only just begun. In orders granting applications for leave to appeal, it has already teed up six more cases for possible overruling. These include: *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007);[42] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004);[43] *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007);[44] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005);[45] *Rory v Continental*

[42] This Court's grant order in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010), inquired whether *Mich Citizens* was correctly decided, and the majority denied a motion to dismiss that case even though the case is now clearly moot. See *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 486 Mich 982, 987-994 (2010) (YOUNG, J., dissenting). Apparently, the majority just could not wait until next term to overrule *Mich Citizens* because it appears already to have done so in *Lansing Sch Ed Ass'n*.

[43] This Court's grant order in *Anglers*, 485 Mich at 1067, also inquired whether *Preserve the Dunes* was correctly decided, and, as noted, the majority denied the motion to dismiss in that case even though it is now clearly moot. See *Anglers*, 486 Mich at 987-994 (2010) (YOUNG, J., dissenting).

[44] *Colaianni v Stuart Frankel Dev Corp*, 485 Mich 1070 (2010), inquired "whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, was correctly decided."

[45] This Court's grant order in *Wilcox v State Farm Mut Auto Ins Co*, 486 Mich 870 (2010), inquired "whether *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005), was correctly decided." This order is the majority's second tee-up of *Griffith*. The majority first requested that the parties brief whether *Griffith* was correctly decided in *Hoover v Mich Mut*

Ins Co, 473 Mich 457; 703 NW2d 23 (2005);[46] and *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).[47]

The new majority once purported to be concerned about the stability of the law,[48] but that concern appears to have passed with the passing of the former majority. Indeed, it is difficult to consider anything more destabilizing to the law than to have the majority issue multiple orders continually requesting that the parties brief whether recently decided cases have been properly decided. Justices who once postured as champions of stare decisis now cannot act quickly enough to overrule disfavored precedents. The majority's past claims of fealty to stare decisis were greatly exaggerated, and obviously nothing more than a function of their opposition to *particular* decisions being decided by the Court at the time.

4. HYPOCRISY AND STARE DECISIS

The majority accuses the dissenting justices of hypocrisy with regard to our stare decisis criticisms of the majority.

Ins Co, 485 Mich 881 (2009), but that case was subsequently dismissed after a settlement, *Hoover v Mich Mut Ins Co*, 485 Mich 1036 (2010). However, the majority wasted little time in finding another case to use as a vehicle for reconsidering *Griffith*.

[46] This Court's grant order in *Idalski v Schwedt*, 486 Mich 916 (2010), inquired "whether *Rory v Continental Ins Co*, 473 Mich 457 (2005), should be reconsidered."

[47] This Court's grant order in *Pollard v Suburban Mobility Auth*, 486 Mich 963 (2010), inquired "whether this Court should reconsider *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007)."

[48] See, e.g., *People v Davis*, 472 Mich 156, 190; 695 NW2d 45 (2005), where then-Justice KELLY opined in dissent that overruling cases "destabilizes our state's jurisprudence. It suggests to the public that the law is at the whim of whoever is sitting on the Supreme Court bench. Surely, it erodes the public's confidence in our judicial system."

> The dissenters' stare decisis protestations should taste like ashes in their mouths. To the principles of stare decisis, to which they paid absolutely no heed as they denigrated the wisdom of innumerable predecessors, the dissenters now would wrap themselves in its benefits to save their recent precedent. [*Ante* at 209 n 21.]

However, the position of the dissenting justices on stare decisis has not changed a whit since we were in the majority; by contrast, the position of the majority justices is unrecognizable.

It has always been our position that stare decisis is not an "inexorable command," and that a judge's primary obligation is to the law and the constitution, not to the judgments of his or her predecessors. To that end, we have always asserted that there are multiple judicial values that must be assessed in any case in which previous decisions of the Court are implicated. In every such case, a judge must respectfully consider the interests served by stare decisis—predictability and certainty in the law, and the uniformity of its application. However, in every such case, a judge must also consider the interests served by interpreting the law correctly—regard for the lawmaker, adherence to constitutional dictates concerning the "judicial power" and the separation of powers, and competing predictability and certainty interests that are served where the law means what it plainly says. *Robinson*, 462 Mich at 464-468. As we explained in *Robinson*:

> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact,

> should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Id.* at 467-468.]

That has been the consistent approach of the dissenting justices, and this continues to be our approach. Respect for stare decisis is a critical judicial value, but so is a regard for the constitutional processes of government by which a judge strives to interpret the law in accordance with its actual language. Balancing these values is sometimes difficult, and reasonable people can often disagree as to how this balance should be struck. *Robinson* supplies one attempt at identifying the factors that courts have traditionally looked to in striking this balance in a consistent and reasonable manner. Despite suggestions to the contrary, *Robinson* does not establish a "mechanical" process, but simply attempts to afford reasonable guidance in achieving a fair equilibrium between stare decisis and getting the law right.[49]

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[49] Given that it has always been our position that *Robinson* does not establish a "mechanical" process, it is not surprising that the majority has been able to identify a *single* case in which we overruled precedent without specifically citing *Robinson*.

However, as explained above, the justices now in the majority who were on the Court at the time took a quite different approach to stare decisis when they were in the minority. As Justice YOUNG has explained:

> [Our] position on stare decisis has not changed, and the [the majority] attempts to shift focus to [us] in order to avoid confronting [their] own inconsistency. The public should understand when justices' positions on important matters shift. And that is the focus of this dissent: when the [majority] justice[s] [were] in the minority, [they] liked stare decisis a lot; now that [they are] in the majority, it is not an issue. That is the "irony" the public should understand. [*Anglers*, 486 Mich at 993 (2010) (YOUNG, J., dissenting).]

The majority entirely misapprehends our criticism of its record on stare decisis if it thinks that we are simply counting the number of occasions on which they have overruled precedent over the past term and a half. That is not our intention at all. We freely acknowledge that we too overruled precedents when we were in the majority—although hardly at their remarkable pace. That is not the nub of our critique. Rather, the nub is: (a) that the majority justices have demonstrated a remarkably inconsistent and "flexible" attitude toward stare decisis, in which their views on the subject appear to be nothing more than a function of whether they are in the majority or the minority; and (b) that the majority justices equate their own overrulings of precedent, in which they have *widened* the distance between the law of the lawmaker and the law of the court, with the previous majority's overrulings, in which we did the opposite.

"[N]o meaningful discussion of a court's attitude toward precedent can be based solely on an arithmetical analysis in which raw numbers of overrulings are simply counted. Such an analysis obscures that not all precedents are built alike, that some are better reasoned than others,

that some are grounded in the exercise of discretionary judgments and others in the interpretation of plain language, that some are thorough in their analyses and others superficial." *Rowland*, 477 Mich at 226 (MARKMAN, J., concurring). The chart set forth in *Rowland* demonstrates, we believe, that the overrulings of precedent that occurred between January 1, 2000, until *Rowland* was decided on May 2, 2007, "overwhelmingly came in cases involving what the justices in the majority [at that time] view[ed] as the misinterpretation of straightforward words and phrases in statutes and contracts, in which words that were *not* there were read into the law or words that *were* there were read out of the law." *Id.* That is, these overrulings of precedent sought more closely to equate our state's caselaw with our statutes, while the overrulings of precedent of the present majority have achieved exactly the opposite.

Thus, the present majority has regard neither for precedent nor for the most significant competing value that would sometimes warrant overturning a precedent, to wit, that it is not in accord with the words of the lawmaker. In the end, the majority's approach to stare decisis is empty and incoherent. The majority has unsettled the precedents of this Court at a Guinness world's record pace, and it has done so while disserving *both* the values of stare decisis and that of a court acting in accordance with the constitutional separation of powers to respect the decisions of the lawmaker. The majority has run amuck in service of values that have no grounding in either stare decisis or any other conception of the "judicial power," other than that they comprise an arithmetical majority of this Court. In this regard, the majority confuses power and authority. The majority unsettles and confuses the law *both* in its disregard for this Court's previous decisions and in its equal disregard for the language of the law. It com-

pounds the confusion it fosters in one realm with the confusion that it fosters in the other.[50] There is no saving grace in its overrulings of precedent, no balancing of difficult judicial principles, no apparent recognition of the values served by either of the competing considerations involved where precedents are at issue, and no thoughtful effort to articulate even the roughest principles for its actions. In its destructive march through the caselaw of this state to identify surviving and straggling decisions that need to be "taken out," the majority furthers no discernible legal value of any kind, other than litigation and still more litigation. In the end, there is no legal core to the majority's approach to stare decisis, and it is left with nothing other than a feeble effort to equate its own actions with those of the dissenting justices when they were in the majority. "We are no worse than you" is the majority's banner, when in truth the majority has not the slightest conception of *our* approach to stare decisis, and not the slightest conception of the damage that their *own* approach to stare decisis is doing to the citizens of this state who wish to act in accordance with the law and who wish to understand their rights and obligations under that law.

F. UNDOING THE LEGISLATIVE COMPROMISE

As discussed earlier, although virtually all legislation involves some sort of compromise, the no-fault act, in particular, entailed a substantial and well-understood compromise. In exchange for the payment of economic

[50] See, for example, *Ruling Clouds Pot Smoking, Driving Law*, Detroit News, July 29, 2010 (indicating that the majority's recent overruling of *Derror* in *Feezel* "has police officers scratching their heads in confusion" and reporting that "[t]he ruling mostly leaves law enforcement officers in a legal limbo, said Sgt. Christopher Hawkins, legislative liaison for the state police") available at <http://www.detnews.com/article/20100729/METRO/7290387#ixzz0v6dvSnGK> (accessed July 29, 2010).

loss benefits from one's own insurance company (first-party benefits), the Legislature limited an injured person's ability to sue a negligent operator or owner of a motor vehicle for noneconomic losses (third-party benefits). *Kreiner*, 471 Mich at 114-115. As stated in *Stephens v Dixon*, 449 Mich 531, 541; 536 NW2d 755 (1995): "It was a specific purpose of the Legislature in enacting the Michigan no-fault act to partially abolish tort remedies for injuries sustained in motor vehicle accidents and to substitute for those remedies an entitlement to first-party insurance benefits."

> At least two reasons are evident concerning why the Legislature limited recovery for noneconomic loss, both of which relate to the economic viability of the system. First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if noneconomic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault.
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> Regarding the trade-off involved in no-fault acts, 7 Am Jur 2d, Automobile Insurance, § 340, p 1068, contains the following:
>
> "It has been said of one such plan that the practical effect of the adoption of personal injury protection insurance is to afford the citizen the security of prompt and certain recovery to a fixed amount of the most salient elements of his out-of-pocket expenses * * *. In return for this he surrenders the possibly minimal damages for pain and suffering recoverable in cases not marked by serious

> economic loss or objective indicia of grave injury, and also surrenders the outside chance that through a generous settlement or a liberal award by a judge or jury in such a case he may be able to reap a monetary windfall out of his misfortune." (Footnotes omitted.)
>
> Thus, it is apparent that the threshold requirements for a traditional tort action for noneconomic loss play an important role in the functioning of the no-fault act. [*Cassidy*, 415 Mich at 500-501.]

Accordingly, there is no question that the legislative compromise that produced the no-fault act recognized that some injuries would not be considered sufficient to meet the no-fault threshold. While every injury resulting from a motor vehicle accident certainly has adverse consequences, and may involve medical costs, treatment, and bodily pain, not all injuries rise to the level of the no-fault threshold of a "serious impairment of body function." *Some* injured persons are able to recover *noneconomic* damages, so that *all* injured persons are able to recover *economic* loss benefits regardless of fault. Otherwise, "little has been gained by granting benefits for economic loss without regard to fault." *Id.* at 500. Indeed, "the excessive litigation of motor vehicle accident cases" would continue, and, yet, economic loss benefits would have to be paid regardless of fault. *Id.* In other words, plaintiffs would be able to recover economic loss benefits regardless of fault and without having to go to a jury, while these same plaintiffs would also be able to go to a jury and seek noneconomic benefits as well. That is not the compromise reached by the Legislature. In particular, it is a lose-lose proposition for those funding the no-fault system, i.e., all insured Michigan drivers.[51]

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[51] The majority argues that the legislative compromise of 1973 that led to the adoption of the no-fault act itself cannot be cited to trump the 1995 enactment of MCL 500.3135(7). We agree, but it is our position that the

In addition, it has been repeatedly recognized that, due to the mandatory nature of no-fault insurance, the Legislature intended that its cost be affordable. *Shavers*, 402 Mich at 599 ("The Legislature has . . . fostered the expectation that no-fault insurance will be available at fair and equitable rates.").[52] Indeed, because it is mandatory, it *must* be affordable. *Id.* at 600 ("We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis."). It is a matter of economic logic that in order to maintain a system in which motor vehicle accident victims are able to receive economic loss benefits regardless of fault, drivers must be required to purchase insurance, and in order to ensure that drivers purchase this insurance, it must be kept affordable. The majority's decision, however, very considerably "lowers the bar" that an injured plaintiff must satisfy in order to meet the serious impairment of

1995 enactment of MCL 500.3135(7), which in large measure rejected *DiFranco* and made it more difficult for plaintiffs to prevail in noneconomic loss benefit cases, is entirely consistent with the compromise. The majority's opinion is not in accord with *either* the compromise or MCL 500.3135(7).

[52] See, e.g., *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) (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"); *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 Auto 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").

body function threshold, making it significantly easier for a plaintiff to recover for noneconomic losses. This means insurance companies that issue no-fault policies will be financially obligated in more cases and, as a result, will be required to pass along their increased costs to policyholders by way of increased premiums charged to Michigan drivers.[53] Today's decision, just as last term's decision by the new majority in *United States Fidelity (On Rehearing)*,[54] will eventually result in a substantial *increase* in premiums paid for their *mandatory* no-fault policies.[55]

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[53] In *Univ of Mich Regents*, 487 Mich at 293, the majority has overruled *Cameron*. This overruling will also lead to significant cost increases to no-fault policies. Indeed, defendant Titan Insurance Company argued in *Univ of Mich Regents* that overruling *Cameron* would have "devastating" effects on the orderly adjustment of no-fault claims and "threaten the viability" of the Michigan Assigned Claims Facility and the Michigan Catastrophic Claims Association (MCCA) because the gutting of the one-year-back rule will lead to a flood of decades old no-fault claims seeking expensive family attendant care benefits. *Id*. at 342 n 12 (MARKMAN, J., dissenting). In addition, in *Wilcox*, 486 Mich at 870, the majority has asked the parties to brief whether *Griffith* "was correctly decided." No-fault insurance costs can be expected to rise even further if the majority overrules *Griffith*, which considered the parameters of an "allowable expense" under MCL 500.3107(1)(a).

[54] As a consequence of the majority's decision in *United States Fidelity (On Rehearing)*, the MCCA substantially increased the mandatory annual assessment no-fault policy holders must pay to the association. According to the MCCA's own website, the annual assessment has increased 40 percent in the last two years (from $104.58 per insured vehicle effective July 1, 2008, to June 30, 2009, to $143.09 per insured vehicle effective July 1, 2010, to June 30, 2011). <http://www.michigancatastrophic.com> (accessed June 28, 2010).

[55] As stated in Justice YOUNG's dissent in *United States Fidelity (On Rehearing)*, 484 Mich at 26, this increase in premiums is not pertinent to our analysis of the substantive issue beyond making the point that the majority is undoing the compromise embodied by the no-fault act. But having lost the battle with the majority over the legal analysis of the no-fault statute, the financial consequences of the majority's decision should not go unremarked.

Every owner of a car that is driven on a public highway must buy certain basic coverages in order to register the vehicle and obtain license plates. MCL 500.3101(1). The Legislature has provided two incentives to ensure that owners purchase the required insurance. First, it is a misdemeanor to drive a motor vehicle without basic no-fault coverage. Under MCL 500.3102(2), if someone is convicted of driving without basic no-fault insurance coverage, he or she can be fined up to $500, incarcerated in jail for up to one year, or both. Second, the no-fault act precludes receipt of no-fault personal protection insurance benefits if at the time of the accident the person was the owner or registrant of an uninsured motor vehicle involved in the accident. MCL 500.3113(b). Notwithstanding this criminal sanction, and this potential preclusion of no-fault benefits, it is estimated that 17 percent[56] of Michigan's approximately 8 million motor vehicles[57] are still operated without a no-fault policy in effect. With such mandatory policies now becoming even more expensive, one can also reasonably anticipate a corresponding increase in the already large number of uninsured vehicles being driven on our roads and highways.

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[56] According to the Insurance Institute of Michigan's 2009 Fact Book, the Insurance Research Council released a study in 2008 estimating Michigan's uninsured motorists rate at 17 percent. <http://www.iiminfo.org/Portals/44/Fact%20Book%204%20Auto%20(19-29).pdf> (accessed June 28, 2010). Indeed, according to a July 11, 2010 editorial in the *Detroit News*, "Statistics suggest more than half the drivers in Detroit ignore state law by driving without coverage because they can't afford the premiums. That's a problem for their fellow motorists and for the state." <http://detnews.com/article/20100711/OPINION01/With-credit-scoring-issue-decided--policymakers-should-explore-other-ways-to-trim-auto-insurance-costs#ixzz0tUKFqijI> (accessed July 14, 2010).

[57] According to the Insurance Institute of Michigan, as of 2008, Michigan had 8.2 million registered motor vehicles. <http://www.iiminfo.org/Portals/44/registered%20vehicles%2008.pdf> (accessed June 28, 2010).

The majority's decision will not only result in increased automobile insurance premiums, and more uninsured vehicles on our roads and highways, but it will also mean that substantially more lawsuits will be filed, even though an express goal of the no-fault act was to reduce "excessive litigation of motor vehicle accident cases." *Cassidy*, 415 Mich at 500. Yet, under the majority's opinion, more lawsuits will make their way to juries for the consideration of noneconomic loss benefits, straining our already overburdened courts.[58]

[58] If one reviews the new majority's decisions, it is difficult not to conclude that the only coherent theme of their jurisprudence is the fostering of litigation. They have virtually guaranteed as much by introducing uncertainty, doubt, and confusion into the law, and by gratuitously interjecting irrelevant considerations into their opinions. See, e.g., *O'Neal*, 487 Mich at 506 n 22 (opinion by HATHAWAY, J.) (gratuitously calling into question the viability of *Wickens*, a case having no relevance to that dispute); *Zahn v Kroger Co*, 483 Mich 34; 764 NW2d 207 (2009) (gratuitously observing that the parties to the contract were business entities "with equal bargaining power," as if the latter circumstance, not at all relevant in that case, might be relevant in a different case); *Anglers*, 486 Mich at 982 (refusing to dismiss a moot case); *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009) (relaxing the causal connection that must exist between an injury sustained and the ownership, maintenance or use of a motor vehicle in no-fault cases); *Decosta v Gossage*, 486 Mich 116; 782 NW2d 734 (2010) (refusing to enforce notice-of-intent requirements under MCL 600.2912b(2); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), *Beasley v Michigan*, 483 Mich at 1025, and *Ward*, 485 Mich at 917 (all refusing to enforce pre-litigation notice requirements); *Adair v Michigan*, 486 Mich 468; 785 NW2d 119 (2010) (reducing a Headlee Amendment plaintiff's burden of proof); *Lansing Sch Ed Ass'n*, 487 Mich at 352-353 (nullifying historical standards for determining whether a plaintiff has "standing" to bring a lawsuit); *Univ of Mich v Titan Ins Co*, 487 Mich at 292-293 (eroding the no-fault act's one-year-back rule); *O'Neal*, 487 Mich at 504-506 (opinion by HATHAWAY, J.) (concluding that whichever lost-opportunity formula benefits the plaintiff the most in any particular case is the correct formula to be utilized); *Vanslembrouck v Halperin*, 483 Mich 965 (2009) (incorrectly characterizing MCL 600.5851(7) as a statute of limitations that can be tolled rather than a saving provision that cannot be tolled); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009) (expanding what injuries can be

As it is, no-fault automobile negligence cases remain a dominant factor in Michigan civil filings every year. Indeed, of the 47,300 new civil case filings in Michigan circuit courts in 2009, 9,067—approximately 20 percent of all civil cases—were automobile related.[59] Given that many no-fault claims are settled without the filing of a lawsuit, the number of claims potentially affected by the majority's ruling is even higher.

The majority's decision will also increase the costs incurred by the state of Michigan itself (and, of course, the taxpayers who fund those costs). In the course of arguing that *Kreiner* should not be overruled because it "clarifies rather than expands the statutory language," the Attorney General's amicus curiae brief warns that if *Kreiner* is overruled, as a self-insured entity, the state will realize "a direct, significant increase in the cost of its litigation and coverage obligations."[60]

Finally, and as a consequence of all the above, the majority's decision will almost certainly call into question the long-term economic integrity of the present no-fault system in Michigan. By nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—

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considered to have occurred "in the course of employment" for purposes of workers' compensation); and the 2010 amendments of MCR 2.112 and MCR 2.118, 485 Mich cclxxv, cclxxvi (undermining affidavit of merit requirements). In the instant case, of course, the majority, by undermining the no-fault compromise struck by the Legislature, makes it easier for plaintiffs to sue for noneconomic loss benefits.

[59] See 2009 Annual Report of the Michigan Supreme Court, pp 35-36, available at <http://www.courts.michigan.gov/scao/resources/publications/statistics/2009/2009execsum.pdf> (accessed June 28, 2010).

[60] It was reported that, as of 2007, the state's vehicle fleet totaled 11,856. <http://www.greatlakeswiki.org/index.php/Michigan_state_fleet_efficiency> (accessed June 28, 2010).

the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system.[61]

IV. CONCLUSION

The no-fault automobile insurance act, in MCL 500.3135(1), provides that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." The issue here is whether plaintiff has suffered a serious impairment of body function. " '[S]erious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

In *Kreiner*, 471 Mich at 132-133, this Court held that in determining whether the impairment affects the plaintiff's general ability to lead his normal life, "a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." In addition, *Kreiner* indicated that certain factors, such as the duration of the impairment, may be of assistance in evaluating whether the plaintiff's general ability to lead his normal life has been affected. *Id.* at 133.

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[61] I reiterate that expected increases in no-fault premiums are not pertinent to our analysis of the legal issues in this case, beyond making the point that the majority is undoing the legislative compromise embodied by the no-fault act and that there will be significant practical consequences to doing this.

The majority overrules *Kreiner*, rejecting these factors and holding that *temporal* considerations are wholly or largely irrelevant in determining whether an impairment affects the plaintiff's general ability to lead his or her normal life. The majority apparently holds instead that as long as a plaintiff's general ability to lead his normal life has been affected for even a single moment in time, the plaintiff has suffered a serious impairment of body function. This conclusion is at odds with the actual language of the statute and nullifies the legislative compromise embodied in the no-fault act. Because I believe that *Kreiner* was correctly decided and that temporal considerations are, in fact, highly relevant, and indeed necessary, in determining whether an impairment affects the plaintiff's general ability to lead his normal life, I would sustain *Kreiner*. By nullifying the legislative compromise over the no-fault act—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—the Court's decision today will revive a legal environment in which each of these hazards reappears and threatens the continued fiscal integrity of our no-fault system.

Because I do not believe that the lower courts erred in concluding that plaintiff has not suffered a serious impairment of body function, I would affirm the judgment of the Court of Appeals.

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

UNIVERSITY OF MICHIGAN REGENTS
v TITAN INSURANCE COMPANY

Docket No. 136905. Argued March 9, 2010 (Calendar No. 1). Decided July 31, 2010.

Nicholas Morgan was treated at the University of Michigan Health System following an automobile accident in 2000. The Michigan Assigned Claims Facility designated Titan Insurance Company as the insurer to service Morgan's claim for personal protection insurance benefits. The Regents of the University of Michigan and the health system brought an action in the Washtenaw Circuit Court against Titan in 2006, seeking payment for Morgan's medical treatment. Titan moved for summary disposition, arguing that the one-year-back rule of MCL 500.3145(1) barred plaintiffs from recovering damages because all the costs had been incurred more than one year before plaintiffs filed suit. Plaintiffs argued that MCL 600.5821(4) allows the state and its political subdivisions to file an action without limitation and supersedes the one-year-back rule. The court, Melinda Morris, J., granted Titan's motion. The Court of Appeals, MURRAY and BECKERING, JJ. (DAVIS, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued June 5, 2008 (Docket No. 276710), concluding that it was required to do so under *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544 (2006). The Supreme Court denied plaintiffs' application for leave to appeal, 482 Mich 1074 (2008), but vacated that order on reconsideration and granted leave to appeal, 484 Mich 852 (2009).

In an opinion by Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY and by Justice WEAVER in part, the Supreme Court *held*:

The one-year-back rule of MCL 500.3145(1) does not apply to claims brought under MCL 600.5821(4). *Liptow* and *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006), are overruled. The *Cameron* Court held that the tolling provision in MCL 600.5851(1) for minors and insane persons did not preclude application of the one-year-back rule to their claims. *Liptow* relied solely on *Cameron* to reach the same conclusion regarding claims brought under MCL 600.5821(4), which provides that actions by the state and its political subdivisions to recover certain costs, including the costs of

care in hospitals, are not subject to the statute of limitations and may be brought at any time without limitation. *Cameron*, however, erred in its interpretation of the interaction between the one-year-back rule and MCL 600.5851(1), which supersedes all the limitations found in MCL 500.3145(1), including that rule. Similarly, the interaction between MCL 600.5821(4) and MCL 500.3145(1) also indicates that the provisions of MCL 600.5821(4) preserving a plaintiff's right to bring an action also preserve the right to recover damages incurred more than one year before suit is filed, and the one-year-back rule does not apply to those claims.

Reversed and remanded.

Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, wrote further to describe the application of stare decisis to the decision to overrule *Cameron*. Numerous factors may be considered when determining whether a compelling justification exists to overturn precedent, and none is dispositive. Chief Justice KELLY considered the appropriate factors with respect to *Cameron* and concluded that a compelling justification existed to overrule it.

Justice WEAVER concurred in all of the majority opinion except the part entitled "Stare Decisis." She wrote separately to note that in addition to the reasons the majority gave for overruling *Cameron*, it should also be overruled for the reasons stated in her *Cameron* dissent. The *Cameron* majority failed to give proper effect to the language of MCL 500.3145(1). The one-year-back rule is not a period of limitations, as *Cameron* held; rather, it details how to apply the tolling provision in the actual limitations period set forth in the statute. Justice WEAVER also stated that stare decisis is a policy and not an immutable doctrine and that the consideration of stare decisis and whether to overrule wrongly decided precedent always includes service to the rule of law through the exercise of judicial restraint, common sense, and a sense of fairness.

Justice HATHAWAY concurred in full with the majority analysis and conclusion with respect to overruling *Cameron* and fully concurred with Justice WEAVER's stare decisis analysis. Justice HATHAWAY wrote separately to set forth her own thoughts concerning what constitutes a proper analysis of stare decisis, noting that it is a principle of policy and not a rule or law subject to a particularized test in all circumstances. The approach taken will depend on the facts and circumstances presented. The special and compelling justifications to overrule *Cameron* are overwhelming in this case.

Chief Justice KELLY wrote a separate concurrence to respond to Justice YOUNG's discussion of comments she had made concerning the change in the Court's membership.

Justice YOUNG, joined by Justice CORRIGAN, dissenting, agreed with Justice MARKMAN's dissent and wrote separately to observe that the justices joining the majority in this case have overruled or ignored numerous recent precedents in a short time and have abandoned their previously expressed adherence to the doctrine of stare decisis. The rule of law requires judges to decide cases on the basis of principles announced in advance rather than personal or subjective preferences for or against a party before them or subjective policy considerations.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, disagreed that *Cameron* and *Liptow* should be overruled. *Cameron* correctly held that the no-fault automobile insurance act's one-year-back rule, MCL 500.3145(1), is a damages-limiting provision rather than a statute of limitations because it only limits the amount of benefits that can be "recover[ed]." Therefore, it is outside the scope of the tolling provision for minors and insane persons in MCL 600.5851(1), which addresses when one may "bring [an] action." The one-year-back rule serves only as a limitation on the recovery of benefits and does not define a period within which a claimant may file an action. *Liptow* properly relied on *Cameron* to hold that MCL 600.5821(4) does not preclude the application of the one-year-back rule because MCL 600.5821(4) only exempts the state and its political subdivisions from a statute of limitations. Having the right to bring an action is not the equivalent of having the right to recover an unlimited amount of damages. Under MCL 600.5821(4), the state and its political subdivisions may bring an action at any time, but under the one-year-back rule, they cannot recover benefits for any portion of the loss incurred more than one year before they commenced the action. The judgment of the Court of Appeals in this case should be affirmed.

INSURANCE — PERSONAL PROTECTION INSURANCE BENEFITS — ONE-YEAR-BACK RULE — LIMITATION OF ACTIONS — ACTIONS BY THE STATE AND POLITICAL SUBDIVISIONS.

The one-year-back rule of MCL 500.3145(1), which provides that a claimant may not recover personal protection insurance benefits for any portion of the loss incurred more than one year before the action was commenced, does not apply to claims brought by the state or its political subdivisions under MCL 600.5821(4) to recover the cost of maintenance, care, and treatment of persons in various institutions.

Miller & Tischler, P.C. (by *Ronni Tischler*), for plaintiffs.

Anselmi & Mierzejewski, P.C. (by *Mark D. Sowle*), for defendant.

Amici Curiae:

Gross & Nemeth, P.L.C (by *James G. Gross*), for the Auto Club Insurance Association.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas Dramis Brake & Boughton & McIntyre PC* (by *George T. Sinas*) for the Coalition Protecting Auto No-Fault.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Ann M. Sherman* and *C. Adam Purnell*, Assistant Attorneys General, for the Michigan Assigned Claims Facility.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Robert Ianni*, *Raymond O. Howd*, and *James P. Delaney*, Assistant Attorneys General, for the Department of Community Health.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for the Insurance Institute of Michigan.

Steven A. Hicks for the Michigan Association for Justice.

KELLY, C.J. We examine whether MCL 600.5821(4), which preserves state entities' rights to bring certain claims, also preserves the right to seek recovery of all damages incurred notwithstanding the one-year-back rule of MCL 500.3145(1). We hold that MCL 600.5821(4) exempts the state entities it lists from the

one-year-back rule. As a consequence, we overrule *Liptow v State Farm Mut Auto Ins Co*,[1] which held to the contrary, and reverse the judgment of the Court of Appeals. We also overrule *Cameron v Auto Club Ins Ass'n*,[2] on which the *Liptow* decision relied exclusively in reaching its conclusion.

FACTS AND PROCEDURAL HISTORY

Nicholas Morgan was severely injured in an automobile accident in March 2000. He was treated at the University of Michigan Health System for six days. Less than one year after the accident, Morgan sought personal protection insurance benefits through the Michigan Assigned Claims Facility (MACF). Because he was not covered under a no-fault insurance policy, the MACF designated Titan Insurance Company as the servicing insurer for his claims. In January 2006, the University of Michigan Health System and the university's regents filed this lawsuit against Titan, seeking payment from defendant for Morgan's medical treatment. Plaintiffs sought reimbursement of the full cost of Morgan's hospitalization, which they alleged was $69,957.19.

Defendant moved for summary disposition, arguing that the one-year-back rule of MCL 500.3145(1)[3] barred plaintiffs from recovering the claimed damages. Plaintiffs countered that MCL 600.5821(4)[4] allows the state and its political subdivisions to file suit without limita-

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[1] *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544; 726 NW2d 442 (2006).

[2] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006).

[3] The one-year-back rule in MCL 500.3145(1) provides that "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."

[4] MCL 600.5821(4) provides:

tion and entirely supersedes MCL 500.3145(1). They asserted that MCL 600.5821(4) exempts certain suits brought by public entities from "the statute of limitations" and allows initiation of such actions "at any time without limitation, the provisions of any statute notwithstanding." The trial court agreed with defendant and dismissed the suit.

On appeal, the Court of Appeals affirmed in a divided decision.[5] The majority concluded that, under MCR 7.215(J)(1), it was bound to follow the *Liptow* decision and uphold the trial court. Judge DAVIS agreed that *Liptow* was controlling, but opined that it had been wrongly decided and that the Court should convene a conflict panel pursuant to MCR 7.215(J)(2) and (3). Initially, we denied leave to appeal,[6] but on reconsideration, we vacated the denial order, granted reconsideration, and granted leave to appeal.[7]

MCL 600.5851(1)—THE MINORITY/INSANITY PROVISION

An analysis of this Court's rulings on the issues implicated in this case naturally begins with *Lambert v*

> Actions brought in the name of the state of Michigan, the people of the state of Michigan, or any political subdivision of the state of Michigan, or in the name of any officer or otherwise for the benefit of the state of Michigan or any political subdivision of the state of Michigan for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding.

[5] *Univ of Mich Regents v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 276710).

[6] *Univ of Mich Regents v Titan Ins Co*, 482 Mich 1074 (2008).

[7] *Univ of Mich Regents v Titan Ins Co*, 484 Mich 852 (2009). Our order also directed the parties to address whether *Liptow* and *Cameron* were correctly decided.

Calhoun.[8] *Lambert* held that MCL 600.5851(1)[9] preserves a claim by a minor or incompetent person even though the statute of limitations in the act under which the claim is brought bars the action.

Four years later, the Court of Appeals in *Rawlins v Aetna Cas & Surety Co* followed *Lambert*.[10] It held that MCL 600.5851(1) preserves a no-fault claim by a minor even though it would otherwise be barred by the limitations period in the no-fault act.

Shortly after, in *Geiger v Detroit Auto Inter-Ins Exch*,[11] the Court of Appeals held that MCL 600.5851(1) preserves a claim by a minor or incompetent person for personal protection insurance benefits even though it would otherwise be barred by the one-year-back rule. *Geiger* remained the prevailing law in this state for the next 24 years.

CAMERON AND *LIPTOW*

In 2006, in *Cameron*, this Court overruled *Geiger* in a 4 to 3 decision. The majority held that the minority/insanity provision in MCL 600.5851(1) did not remove the plaintiff's claim from application of the one-year-back rule. The analysis stated:

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[8] *Lambert v Calhoun*, 394 Mich 179; 229 NW2d 332 (1975).

[9] MCL 600.5851(1) states in part:

> Except as otherwise provided in [MCL 600.5851(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.

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

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

> 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).[12]

Accordingly, the majority held that a statute governing when a party may bring an action does not affect the damages recoverable under the one-year-back rule.

In *Liptow*, the Court of Appeals examined the interplay of the one-year-back rule and MCL 600.5821(4). Relying solely on *Cameron*, it stated:

> Thus, the pertinent question is whether the damages-limiting portion of MCL 500.3145(1), the one-year-back rule, limits the [claimant's] recovery. This Court's ruling in *Univ of Michigan Regents* [*v State Farm Mut Ins Co*, 250 Mich App 719, 733; 650 NW2d 129 (2002)] is of no assistance in this determination. The issue appears to be one of first impression.
>
> MCL 600.5821(4) provides that actions brought by the state or its subdivisions to recover the cost of maintenance, care, and treatment of persons in state institutions "are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding." We conclude that, by the plain import of this language, the Legislature intended to exempt the state from statutes of limitations when bringing an action to recover public funds. The language refers to statutes of limitations and provides that an action may be brought at any time. But the statute does not address damage limitation provisions or any other limiting provisions. In other words, like the minority tolling provision, MCL 600.5821(4) concerns the *time* during which the state

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[12] *Cameron*, 476 Mich at 62.

> may bring an action; it "does not pertain to the damages recoverable once an action has been brought." *Cameron, supra*, 476 Mich at 62. Accordingly, we conclude that MCL 600.5821(4), like the minority tolling provision of MCL 600.5851(1), does not operate to toll the one-year-back rule of MCL 500.3145(1). *Cameron, supra*, 476 Mich at 61-62. Therefore, we hold that defendant is liable to the [claimant] only for costs it incurred for [the patient's] care, maintenance, and treatment in state institutions within one year before the filing of the complaint.[13]

ANALYSIS

This case presents questions of statutory interpretation that are reviewed de novo.[14]

No party disputes that MCL 600.5821(4) preserves plaintiffs' right to bring the instant cause of action. The question before us is whether MCL 500.3145(1) restricts plaintiffs' recovery to damages incurred one year before plaintiffs filed suit. The answer turns on the correct understanding of the interaction between MCL 500.3145(1) and MCL 600.5821(4). It is undisputed that all of plaintiffs' costs were incurred between March 18 and March 23, 2000. Thus, if the one-year-back rule applies to their claim, plaintiffs are entitled to no damages.

Defendant relies on *Liptow*, which held that the one-year-back rule governs actions to which MCL 600.5821(4) applies because that statute does not exempt state entities from its limitation on damages. We disagree.

Defendant's argument and the holding in *Liptow* rest on a fundamentally incorrect premise. *Liptow* reasoned

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[13] *Liptow*, 272 Mich App at 555-556.

[14] *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 7; 779 NW2d 237 (2010).

that (1) MCL 600.5821(4) exempts state entities from any statute of limitations, (2) the one-year-back rule of MCL 500.3145(1) is not a statute of limitations, but a damages limitation, and therefore (3) MCL 600.5821(4) does not exempt a governmental entity from the one-year-back-rule of MCL 500.3145(1).[15] This premise is derived from our decision in *Cameron*. Therefore, we are required to revisit *Cameron*'s analysis.

The *Cameron* majority concluded that actions brought pursuant to MCL 600.5851(1) are subject to the one-year-back rule because that statute does not implicate when a plaintiff may "bring an action." We conclude that the statutory language in MCL 600.5851(1) and MCL 500.3145(1) does not command the conclusion that the *Cameron* majority reached.

To begin with, we conclude that the approach in *Cameron* was flawed because it read the statutory language in isolation. MCL 600.5851(1) does not create its own independent cause of action. It must be read together with the statute under which the plaintiff seeks to recover. In no-fault cases, for example, MCL 600.5851(1) must be read together with MCL 500.3145(1). Doing so, the statutes grant infants and incompetent persons one year after their disability is removed to "bring the action" "for recovery of personal protection insurance benefits . . . for accidental bodily injury . . . ." On the basis of its language, MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.[16]

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[15] See *Cameron*, 476 Mich at 62.

[16] Therefore, we also do not agree with Justice MARKMAN's criticism that we "discern the purpose of the statute from something other than its actual language . . . ." *Post* at 336.

For what purpose might a plaintiff "bring an action"? Surely not for the sole satisfaction of filing papers in court. A plaintiff brings a tort action to recover damages. Although the right to bring an action would be a hollow one indeed if a plaintiff could not recover damages, *Cameron* and *Liptow* limited a plaintiff to just that hollow right. Therefore, we restore the proper understanding of the interaction between MCL 600.5851(1) and the one-year-back rule. We hold that the "action" and "claim" preserved by MCL 600.5851(1) include the right to collect damages. As Justice CAVANAGH explained in his dissenting opinion in *Cameron*,

> [t]he 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:
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> > " '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."[17]

Justice CAVANAGH's dissent is equally applicable here. The statute at issue in this case, MCL 600.5821(4), also addresses "[a]ctions." Specifically, it preserves actions brought by state entities. It also explicitly delineates that the action contemplated is one brought for the recovery for certain costs incurred. MCL 600.5821(4) lists the costs as those for the "maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions . . . ." Thus, it is apparent from the language of the statute that the Legislature intended to preserve more than the state entities' right to file papers in court.

Moreover, this Court's caselaw predating *Cameron* also does not support the *Cameron* majority's holding. The only authority cited for *Cameron*'s interpretation was in Justice MARKMAN's concurring opinion, which relied on dicta from Justice BRICKLEY's lead opinion in *Howard v Gen Motors Corp*.[18]

In *Howard*, two justices analyzed the one-year-back rule in the workers' compensation act to determine

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[17] *Cameron*, 476 Mich at 100 (CAVANAGH, J., dissenting).

[18] *Howard v Gen Motors Corp*, 427 Mich 358; 399 NW2d 10 (1986). Only Justice RILEY concurred in Justice BRICKLEY's opinion.

We take no issue with Justice MARKMAN's argument that the *Cameron* majority needed no "authority" to support its holding other than "the language of the statute itself." *Post* at 337. But he wrongly claims that this opinion "fails to apprehend" the principle of statutory interpretation that the actual language of the statutes is the best indicator of legislative intent. *Post* at 337. To the contrary, we conclude that the statutory language does not compel the interpretation reached by the *Cameron* majority. See pages 298-300 of this opinion. We make the additional observation that our caselaw also provides no support for the *Cameron* majority's interpretation.

whether it was a jurisdictional affirmative defense akin to a statute of limitations. Justice BRICKLEY concluded that "the 'statute of limitations' interpretation of the one-year-back rule offered in *Kleinschrodt*[19] and applied to the two-year-back rule in *Kingery*[20] and *Howard* [in the Court of Appeals] contradicts our earlier precedent on the subject as well as the plain language of the statutes."[21] By contrast, in *Kleinschrodt*, five justices stated that "[w]e are of the opinion that the one-year-back provision is a defense, akin to the statute of limitations . . . ."[22]

In sum, for more than 20 years before *Cameron*, the majority in all of the Court's relevant opinions saw no basis for treating any of the provisions of MCL 500.3145(1) differently. In *Welton v Carriers Ins Co*, we made a distinction among the provisions only to the extent of noting that the section contains "two limitations on time of suit and one limitation on period of recovery[.]"[23] Even then, the *Welton* Court saw no basis for treating the provisions differently.[24] Indeed, the law was so well settled that the defendants in *Cameron* did not even argue for different treatment until this Court heard oral argument on appeal.[25]

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[19] *Kleinschrodt v Gen Motors Corp*, 402 Mich 381, 384; 263 NW2d 246 (1978).

[20] *Kingery v Ford Motor Co*, 116 Mich App 606; 323 NW2d 318 (1982).

[21] *Howard*, 427 Mich at 383.

[22] *Kleinschrodt*, 402 Mich at 384.

[23] *Welton v Carriers Ins Co*, 421 Mich 571, 576; 365 NW2d 170 (1984).

[24] *Id.* at 577 n 2 ("Applying the tolling to both the limitation period and the period of recovery accords with common sense, since the only reason for tolling the limitation provision to get plaintiff into court is to allow recovery for that earlier expense.").

[25] *Cameron*, 476 Mich at 89 n 4 (CAVANAGH, J., dissenting). As Justice CAVANAGH observed, defense counsel in *Cameron* did not even divine this argument, but adopted it only after this Court raised the question sua sponte.

Thus, we conclude that *Cameron* erroneously held that MCL 600.5851(1) does not protect a plaintiff's claim from the one-year-back rule. We also hold that this understanding of the interaction between the statutes is equally applicable to the interaction between MCL 600.5821(4) and MCL 500.3145(1). Therefore, the provisions of MCL 600.5821(4) preserving a plaintiff's right to bring an action also preserve the plaintiff's right to recover damages incurred more than one year before suit is filed. The one-year-back rule in MCL 500.3145(1) is inapplicable to such claims.[26]

STARE DECISIS[27]

For the aforementioned reasons, we conclude that

[26] In reaching our decision today, we do not rely on plaintiffs' argument that *Liptow* was inconsistent with the Court of Appeals' decision in *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002). Thus, we need not address Justice MARKMAN's rejection of this argument.

We also decline to comment on Justice MARKMAN's discussion of the "absurd result" doctrine, because we do not rely on it to reach our decision here.

[27] I recognize that there are different approaches used by members of the Court in applying the doctrine of stare decisis. See, e.g., *post* at 310-314 (WEAVER, J., concurring); *post* at 316-317 (HATHAWAY, J., concurring); *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

I believe that our thoughtful and lengthy treatments of whether *Cameron* is entitled to stare decisis respect belie Justice YOUNG's criticism that "today precedent is no longer an 'issue.' " *Post* at 322. Justice YOUNG disdains our positions of the last decade regarding stare decisis as nothing but a "decade-long shrill pretense . . . ." *Post* at 321. But he is incorrect. Not only have our positions been put forth without vitriol and ad hominem innuendos, there has been no pretense about them.

Nor do we simply ignore precedent with which we disagree, as Justice YOUNG once again asserts. It appears that he intends to repeat himself using an identical attack in each and every case in which I vote for a different result than he does. See, e.g., *Esselman v Garden City Hosp*, 486 Mich 892 (2010). But with each repetition, his claims grow less believable.

Cameron was wrongly decided. However, despite the fact that a previous decision was wrongly decided, we must be mindful of the doctrine of stare decisis when deciding whether to overrule it.[28] Our analysis always begins with a presumption that upholding precedent is the preferred course of action.[29] That presumption should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn it.[30] Nonetheless, when analyzing precedent that itself represents a recent departure from established caselaw, we apply a decreased presumption in favor of upholding precedent.[31]

In determining whether a compelling justification exists to overturn precedent, the Court may consider numerous evaluative criteria, none of which, standing alone, is dispositive. Historically, courts have considered (1) whether the precedent has proved to be intolerable

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Finally, Justice YOUNG again quotes a statement I made two years ago and applies it in an altogether different context to impugn my motives for voting as I have in this case. But he has no wisdom concerning my motives, nor do I claim any concerning his. His attack has no proper place in a judicial opinion.

[28] We are at a loss to understand Justice MARKMAN's argument that we deem it "appropriate" to overrule *Cameron* because *Cameron* overruled *Geiger*. *Post* at 337. To be clear, we conclude that it is appropriate to overrule *Cameron* because it was wrongly decided and stare decisis considerations do not support retaining it. Thus, weighing the merits of overruling *Cameron* vis-à-vis overruling *Geiger*, an analysis that his dissent engages in, *post* at 337-338, is not necessary to our analysis. He also claims that our decision to overrule *Cameron* makes the caselaw of our state less consistent with the intentions of the Legislature. *Post* at 338. In most disputes that come before this Court, including this one, the validity of such a claim is undoubtedly in the eye of the beholder.

[29] *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by KELLY, C.J.).

[30] *Id*.

[31] *Adarand Constructors, Inc v Pena*, 515 US 200, 233-234; 115 S Ct 2097; 132 L Ed 2d 158 (1995).

because it defies practical workability, (2) whether reliance on it is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from then existing precedent.

These factors may or may not be applicable in a given case. Nor is there a magic number of factors that must favor overruling a case in order to establish the requisite compelling justification. Rather, this conclusion should be reached on a case-by-case basis.

Here, we first consider whether *Cameron* has proved intolerable because it defies practical workability. Indeed it does. *Cameron* left MCL 600.5851(1) and similar provisions void of effect in many cases while ostensibly protecting an injured party's right to file suit. This created an indefensible paradox and, as such, an unworkable and confusing legal landscape. Consider, for example, the hypothetical case of a boy injured in a car accident at age 12 and fully recovered by age 15. Upon reaching 18, he retains an attorney to file suit to recover the costs associated with the treatment of his injuries, relying on MCL 600.5851(1). The defendant also retains counsel, who responds by filing a motion to dismiss, arguing that none of the plaintiff's damages are recoverable. The trial court parses the parties' filings and determines that none of the plaintiff's costs were incurred in the year before suit was filed.

Under *Cameron*, the plaintiff in this hypothetical case was indisputably entitled to file suit, because MCL 600.5851(1) preserved his right to do so. Yet *Cameron* gutted his suit of any practical worth because, under its interpretation of MCL 600.5851(1), the plaintiff had no chance to recover any damages. Thus, the plaintiff was denied the legal recourse the Legislature provided him, which is, after reaching his majority, to recover the damages he incurred more than a year earlier. Accordingly, we conclude that *Cameron* is frequently innately unworkable.

Second, we consider whether reliance interests weigh in favor of overruling *Cameron*. We conclude that they do. *Cameron* is of recent vintage, having been decided a mere four years ago. Hence, reliance on its holding has been of limited duration. Moreover, *Cameron* represented a sea change in one area of the law and toppled settled interpretations of the no-fault act that had existed almost since the adoption of MCL 600.5851.[32] In doing so, *Cameron* disrupted the reliance interests of the injured minors and the incompetents who relied on its provisions to preserve their claims until removal of their disabilities.

We recognize that there exists a competing reliance interest in the continuing validity of *Cameron*: that of the defendants in no-fault cases. Yet *Cameron*'s evisceration of the crux of a plaintiff's claim—the potential to recover damages—effectively removed altogether the incentive to file suit as permitted by MCL 600.5851(1). We conclude that, while no-fault defendants' reliance on this interpretation is reasonable, it is not itself sufficient to preclude overruling *Cameron* given the extent of *Cameron*'s prejudice to no-fault plaintiffs.

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[32] See n 35 of this opinion.

Third, we consider whether related principles of law have developed since *Cameron*'s interpretation of MCL 600.5851(1) was pronounced. This factor is inapplicable to our stare decisis analysis in this case, as we are aware of no intervening change in the law that further supports or undermines *Cameron*'s continuing legitimacy.

Fourth, we examine whether facts and circumstances have so changed, or have come to be seen so differently, that *Cameron* has been robbed of significant justification. Like the previous factor, we discern no factual or circumstantial changes that counsel for or against overruling *Cameron*. Therefore, this factor also is inapplicable to our analysis.

Fifth, we consider whether other jurisdictions have decided similar issues in a different manner. This factor is likewise inapplicable to our stare decisis analysis. Michigan's comprehensive no-fault insurance scheme is unique to our state. While other states share the fundamental underpinnings of our system, judicial interpretations of the no-fault act have evolved independently of those of other states with similar insurance schemes. Thus, other jurisdictions' interpretations of similar statutes are unhelpful to our analysis in this case.

Sixth, we examine whether upholding *Cameron* is likely to result in serious detriment prejudicial to public interests. We conclude that this factor weighs heavily in favor of overruling *Cameron*. *Cameron* drastically curtailed the protection provided by the Legislature for minors and incompetents. In enacting MCL 600.5851(1), the Legislature conveyed its intention to protect individuals in those groups with unique treatment under the law. The statute represents the culmination of the Legislature's deliberative process. *Cameron* undermined the Legislature's decision to provide a

"year of grace" to infants and incompetents in recognition of their inability to legally act until their disabilities are removed.[33]

Moreover, *Cameron* set an ironic trap for minors and incompetents. As Justice CAVANAGH astutely noted in dissent:

> [I]f a person is injured in a motor vehicle accident while an infant or legally incompetent, and his injuries resolve a year or more before his disability resolves, then [*Cameron*'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.[34]

Thus, what the Legislature intended as a provision to preserve a plaintiff's claims, *Cameron* rendered largely meaningless. In certain circumstances, *Cameron*'s interpretation of the saving provision actually operates to extinguish a claim, not save it.

Finally, we consider whether *Cameron* represented an abrupt and largely unexplained departure from precedent. We conclude that this factor also weighs heavily in favor of overruling *Cameron*. *Cameron* overruled *Geiger*,[35] a Court of Appeals case interpreting the interplay between the saving provision and the no-fault

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[33] See *Cameron*, 476 Mich at 97 (CAVANAGH, J., dissenting).

Moreover, Justice MARKMAN is certainly correct that there is a general public interest in keeping no-fault insurance affordable. However, preserving claims brought by a group specifically protected by the Legislature—minors, incompetents, or state entities—is particularly compelling, given that the Legislature singled out these groups for disparate treatment.

[34] *Id*. at 93 n 6.

[35] *Geiger* cited *Rawlins* for the proposition that MCL 600.5851 applied to the one-year period of limitations in MCL 500.3145(1). Thus, the underlying analytical support for *Geiger* dates back 27 years.

act. *Geiger* was decided in 1982 and stood as the seminal interpretation of the one-year-back rule until *Cameron* unexpectedly swept it aside 24 years later.[36]

Furthermore, as noted, a majority of this Court had concluded before *Cameron* that the one-year-back rule does not apply to claims preserved by tolling. We made this decision even though in *Welton* we described the provisions of MCL 500.3145(1) as "two limitations on time of suit and one limitation on period of recovery[.]"[37] To the extent that *Cameron* held otherwise, it also implicitly overruled *Welton*. Thus, we are firmly convinced that *Cameron* represented an abrupt and largely unexplained departure from precedent.

In summary, *Cameron* is often unworkable, has not engendered valid reliance interests, has caused serious detriment prejudicial to public interests, and represented an abrupt and largely unexplained departure from precedent. Accordingly, we conclude that a compelling justification exists for overruling it.[38]

CONCLUSION

We overrule our decision in *Cameron* and the Court of Appeals' decision in *Liptow*. Entities listed in MCL 600.5821(4) may bring an action and recover costs notwithstanding the limiting provisions of MCL 500.3145(1), including the one-year-back rule. There-

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[36] Given that our decision does nothing more than restore the law to its pre-2006 state, we find defendant's assertion that overruling *Cameron* will have "devastating effects" highly questionable.

[37] *Welton*, 421 Mich at 576.

[38] Justice MARKMAN is correct that a majority of this Court has overruled several precedents this term. But it is an overstatement for his dissent to characterize this as a mass or flood of overrulings. *Post* at 340. This is particularly true given that almost every case overruled this term is one in which the former majority departed from settled jurisprudence to establish a new rule of law.

fore, we reverse the judgment of the Court of Appeals in this case and remand the case to the circuit court for further proceedings consistent with this opinion.

CAVANAGH, WEAVER (except for the part entitled "Stare Decisis"), and HATHAWAY, JJ., concurred with KELLY, C.J.

WEAVER, J. (*concurring*). I concur in and sign all of the majority opinion except the section entitled "Stare Decisis." I write separately to note that in addition to the reasons given in the majority opinion, I also believe that *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), should be overruled for the reasons in my dissent to the *Cameron* decision. *Id*. at 104.

In *Cameron*, the majority failed to give proper effect to the language contained in MCL 500.3145(1).[1] As I noted in my *Cameron* dissent, the "one-year-back rule" is not a period of limitations as interpreted by the majority. *Id*. at 106. Rather, the "one-year-back rule" is part of the statute that details how to apply the tolling provision contained in the period of limitations laid out in the first sentence of MCL 500.3145(1). *Id*. at 106-107. By holding that the one-year-back rule was a period of

[1] MCL 500.3145(1) states:

> 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.

limitations, the *Cameron* majority failed to "give meaning to the actual text of the statute." *Id*. at 108.

In addition to the lack of restraint of the *Cameron* majority's use of the judicial power of interpretation, Chief Justice KELLY's majority opinion in this case shows that the *Cameron* majority failed to exercise common sense and fairness. As noted in Chief Justice KELLY's majority opinion in this case, *Cameron* resulted in the Legislature's saving provisions regarding minors and governmental entities becoming hollow rights when injuries occurred more than a year before a lawsuit was filed.

On the subject of stare decisis, Justice YOUNG's dissent in this case attempts to deceive the public. It attempts to lump together the four justices who agree with parts of the majority opinion into having had some sort of previously stated fidelity to stare decisis that those justices have abandoned since former Chief Justice TAYLOR's overwhelming defeat in the 2008 election.

Justice YOUNG's dissent quotes various past statements, made by those justices signing portions of the majority opinion, regarding stare decisis and criticizing the former "majority of four" (former Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN). With respect to myself, the dissent quotes a statement I made in response to the improper and unfair dismantling of decades of longstanding insurance contract law by the former "majority of four" in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). In *Devillers*, I stated: "Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis *in this case*." *Id*. at 622 (WEAVER, J., dissenting) (emphasis added).

Justice YOUNG's dissent uses my *Devillers* statement in what appears to be an attempt to try to get people to believe that I have somehow changed my view of stare decisis since former Chief Justice TAYLOR was defeated. The dissent's misleading assertions are simply incorrect.

My *Devillers* statement itself shows that I was criticizing the disregard for stare decisis in that *specific case*. My *Devillers* statement is an example of my service to the rule of law and a partial expression of my view of the policy of stare decisis, which is that past precedent should generally be followed but that, in deciding whether wrongly decided precedent should be overruled, each case should be looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness.

Justice YOUNG's dissent cannot point to a statement where I professed some sort of position regarding stare decisis as an immutable doctrine because I have not taken that position and therefore have made no such statements. Justice YOUNG's various dissents continue to mischaracterize my positions by making inaccurate statements, using partial quotations taken out of context, and omitting relevant information in an apparent attempt to deceive readers.[2]

I agree with the sentiment recently expressed by Chief Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v Fed Election Comm*, 558 US ___, ___; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010), when he said that

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[2] I will leave it to the people of Michigan to judge and determine my commitment to the rule of law, judicial restraint, common sense, fairness, and independence.

> *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 [123 S Ct 2472; 156 L Ed 2d 508] (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 [60 S Ct 444; 84 L Ed 604] (1940) . . . . If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967).

Chief Justice Roberts further called stare decisis a "principle of policy" and said that it "is not an end in itself." *Id*. at ___; 130 S Ct at 920; 175 L Ed 2d at 807. He explained that "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id.* at ___; 130 S Ct at 921; 175 L Ed 2d at 807.[3]

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[3] It appears that Justice YOUNG does not agree with Chief Justice Roberts. In Justice YOUNG's dissent, he lists 12 cases that have been overruled by this Court in the past 18 months. While Justice YOUNG may feel aggrieved by this Court overruling those 12 cases, amongst those cases were some of the most egregious examples of judicial activism that did great harm to the people of Michigan. Those decisions were made by the "majority of four," including Justice YOUNG, under the guise of ideologies such as "textualism" and "judicial traditionalism." Justice YOUNG's apparent contempt for the common law and common sense can be seen in his 2004 article in the Texas Review of Law and Politics, where Justice YOUNG stated:

I agree with Chief Justice Roberts that stare decisis is a policy and not an immutable doctrine. I chose not to sign Chief Justice KELLY's lead opinion in *Petersen v Magna Corp*, 484 Mich 300, 316-320; 773 NW2d 564 (2009), because it proposed to create a standardized test for stare decisis. Likewise, I do not sign the majority opinion's stare decisis section in this case because it applies *Petersen*. There is no need for this Court to adopt any standardized test regarding stare decisis. In fact, it is an impossible task. There are many factors to consider when deciding whether or not to overrule precedent, and the importance of such factors often changes on a case-by-case basis.[4]

> Consequently, I want to focus my remarks here on the embarrassment that the common law presents—or ought to present—to a conscientious judicial traditionalist. . . .
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> To give a graphic illustration of my feelings on the subject, I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party. Grandpa's presence is undoubtedly a cause of mortification to the host. But since only the most ill-bred of guests would be coarse enough to comment on Grandpa's presence and condition, all concerned simply try ignore him. [Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 301-302 (2004).]

[4] Over the past decade, the principal tool used by this Court to decide when a precedent should be overruled is the set of guidelines that was laid out in *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), an opinion written by former Justice TAYLOR that Justices CORRIGAN, YOUNG, MARKMAN, and I signed, and that I have used numerous times. By no means do I consider the *Robinson* guidelines a "be-all, end-all test" that constitutes precedent of this Court to be used whenever this Court considers overruling precedent. I view *Robinson* as merely providing guidelines to assist this Court in its legal analysis when pertinent. I note that my position in *Devillers* is in no way inconsistent with my position on stare decisis in this case, nor is it inconsistent with any position on stare decisis that I have taken in other cases, such as *Robinson*. *Devillers* involved the "majority of four" overruling precedent involving contract interpretation from a case that was nearly twenty (20) years old. In my

In the end, the consideration of stare decisis and whether to overrule wrongly decided precedent always includes service to the rule of law through an application and exercise of judicial restraint, common sense, and a sense of fairness—justice for all.

In serving the rule of law and applying judicial restraint, common sense, and a sense of fairness to the case at hand, I agree with and join the majority opinion's holding that *Cameron* is overruled.

HATHAWAY, J. (*concurring*). I fully concur with Chief Justice KELLY's analysis and conclusion in this matter and support overruling *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006). I also fully concur with Justice WEAVER's stare decisis analysis in her concurring opinion. I write separately to express my own thoughts on the doctrine of stare decisis.

Given the debate amongst the justices of this Court concerning what constitutes the proper stare decisis analysis, I find it insightful to review how our United States Supreme Court has treated the doctrine. Stare decisis is a principle of policy that commands judicial respect for a court's earlier decisions and the rules of law that they embody. See *Harris v United States*, 536 US 545, 556-557; 122 S Ct 2406; 153 L Ed 2d 524 (2002); *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940). "*Stare decisis* is the preferred

Devillers dissent, I noted that I agreed with the majority's interpretation that the old precedent was incorrect, but given the passage of time since that specific precedent was decided, the Court should not disturb that longstanding precedent because the law had become so ingrained that to overrule it would harm the reliance interests of parties in insurance cases. My position in *Devillers* was entirely consistent with the reliance prong of the *Robinson* guidelines. My position in the instant case is also consistent with the reliance prong of the *Robinson* guidelines since *Cameron*, the case which is now being overruled, was only decided four (4) years ago.

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." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). However, when balancing the need to depart from precedent with the need to adhere to established precedent, it is important to bear in mind that stare decisis is neither an "inexorable command," *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering*, 309 US at 119. "If it were, *segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.* See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967)." *Citizens United v Fed Election Comm*, 558 US __, __; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010) (Roberts, C.J., concurring).

I too believe that stare decisis is a principle of policy. As stated in *Helvering*:

> We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adher-

> ence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.[1]

I do not agree with any approach to stare decisis that suggests or implies that it is a "rule" or "law" subject to a particularized test to be used in all circumstances. Any particular approach to stare decisis, such as the one taken in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), is not "law" or "established precedent" that would require us to overrule, reject, or modify its analysis. The *Robinson* approach to stare decisis, just as the one taken in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009), is one among many varying approaches, and no particular approach, in and of itself, is inherently superior to another. As with any policy determination, the approach taken in any given case will depend on the facts and circumstances presented.

Historically, the United States Supreme Court has utilized many different approaches to stare decisis, including such approaches as those involving a "compelling justification,"[2] "special justification,"[3] and a determination that a case was "wrongly decided."[4] Each of these approaches is valid and offers a different nuance to stare decisis consideration.[5] However, because stare decisis is a policy consideration, which must be considered on a case-by-case basis, the particular

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[1] *Helvering*, 309 US at 119.

[2] See *14 Penn Plaza LLC v Pyett*, 556 US 247, 280; 129 S Ct 1456; 173 L Ed 2d 398 (2009) (Souter, J., dissenting).

[3] *Arizona v Rumsey*, 467 US 203, 212; 104 S Ct 2305; 81 L Ed 2d 164 (1984).

[4] *Seminole Tribe of Florida v Florida*, 517 US 44, 66; 116 S Ct 1114; 134 L Ed 2d 252 (1996).

[5] Any of these approaches to stare decisis can be valid depending on the issues before the court. However, the factors used in any of these tests may or may not be applicable in any given case.

analytical approach will differ from case to case. Most importantly, the critical analysis should be on the rationale regarding whether or not to change precedent.

It is also worthy to note that not only has the United States Supreme Court historically not taken one single approach to the application of stare decisis, the Court has not felt compelled to discuss stare decisis in all cases when precedent is being overturned. Many landmark cases that overruled well-established precedent did not discuss or even mention the phrase "stare decisis." For example, *Brown* overruled *Plessy*, thereby ending segregation in our public schools, without mentioning the phrase "stare decisis," much less articulating and following a particularized test. Similarly, *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), which established the rights of indigents to have counsel in all criminal cases, not merely capital offenses, overruled *Betts v Brady*, 316 US 455; 62 S Ct 1252; 86 L Ed 1595 (1942), again without mentioning "stare decisis" or a particularized test. Instead, both of these cases focused on the important policy considerations that weighed in favor of overruling precedent.[6]

With these principles in mind, any analysis of the impact of stare decisis must focus on the individual case and the reason for overruling precedent. Thus, the reasons for overruling *Cameron* are paramount to any articulated test and the special and compelling justifications to do so are overwhelming in this case. As I

[6] See Supreme Court Decisions Overruled By Subsequent Decisions, available at <http://www.gpoaccess.gov/constitution/pdf2002/048.pdf> (accessed July 28, 2010), for a partial list of United States Supreme Court cases (covering the period from 1810 to 2001) that overrule precedent. Numerous additional examples can be found on this list of cases that do not mention or discuss the phrase "stare decisis" despite the fact that the case overrules precedent.

agree with the well-articulated reasons expressed by Chief Justice KELLY, I will not repeat them here.

KELLY, C.J. (*concurring*). I authored the majority opinion in this case and therefore join it in its entirety. I write separately because Justices YOUNG and CORRIGAN continue to misleadingly refer to a statement I made off the bench nearly two years ago that was published by the *Detroit Free Press*.[1] They seem to believe that this statement provides them insight into my motivation for voting as I have in every subsequent case that has come before the Court. They are manifestly incorrect. To be clear, my remark reflected my desire to "undo . . . the damage" done to the good reputation of this Court as an institution during the former majority's tenure.[2] My only "agenda" was and is to restore nationwide respect to this Court and to chart a new course of civility.[3] Of course, I do not control Justice YOUNG's pen. His dis-

[1] *Post* at 322-323. Justice YOUNG has cited my statement on numerous occasions, impugning my motives for voting as I did on each occasion. See, e.g., *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 532; 791 NW2d 853 (2010) (YOUNG, J., dissenting); *Pollard v Suburban Mobility Auth for Regional Transp*, 486 Mich 963, 965 (2010) (YOUNG, J., dissenting); *Idalski v Schwedt*, 486 Mich 916, 918 (2010) (YOUNG, J., dissenting); *People v Feezel*, 486 Mich 184, 221 n 13; 783 NW2d 67 (2010) (YOUNG, J., dissenting); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (YOUNG, J., dissenting); *Hoover v Mich Mut Ins Co*, 485 Mich 881, 882 (2009) (YOUNG, J., dissenting); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853, 856 (2009) (YOUNG, J., dissenting).

[2] See Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, NY Times, January 19, 2007, available at <http://www.nytimes.com/2007/09/us/19michigan.html?_r=1> (accessed July 28, 2010).

[3] I do not find it "disquieting" that Justice YOUNG quotes my remark. Rather, I find it disquieting that Justices YOUNG and CORRIGAN conclude in a legal opinion that the remark was made with a "dreadful," "disquieting," and "scurrilous" intent.

In regard to the quoted portion of my statement referring to my pledge to not sleep on the bench, Justice YOUNG does not tell the whole

senting opinion demonstrates that my efforts in the area of civility have not yet been as successful as I hoped.

Written opinions serve an important function in the judicial process: they provide a forum in which the majority and dissenting justices debate the legal issues raised in cases. Sometimes that debate focuses on a narrow question. Other times, the debate extends to broader legal questions with wider implications, such as the doctrine of stare decisis, a particularly controversial matter.

It is no secret that the philosophical divisions among the justices on this Court are deep. For some years now, our disagreements on legal questions have erupted in occasionally heated and unpleasant personal recriminations. This case is a perfect example.[4]

I know that, if asked, both Justices YOUNG and CORRIGAN would agree with my sentiments and would deplore these outbursts. Both justices fully understand

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story. The day after I was elected Chief Justice, I was specifically asked if I had been referring to former Chief Justice TAYLOR in my statement. As the *Detroit Free Press* explained:

> Outside the hearing, Kelly pledged to seek common ground with her colleagues and said her comment about the sleeping on the bench was metaphorical, not meant as an endorsement of the Democratic Party ad attacking Taylor. She said she had not seen him sleeping during the case the ad cited. [Dawson Bell, *Statewide: After 10 Years of the GOP, Dem to Lead High Court*, Detroit Free Press, January 9, 2009, p 3B.]

As I indicated then, I will not engage in character assassinations of my current or former colleagues.

[4] The quotations cited by Justice YOUNG, *post* at 328 n 12, accurately point out strong language I have used in the past to criticize the former majority's *legal* reasoning in various cases. But this is far different from Justice YOUNG's criticism today, the chief purpose of which is to impugn my motives in reaching legal conclusions, thus attacking my character.

that personal recriminations reduce the public's confidence in the objectivity and wisdom of judges and in the Court as an institution.

With these reflections in mind, I urge them to reevaluate the utility of their ad hominem attacks and eliminate them. Surely each has significant confidence in the strength of their legal arguments to allow those arguments to stand on their merits, absent distracting attack props. Moreover, their personal assaults do nothing to resolve the legal issues before us; they do not benefit the parties to a case or the citizens of Michigan whom we serve.

I sincerely regret having to address these matters in the first place and would prefer that this opinion were not necessary. But I cannot stand passively by and allow Justices YOUNG and CORRIGAN to accuse me and the justices in the "new majority" of being unprincipled and driven by inappropriate motives. Their attacks wrongly accuse Justices CAVANAGH, WEAVER, HATHAWAY, and me of reaching predetermined outcomes in many, if not all, cases rather than following the law, as we are sworn to do.

People respect the judiciary only insofar as they believe that judges decide cases impartially and without ulterior motives. Justices YOUNG's and CORRIGAN's assertions in this and previous cases that we have an "agenda" that involves selecting and overturning certain precedents is unfair and untrue. Furthermore, it undermines respect both for the justices attacked and for those making the unwarranted accusations. Most importantly, it reduces public confidence in the judiciary as a whole.

YOUNG, J. (*dissenting*).

Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court,

> revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.
>
> —Antonin Scalia, in *Morrison v Olson*[1]

I agree entirely with Justice MARKMAN's dissenting opinion in this case. I write separately only to note that, today, the decade-long shrill pretense of several of my colleagues' adherence to "preserving precedent" is over. The concurring opinions of Justices WEAVER and HATHAWAY make clear that there is no longer any need for them to pretend that "precedent" is anything sacred for the "new majority" of this Court.[2] That mask has now been cast aside. After a decade of dissents in which Justices CAVANAGH, WEAVER, and KELLY played the recurrent theme that they were hawk-like adherents to stare decisis,[3] attacking the then majority—Justices TAYLOR, CORRIGAN, MARKMAN, and me—for failing to preserve cases with whose results

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[1] 487 US 654, 712; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (Scalia, J., dissenting).

[2] "New majority" is the self-description selected by Chief Justice KELLY. See text accompanying footnote 6 of this opinion.

[3] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) (" 'We have overruled our precedents when the intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes.' "), quoting *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "),

they agreed,[4] today precedent is no longer an "issue." Nor is precedent now an issue for my newest colleague, Justice HATHAWAY, although her campaigns for election to the Court of Appeals and this Court featured prominently her position adamantly proclaiming an absolutist support for stare decisis.[5]

The new majority, being a majority, is now free to do as it pleases. And it pleases the new majority to honor the agenda to which our new Chief Justice pledged them after the defeat of Chief Justice TAYLOR in 2008:

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quoting *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622; 702 NW2d 539 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case.").

[4] In addition to the vigorous responses to these charges that each justice—TAYLOR, CORRIGAN, MARKMAN, and I—gave in our respective cases, Justice MARKMAN has already explored, at great length, the general charge that the former majority was disrespectful of precedent. See *Rowland*, 477 Mich at 223-247 (MARKMAN, J., concurring). His conclusions demonstrate quite the opposite: that while we did, in fact, overrule some prior cases, those precedents had either failed to follow even more established precedents from this Court or failed to accord the appropriate and text-based meaning to the words of this state's statutes or constitution. Moreover, we specifically set forth a test explaining the explicit standards by which a case would be reviewed in determining whether overruling it would be appropriate. See *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). Notably, this test is the *only* test to garner support from a majority of this Court, even though all members of the new majority now treat it, alternatively, as "one among many varying approaches," *ante* at 316 or, worse still, not existent at all. See, e.g., *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). These standards stand in sharp contrast to the actions of the new majority and, in particular, the legal relativism espoused by the concurring opinions today.

[5] Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006 (quoting Justice HATHAWAY, then running for a position on the Court of Appeals, as saying that "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent").

> We the new majority [Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY] will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench.[6]

The new majority has not been shy about acting on its agenda to "undo" the precedents of the "Republican-dominated court." In the 18 months of its existence, the new majority has moved muscularly in making good on this promise. Just in this term alone, the new majority has overturned the following cases recently decided by this Court:

1. In *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010), the new majority overruled *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

2. In *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), the new majority overruled *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the new majority overruled (at least) the following cases:

3. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001);

4. *Crawford v Dep't of Civil Serv*, 466 Mich 250; 645 NW2d 6 (2002);

5. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004);

6. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117; 693 NW2d 374 (2005);

7. *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006);

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[6] *She Said*, Detroit Free Press, December 10, 2008, p 2A.

8. *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007);

9. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007); and

10. *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008).

11. In *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010), the new majority expressly overruled the limited retroactive effect of *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

12. And in this case, the new majority now overrules *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006).

And this list is separate and distinct from those cases in which the new majority has ignored or otherwise failed to follow other recently decided precedents of this Court,[7] or

[7] See, e.g., *Hardacre v Saginaw Vascular Servs*, 483 Mich 918 (2009), in which the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), in which it failed to follow *Chrysler v Blue Arrow Transp Lines*, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest Sch Dist (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), in which it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244-245; 736 NW2d 561 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), in which it failed to follow *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Mich State Univ*, 485 Mich 917 (2009), in which it failed to follow *Rowland*; *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009), in which it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of Am*erica, 454 Mich 626; 563 NW2d 683 (1997); and *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009), in which it failed to follow *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004).

From this term, see also *Esselman v Garden City Hosp*, 486 Mich 892 (2010), in which it again failed to follow *Roberts*, 470 Mich 679.

the case that the new majority implicitly overruled by enacting a contradictory court rule.[8] Several justices have even gone so far as to call into question the continued validity of precedents that are in no relevant way before the Court.[9] Indeed, by expressly overruling cases this term when, last term, it simply ignored or implicitly overruled them, the new majority has become *more aggressive* in achieving its policy agenda.

It is a touch more than ironic that Justices WEAVER and HATHAWAY now argue that well-established principles of stare decisis must give way to a justice's *subjective* view of a case. This process produces a result whereby the parties and the public will never know what criteria or standards several justices on this Court will employ until *after* the decision has been made. This ad hoc, subjective process is the very antithesis of the "rule of law" and instead denotes a system hijacked by the concurring justices, who appear to be guided and constrained only by their personal beliefs. That stare decisis is a "principle of policy," as Justice HATHAWAY repeats many times, does *not* mean that analysis of a case pursuant to the doctrine should be driven by each judge's *personal policy choices*.[10] Nor does the fact that

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[8] The new majority recently amended MCR 2.112 and MCR 2.118, and the amendment effectively overruled this Court's precedent in *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007). 485 Mich cclxxv, cclxxxi-ccxciii (order entered February 16, 2010) (dissenting statements of CORRIGAN, YOUNG, and MARKMAN, JJ.).

[9] See *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 506 n 22; 791 NW2d 853 (2010) (opinion by HATHAWAY, J., joined by WEAVER, J.) (calling into question the continued validity of *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 [2001], regarding the doctrine of lost opportunity to survive, even though *O'Neal* in no way involved a claim for lost opportunity to survive).

[10] In particular, Justice HATHAWAY apparently fails to understand that stare decisis, even as a principle of judicial policy, does not equate with a judge making individual "policy determination[s]," *ante* at 316, as if she

stare decisis is a "principle of policy" mean that judges need not announce a fixed set of principles that will guide their decisions.[11] Yet this is precisely what char-

were a citizen-legislator. As any student of the law can explain, her theory represents the precise *opposite* principle that governs courts in a society based on the rule of law. Judges serve an important yet *limited* role in a constitutional republic. Not being of the policy-making branches of government, they should never base their decisions on their own subjective policy beliefs. If nothing else, Justice HATHAWAY's admission that she is making her own personal "policy determination[s]" in cases at least provides a view into what has driven many of the decisions produced by the new majority.

[11] My criticism of Justice WEAVER's approach is not, as she alleges, that she has subscribed to a theory of stare decisis as an "inexorable command" that she now rejects. In fact, it is precisely the opposite: *She often subscribes to no objective test whatsoever.* Cases from time to time may need to be overruled, but the ultimate problem with Justice WEAVER's approach is that she relies on her *subjective* application of "judicial restraint, common sense, and a sense of fairness—justice for all," rather than any defined legal standard in making these decisions. And unlike her prior protests that "[c]orrection for correction's sake does not make sense," *Devillers*, 473 Mich at 622, Justice WEAVER is now working to "correct" and overrule as many recent precedents as possible. Worse still, she is content to do so without any serious stare decisis analysis as long as doing so does not offend her subjective "sense of fairness." And, as the public is no doubt aware, "common sense" is not so common and Justice WEAVER has no greater fund of common sense than anyone else. If for no other reason, that is why simply "following the law" is the best course for any serious jurist committed to the "rule of law" rather than the "rule of judges."

Justice WEAVER also selectively quotes without context a passage from an extended law review article that I authored. See Robert P. Young, Jr., *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299 (2004). The article was designed to highlight, in an arresting way, how difficult it should be for any judge committed to the rule of law to make the difficult policy choices necessary when modifying the common law. Quite simply, policy-making in the judiciary is one of least desirable and most difficult things for judges to do. This is because it is hard to assess the trade-offs that competing policies might create, especially when, unlike the Legislature, judges cannot consider the competing policy positions of interest groups affected by the issue in question. However, since Justice WEAVER is not committed to the rule of law, but instead applies her brand of "common sense," she has no qualms with judicial policy-making in any context—common law or otherwise. This fact is attested to by her concur-

acterizes Justices WEAVER and HATHAWAY's unique brand of feckless jurisprudence announced today.

The rule of law, by definition, requires judges to decide cases on the basis of principles, announced in advance, rather than on a personal or subjective preference for or against a party before them. This ensures stability in the law despite the diversity of judges' personal beliefs. Whether we, as judges, "like" the outcome is, quite simply, *irrelevant* to whether it reflects a correct conclusion of law. It is harrowing that Justices WEAVER and HATHAWAY either do not understand this concept or refuse to subscribe to it, preferring to base their decisions on subjective "policy consideration[s]."

Finally, Chief Justice KELLY has tried on several occasions to explain away what she meant when she said the "new majority" would "undo . . . the damage [of] the Republican-dominated court," as she again attempts today. Chief Justice KELLY finds it disquieting that I quote her remarks about the "new majority's" agenda. She should. Her remarks *are* as disquieting as they are scurrilous. What is noteworthy is that Chief Justice KELLY has never repudiated what she said, apologized for it, or sufficiently explained why that statement doesn't mean what it plainly says. Instead, she merely prefers that I not repeat it for reasons that are obvious to all. Rare is it that a judge publicly tells the public that she has an agenda and what it is. I am glad that the Chief Justice was so candid because everyone can examine her conduct in light of her statement. Her motivations for making this dreadful remark and whether her subsequent resolution of cases is consistent with her remark are questions for the public to decide.

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rence here and illustrated in recent decisions handed down by the new majority that she has signed.

Moreover, after being the target of much *un*civil criticism by then Justice KELLY over the years, I am nonplussed by the Chief Justice's pique at the passion of my dissent and the tone in which I have expressed it. One need only review the Chief Justice's dissenting opinions over the years to acknowledge that her views on civility have conveniently changed as quickly as the new majority's view regarding the importance of preserving precedent.[12] Now that she is part of this Court's

[12] See, e.g., *People v Smith*, 478 Mich 292, 331, 335 n 4, 339 n 13; 733 NW2d 351 (2007) (KELLY, J., dissenting) (accusing the majority of "again unnecessarily chip[ing] away at the Double Jeopardy Clause" and "mangling" double jeopardy jurisprudence and noting that "in its zeal, [the majority] will at times punish a defendant twice for the same offense"); *Rowland*, 477 Mich at 256-257 & n 13, 266 (KELLY, J., concurring in part and dissenting in part) ("The majority has ordained itself master of such 'higher law' [i.e., law ' "manufactured for each special occasion out of our own private feelings and opinions" ']. In doing so, it undermines the stability of Michigan's courts and damages the integrity of the judicial process."; among other charges, Justice KELLY also alleged that the majority had launched an "unprecedented attack on stare decisis," was "overturning precedent will-nilly," and "disrespect[ed] . . . past justices of the Michigan Supreme Court.") (citation omitted); *Rory v Continental Ins Co*, 473 Mich 457, 492; 703 NW2d 23 (2005) (KELLY, J., dissenting) ("The majority's decision constitutes a serious regression in Michigan law, and it gives new meaning to the term 'judicial activism.' . . . [T]he majority [reaches an unnecessary issue], apparently using this dispute as a vehicle to reshape the law on adhesion contracts more closely to its own desires."); *People v Davis*, 472 Mich 156, 190; 695 NW2d 45 (2005) (KELLY, J., dissenting) ("[The majority] destabilizes our state's jurisprudence. It suggests to the public that the law is at the whim of whoever is sitting on the Supreme Court bench. Surely, it erodes the public's confidence in our judicial system."); *Terrien v Zwit*, 467 Mich 56, 92; 648 NW2d 602 (2002) (KELLY, J., dissenting) (characterizing the majority opinion as "the embodiment of judge-made law" because, to Justice KELLY, it "engrafts its own version of what the law should be" and "discard[s] the knowledge and wisdom of those who came before the current Court"); *Sington v Chrysler Corp*, 467 Mich 144, 179 n 8, 180, 184; 648 NW2d 624 (2002) (KELLY, J., dissenting) (characterizing her actions as "a matter of not falling prey to a zealot's conviction that what has been done in the past by others has been simply wrong . . . ." "When a Court pays no more than

philosophical majority, her criticism of my impassioned tone recalls a line from Shakespeare: "The lady doth protest too much, methinks."[13]

Moreover, the Chief Justice's calls for civility are especially hypocritical given the very ugly reference she made to the false "sleeping judge" ads that played so prominent a role in the campaign to defeat Chief Justice TAYLOR in 2008. Given the context that this remark was made just after the defeat of Chief Justice TAYLOR in the last election, Chief Justice KELLY's final comment that "we will not sleep on the bench" was a particularly uncivil reference denigrating our distinguished former colleague.[14] Chief Justice KELLY was present during the arguments of the case in which it was falsely asserted that Chief Justice TAYLOR fell asleep, and she knew, or should have known, that the claim was false. These facts are impossible to square with her current desire to improve civility among members of the Court.

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lip service to [stare decisis], the basic integrity of the legal system itself is shaken. . . . So it is that, in the history of this and of the vast majority of supreme courts across the land, overrulings of precedent are infrequent. Yet, quite the opposite is true of the present Michigan Supreme Court. It is for that reason that, the majority's pronouncements to the contrary notwithstanding, one may wonder whether reasoned adherence to stare decisis may properly be considered a policy of this Court."); *Robinson*, 462 Mich at 491 (KELLY, J., concurring in part and dissenting in part) ("The majority's casual disregard for this Court's past opinions suggests to future courts that they do the same and creates instability in the law of this state. The reasons proffered to overrule [the past precedents] are based solely on the majority's subjective, contrived interpretation of the statutes involved.").

[13] Shakespeare, *Hamlet*, act 3, sc 2 (Gertrude, Queen of Denmark).

[14] It is this context that makes her after-the-fact rationalization that she was merely being "metaphorical" hard to believe. The credibility of her explanation for this is a matter for the public to decide, as is the credibility of her explanation that her statement does not refer to a substantive agenda to overturn jurisprudence decided by the prior majority.

The public should be just as indignant as I am—not only regarding the hypocrisy of the new majority's radically changing views on the question of preserving precedents, but also with its equally radically subjective approach to the law. I will continue to strive to bring such issues to the public's attention. The public may judge whether the former majority's or this new majority's opinions provided greater predictability in the law and were more faithful to the actual language of the statutes, or whether the legislative "work product" was disregarded for the pet policies of the several justices who formed these respective majorities. Indeed, in a constitutional republic where judges are elected, it is the obligation of the public to do just that. Otherwise, for the foreseeable future, the public can look forward to more "damage control" in the form of brash judicial activism from the new majority.

CORRIGAN, J., concurred with YOUNG, J.

MARKMAN, J. (*dissenting*). I dissent from the instant decision overruling *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), which held that the no-fault automobile insurance act's one-year-back rule, MCL 500.3145(1), is a damages-limiting provision, not a statute of limitations, and *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544; 726 NW2d 442 (2006), which held that MCL 600.5821(4) does not preclude the application of the one-year-back rule.[1]

[1] On November 26, 2008, this Court denied leave to appeal in this case, although Chief Justice KELLY and Justices CAVANAGH and WEAVER would have granted leave to appeal. 482 Mich 1074 (2008). However, after the composition of this Court changed when Justice HATHAWAY replaced former Chief Justice TAYLOR on January 1, 2009, this Court granted plaintiffs' motion for reconsideration even though the motion did not raise any new legal arguments. 484 Mich 852 (2009).

MCL 500.3145(1), part of the no-fault automobile insurance act, 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."[2] (Emphasis added.) This is known as the one-year-back rule. MCL 600.5821(4), part of the Revised Judicature Act (RJA), provides, in pertinent part:

> Actions brought in the name of . . . any political subdivision of the state of Michigan[3] . . . for the recovery of the cost of maintenance, care, and treatment of persons in hospitals . . . are not subject to the *statute of limitations* and may be *brought* at any time without limitation, the provisions of any statute notwithstanding. [Emphasis added.]

In *Cameron*, this Court held that the minority/insanity tolling provision of the RJA, MCL 600.5851(1), which

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[2] In its entirety, MCL 500.3145(1) 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.* 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 therefore, 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.]

[3] It is undisputed that the University of Michigan Health System constitutes a political subdivision of the state of Michigan for purposes of this statute.

addresses when one may "bring [an] action,"[4] does not preclude the application of the no-fault automobile insurance act's one-year-back rule because the latter only limits the amount of benefits that can be recovered, i.e., the one-year-back rule is a damages-limiting provision rather than a statute of limitations. See also *Howard v Gen Motors Corp*, 427 Mich 358, 385-386; 399 NW2d 10 (1986) (lead opinion by BRICKLEY, J.) (explaining that the one- and two-year-back rules of the Worker's Disability Compensation Act are not statutes of limitations).[5] I continue to believe that *Cameron* was correctly decided.

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[4] MCL 600.5851(1), in its entirety, provides:

> Except as otherwise provided in [MCL 600.5851(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 [MCL 600.5852]. [Emphasis added.]

[5] As explained in *Howard* about the one- and two-year-back rules of the Worker's Disability Compensation Act:

> A statute of limitations "represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action." *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982).
>
> * * *
>
> Thus, relying on these very basic definitions of statutes of limitations, the one- and two-year-back rule statutes may not be so categorized. 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 one-year-back rule "limits the amount of personal protection insurance (PIP) benefits recoverable to those incurred within one year before the action was commenced." *Cameron*, 476 Mich at 58 n 1. As *Cameron* explained:

> 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). [*Id.* at 62.]

That is, the one-year-back rule by its straightforward language serves 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 RJA's 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

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> . . . 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.
>
> Therefore, on the basis of the language of the rules, we perceive no logical reason for characterizing the one- and two-year-back rules as statutes of limitations. [*Howard*, 427 Mich at 384-387 (lead opinion by BRICKLEY, J.).]

> 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." [*Id.* at 77 (MARKMAN, J., concurring).]

The majority apparently believes that it is appropriate to overrule *Cameron* because *Cameron* overruled *Geiger v Detroit Auto Inter-Ins Exch*, 114 Mich App 283; 318 NW2d 833 (1982).[6] First, *Geiger* was a Court of Appeals decision, and thus not binding upon this Court.[7]

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[6] Justice WEAVER would also overrule *Cameron* because it is inconsistent with "the reasons in [her] dissent to the *Cameron* decision." In her dissent, she concluded that the one-year-back rule applies when the plaintiff is able to bring an action beyond one year from the date of the accident because he provided notice or was previously paid benefits, but does not apply when notice was not provided and benefits were not previously paid. However, as *Cameron* itself explained, 476 Mich at 69-72, such a conclusion is inconsistent with the clear language of MCL 500.3145(1), which contains three pertinent provisions. The first provides that if notice was not provided and benefits were not previously paid, the action must be filed within one year after the accident. The second provides that if notice was provided or benefits were previously paid, the action must be filed within one year after the most recent allowable loss was incurred. And the third, known as the one-year-back rule, provides that losses incurred more than one year before an action was filed cannot be recovered. There is no indication whatsoever in the statute that the Legislature intended that the third provision only apply where notice has been provided or benefits have been previously paid.

[7] Moreover, contrary to the majority's suggestions, *Cameron* is not at all inconsistent with *Lambert v Calhoun*, 394 Mich 179, 181; 229 NW2d 332 (1975), which held that the minority/insanity tolling provision of the RJA "extends the time for bringing suit under an act which contains its own statute of limitations"; with *Rawlins v Aetna Cas & Surety Co*, 92 Mich App 268; 284 NW2d 782 (1979), which held that the minority/insanity tolling provision of the RJA applies to the period of limitations contained in the no-fault automobile insurance act; with *Kleinschrodt v Gen Motors Corp*, 402 Mich 381; 263 NW2d 246 (1978), which held that the one-year-back rule of the Worker's Disability Compensation Act is a defense that can be waived; or with *Welton v Carriers Ins Co*, 421 Mich 571; 365 NW2d 170 (1984), which held that the one-year-back rule of the no-fault act is not tolled by submitting a general

Catalina Mktg Sales Corp v Dep't of Treasury, 470 Mich 13, 23; 678 NW2d 619 (2004). Second, as *Cameron* itself explained:

> In reaching this conclusion the Court of Appeals [in *Geiger*], 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).
>
> 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. 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

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notice of injury to the insurer that does include a claim for specific benefits. Indeed, no case other than *Geiger* has held that the minority/insanity tolling provision of the RJA applies to the one-year-back rule of the no-fault act. Although the lead opinion characterizes *Welton* as holding "that the one-year-back rule does not apply to claims preserved by an applicable tolling or saving provision," and accuses *Cameron* of "implicitly overrul[ing] *Welton*," *Welton* held no such thing. *Welton*'s statement that "[a]pplying the tolling to both the limitation period and the period of recovery accords with common sense" is clearly dictum because *Welton* held that tolling did *not* apply in that case. *Welton*, 421 Mich at 577 n 2. Further, *Welton* involved judicial tolling, not the statutory minority/insanity tolling provision that was at issue in *Cameron*.

> Constitution. Thus, because *Geiger*'s conclusion that the minority/insanity tolling provision applies to extend the one-year-back rule is contrary to what the Legislature clearly directed in MCL 500.3145(1) and MCL 600.5851(1), *Geiger* is overruled. [*Cameron*, 476 Mich at 63-64.]

The majority here commits the same error that *Geiger* committed. That is, the majority believes that it can somehow discern the purpose of the statute from something other than its actual language, despite the fact that this Court has repeatedly held that this constitutes an improper approach to statutory interpretation. As I explained in my concurring opinion in *Cameron*:

> 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 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.[8] 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

[8] It is ironic that the majority accuses the *Cameron* majority of "read[ing] the statutory language in isolation," when it is the majority here that reads the minority/insanity tolling provision in a manner so far isolated from the one-year-back rule of the no-fault act that it gives the latter *no meaning whatsoever*.

> in *Geiger* that it preferred a different statute than the one actually enacted by the Legislature. [*Id.* at 83-84 (MARKMAN, J., concurring).]

The majority criticizes *Cameron* on the basis that "[t]he only authority cited for [its] interpretation was in Justice MARKMAN's concurring opinion, which relied on dicta from Justice BRICKLEY's lead opinion in *Howard v Gen Motors Corp.*" This statement very much illustrates the flaw in the majority's approach to statutory construction—it fails to recognize that the best indicator of the Legislature's intent is the language of the statute itself. That is, the best "authority" cited in either the majority or concurring opinions in *Cameron* for their interpretation is the actual language of the statutes at issue. That the majority fails to apprehend this first principle of statutory interpretation sufficiently speaks to the shortcomings in its analysis.

Finally, with regard to the majority's apparent belief that it is somehow appropriate to overrule *Cameron* because *Cameron* overruled *Geiger*, even if *Geiger* were controlling precedent—which it is not—the majority errs by conflating all precedents as deserving of equal respect. However, as I explained in my concurring opinion in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 226; 731 NW2d 41 (2007), "not all precedents are built alike . . . ." Indeed, "some are better reasoned than others, . . . some are grounded in the exercise of discretionary judgments and others in the interpretation of plain language, [and] some are thorough in their analyses and others superficial." *Id.* As discussed earlier, while *Cameron* entailed a serious effort to interpret the language of the law and to render our caselaw consistent with this language, *Geiger*, as also explained earlier, was principally grounded in a desire to advance the policy of the minority/insanity tolling provision over

the policy of the one-year-back rule of the no-fault act. For these reasons, *Cameron*'s overruling of *Geiger* can hardly be equated with the majority's overruling of *Cameron*. The former entailed an effort to render the caselaw of our state *more consistent* with the intentions of the Legislature, while the latter renders it *less consistent*. The majority has never quite grasped that the issue of stare decisis is one that cannot be viewed exclusively in quantitative terms, but must also be viewed in qualitative terms. By indiscriminately placing on equal footing all decisions of this Court that overrule precedent, without considering whether each does so in order to further the intentions of the lawmaker or to further the intentions of the judge, the majority communicates well the flaws in its understandings of stare decisis and of the judicial role itself.

In *Liptow*, the Court of Appeals, relying on this Court's decision in *Cameron*, held that MCL 600.5821(4) does not preclude the application of the one-year-back rule because MCL 600.5821(4) only exempts the state and its political subdivisions from a statute of limitations and the one-year-back rule is a damages-limiting provision, not a statute of limitations. This Court denied leave to appeal in *Liptow*, 478 Mich 853 (2007), and I agree with the Court of Appeals' decision. As the Court of Appeals explained in *Liptow*:

> MCL 600.5821(4) provides that actions brought by the state or its subdivisions to recover the cost of maintenance, care, and treatment of persons in state institutions "are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding." We conclude that, by the plain import of this language, the Legislature intended to exempt the state from statutes of limitations when bringing an action to recover public funds. The language refers to statutes of limitations and provides that an action may be

> brought at any time. But the statute does not address damage limitation provisions or any other limiting provisions. In other words, like the minority tolling provision, MCL 600.5821(4) concerns the *time* during which the state may bring an action; it "does not pertain to the damages recoverable once an action has been brought." *Cameron*, *supra*, 476 Mich at 62. Accordingly, we conclude that MCL 600.5821(4), like the minority tolling provision of MCL 600.5851(1), does not operate to toll the one-year-back rule of MCL 500.3145(1). *Cameron*, *supra*, 476 Mich at 61-62. [*Liptow*, 272 Mich App at 555-556 (emphasis in the original).]

While the RJA, specifically MCL 600.5821(4), states that an action by the state or one of its political subdivisions "may be *brought* at any time without limitation," the no-fault act, specifically MCL 500.3145(1), states that 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.) Having the right to *bring* a cause of action is not the equivalent of having the right to *recover* an unlimited amount of damages.[9] Therefore, when these two provisions are read together, it is clear that while a political subdivision may *bring* an action at any time, it cannot *recover* benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. In other words, MCL 600.5821(4), which pertains only to *when* an action may be commenced, does not preclude the application of the one-year-back rule, which only limits *how much* can be recovered after the action has been commenced.

The majority overrules *Liptow* simply because it relied on *Cameron*. Because I believe that *Cameron* was correctly decided and that *Liptow* appropriately relied

[9] Indeed, the one-year-back rule may be more analogous to a cap on damages than it is to a statute of limitations.

on *Cameron*, I would not overrule either *Cameron* or *Liptow*. As is obvious from the flood of opinions that the majority has recently overruled, the majority justices' repeated self-proclamations of adherence to stare decisis were merely a reflection of the fact that they agreed with the particular decisions that were being overruled. For a more thorough discussion of the majority justices' past expressions of fealty toward stare decisis, see my dissent in *McCormick v Carrier*, 487 Mich 180, 262-279; 795 NW2d 517 (2010). However, the lead opinion's reliance on Chief Justice KELLY's opinion in *Petersen v Magna Corp,* 484 Mich 300; 773 NW2d 564 (2009), which only Justice CAVANAGH joined, rather than the majority opinion in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), should not go unnoticed. For a thorough discussion of Chief Justice KELLY's *Petersen* standard for overruling precedent, see my dissent in *Petersen*, 484 Mich at 350.[10]

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[10] Justice HATHAWAY contends that stare decisis constitutes a "policy consideration" and that the "particular analytical approach will differ from case to case." Similarly, Justice WEAVER contends that stare decisis constitutes a "principle of policy" and that there is no need for a "standardized test for stare decisis," as long as justices exercise "judicial restraint, common sense, and a sense of fairness . . . ." The problem with these "approaches" is that "litigants will, of course, have no notice beforehand of which ["analytical approach"] will be employed, for the justices themselves will not know this beforehand." *Petersen,* 484 Mich at 380 (MARKMAN, J., dissenting). Under the concurring justices' "analytical approaches,"

> there [would be] no consistently applied . . . process with which the judge promises beforehand to comply. He or she may promise to be "fair," and he or she may seek to be fair, but there are no rules for how this fairness is to be achieved. There is only the promise that the judge will address each [precedent] on a case-by-case basis, using whatever ["policy considerations"] he or she believes are required in that instance. And the suspicion simply cannot be avoided that these varying and indeterminate ["policy considerations"] may be largely a function of the outcome preferred by the

What also cannot go without comment is the lead opinion's conclusion that "upholding *Cameron* is likely to result in serious detriment prejudicial to public interests" and, thus, that "this [*Petersen*] factor weighs heavily in favor of overruling *Cameron*." Given that the lead justices believe that it is appropriate to consider their own conceptions of "public interests," their relative silence is telling with regard to the "public interest" in the viability of our state's no-fault system. It has been repeatedly recognized that because of the mandatory nature of no-fault insurance, the Legislature intended that it be affordable.[11] The lead opinion gives

> judge and by his or her personal attitudes toward the parties and their causes. Any [pertinent "policy considerations"] will be identified only *after the fact*, and these ["policy considerations"] may or may not have been invoked in resolving yesterday's dispute, and may or may not be employed in resolving tomorrow's dispute. *Any* judge can concoct an *after-the-fact* rationale for a decision; the judicial process, however, is predicated upon *before-the-fact* rationales. An ad hoc process is not a judicial process at all. In the place of predetermined rules . . . [the concurring justices] would substitute ["policy considerations"] to be determined later. [*Id.* at 381-382.]

Although Justice WEAVER is correct that "[t]here are many factors to consider when deciding whether or not to overrule precedent," and Justice HATHAWAY is equally correct that the application of stare decisis must take place on a "case-by-case basis," this does not obviate the need to at least reasonably *attempt* to apprise the parties, and the citizens of this state, *before the fact* what these factors might be, as this Court did in *Robinson* and as the Chief Justice and Justice CAVANAGH did in *Petersen*. And whatever else can be understood of Justice HATHAWAY's and Justice WEAVER's "approaches" to stare decisis, the application of these "approaches" has resulted in 13 precedents of this Court being overruled during this term alone and 6 other precedents being teed up for possible overruling during the next term, doubtless a record pace for dismantling the caselaw of this state.

[11] See, e.g., *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) (recognizing that a primary goal of the no-fault act is to "provid[e] an equitable and prompt method of redressing injuries

little heed to the fact that its decision will once again raise the premiums of all insured drivers in this state.[12]

The majority also asserts that because "MCL 600.5821(4) lists the costs [for which recovery may be sought] as those for the 'maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions,' " it "supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery." In other words, the majority contends that MCL 600.5821(4) provides an absolute right to recover the enumerated costs. The problem with this argument, however, is that the statute says no such thing. The statute does not say that there is an unfettered right to recover the enumerated costs. Instead, MCL 600.5821(4) says only that "[a]ctions brought . . . for the recovery of the [enumerated]

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in a way which made the mandatory insurance coverage affordable to all motorists"); *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 Auto Ins Co*, 404 Mich 524, 547; 273 NW2d 829 (1979) (recognizing that the Legislature has provided for setoffs in the no-fault act and stating that "[b]ecause 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").

[12] Indeed, defendant Titan Insurance Company argued that overruling *Cameron* would have "devastating" effects on the orderly adjustment of no-fault claims and "threaten the viability" of the Michigan Assigned Claims Facility and the Michigan Catastrophic Claims Association because nullifying the one-year back rule will lead to a flood of decades-old no-fault claims seeking expensive family attendant care benefits. For a more thorough discussion of the stakes of undoing the compromise embodied in the no-fault act, see my dissent in *McCormick*, 487 Mich at 279-287. See also *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 35-41; 773 NW2d 243 (2009) (YOUNG, J., dissenting).

cost[s] . . . are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding." That is, the reference to "the recovery of the cost[s]" is in the context of describing what types of actions are *not* subject to the statute of limitations—those "[a]ctions brought . . . for the recovery of the [enumerated] cost[s] . . . ." Nowhere within the statute is there any indication that the Legislature intended to preclude *any* and *all* limitations on the amounts of money the state and its political subdivisions can recover. Instead, because MCL 600.5821(4) only pertains to *when* an action may be *brought,* it "is irrelevant to the damages-limiting one-year-back provision of MCL 500.3145(1)." *Cameron,* 476 Mich at 62.

Plaintiffs also argue that *Liptow* was inconsistent with *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002), in which the Court of Appeals held that MCL 600.5821(4) in the RJA exempts the state and its political subdivisions from the no-fault act's statute of limitations in MCL 500.3145(1). Specifically, the Court held:

> The language of the statute clearly indicates that the Legislature intended to exempt the state and its political subdivisions from all *statutes of limitation*. Thus, [MCL 600.5821(4)] exempts plaintiff from the *statute of limitations* contained in [MCL 500.3145(1)]. [*Id.* at 733 (emphasis added).]

However, as the Court of Appeals explained in *Univ of Mich Regents v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2009 (Docket No. 281917):

> [T]he decision in *Univ of Michigan Regents* [*v State Farm Mut Ins Co*] concerned "statutes of limitation," not "the damages-limiting portion of MCL 500.3145(1), the

one-year back rule." Consequently, there is no conflict between *Univ of Michigan Regents* and *Liptow*.[13]

As this Court has explained, "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[.]" *Cameron*, 476 Mich at 61, citing *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005). First, "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." *Cameron*, 476 Mich at 61. Second, "[i]f notice was given or payment was made, the action can be commenced within one year of the most recent loss." *Id.* Third, under the one-year-back rule, "[r]ecovery . . . is limited to losses incurred during the year before the filing of the action." *Id. Univ of Mich Regents v State Farm* concerned the statute of limitations portion of MCL 500.3145(1), not the one-year-back rule. Therefore, there is utterly no inconsistency between *Univ of Mich Regents v State Farm* and *Liptow*.[14]

The Court of Appeals dissent stated, "I believe that the holding in *Liptow* takes an irrationally and improperly narrow view of this statute by holding that it exempts entities like plaintiff[s] from a one-year limitation on *bringing* an action but not from a one-year limitation on *recovering* in such an action." *Univ of Mich Regents v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008

[13] An application for leave to appeal in *Univ of Mich Regents v Auto Club Ins Ass'n* is currently being held in abeyance pending the decision in this case. *Univ of Mich Regents v Auto Club Ins Ass'n*, 774 NW2d 906 (Mich, 2009).

[14] This conclusion is further supported by the fact that Judges FITZGERALD and MARKEY were in the majority on *both* Court of Appeals panels.

(Docket No. 276710) (DAVIS, P.J., dissenting) (emphasis in the original).[15] *Cameron* involved a very similar situation. In my concurring opinion in *Cameron*, I indicated that I was concerned because

> 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. [*Cameron*, 476 Mich at 73 (MARKMAN, J., concurring).]

However, I concluded that, regardless of my concerns about the wisdom (or lack thereof) of the statute, a judge is bound to follow this language. The same remains true here. Although to some it may seem less than optimal to exempt entities such as plaintiffs from

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[15] The lead opinion here likewise contends that *Cameron* and *Liptow* "created an indefensible paradox" by limiting a plaintiff to the "hollow right" of being able to bring a cause of action without being able to recover *any* damages. It also states that "*Cameron*'s interpretation of the saving provision actually operates to extinguish a claim, not save it." However, the lead opinion ignores that a plaintiff will only be unable to recover damages if that plaintiff has not suffered *any* losses within the year preceding the filing of the action. Contrary to the lead opinion's contention, this does not make *Cameron* and *Liptow* "unworkable." It just means that they work differently than the lead justices would like them to work. Furthermore, it is not *Cameron* or "*Cameron*'s interpretation of the saving provision" that prohibits a plaintiff from recovering losses incurred more than one year before the action was filed; it is the Legislature's adoption of the one-year-back rule in the no-fault act. The lead opinion also states that *Cameron* and *Liptow* are "unworkable" because they deny plaintiffs "the legal recourse the Legislature provided [them], which is . . . to recover the damages [they] incurred more than a year earlier." The problem with this assertion is that the Legislature has provided no such right. Instead, the Legislature has only provided certain people and entities the right to bring a cause of action after the period of limitations has expired. Nowhere, however, has the Legislature provided these same people and entities the right to recover an unlimited amount of money in those actions.

a one-year limitation on *bringing* an action, but not also from a one-year limitation on *recovery* in that an action, that is clearly what the Legislature has done, and it is entitled to act in a way that is viewed with disapproval by members of the judiciary.

Nor is this, assuming arguendo that such is a relevant consideration, an "absurd result." Even to the extent that an "absurd result" doctrine exists in Michigan,[16] a result is only "absurd" if it is " 'quite impossible that [the Legislature] could have intended the result . . . .' " *Id.* at 85 n 9 (MARKMAN, J., concurring), quoting *Pub Citizen v United States Dep't of Justice*, 491 US 440, 470-471; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring). It is entirely possible that the Legislature could have intended the result reached in *Liptow*. For example, the Legislature "*might* have intended these results in order to make no-fault insurance more affordable." *Cameron*, 476 Mich at 80 (MARKMAN, J., concurring) (emphasis in the original), citing *Griffith v State Farm Mut Auto 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

[16] Whether the "absurd result" doctrine should exist in Michigan is a matter of some debate, but the Court need not address the question in this case because, as discussed, what was done here by the Legislature was not absurd. It suffices to note, however, that while I still subscribe to the view that the absurd result doctrine is an appropriate tool of statutory construction, the two justices who join this dissent do not. See, e.g., *People v McIntire*, 461 Mich 147, 152-160; 599 NW2d 102 (1999); *People v McIntire*, 232 Mich App 71, 122-127; 591 NW2d 231 (1998).

on whether no-fault insurance is available at fair and equitable rates"). 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. [*Cameron*, 476 Mich at 81-82 (MARKMAN, J., concurring) (emphasis in the original).]

That is,

> [s]uch 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, and to ensure that their medical expenses were reimbursed expeditiously. [*Id.* at 82 (emphasis in the original).]

"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 [claimant] and those of the insurer." *Id.* (emphasis in the original).

As the majority acknowledges, "if the one-year-back rule applies to [plaintiffs'] claim, plaintiffs are entitled to no damages," because all of their losses were "incurred more than 1 year before the date on which the action was commenced," MCL 500.3145(1). Indeed, all of plaintiffs' losses were incurred in 2000, and yet plaintiffs waited until 2006 to file this cause of action. Because I believe, for the reasons set forth above, that

the one-year-back rule *does* apply to plaintiffs' claim, I conclude that plaintiffs' damages are not recoverable. Therefore, I would affirm the judgment of the Court of Appeals.

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

LANSING SCHOOLS EDUCATION ASSOCIATION
v LANSING BOARD OF EDUCATION

Docket No. 138401. Argued April 13, 2010 (Calendar No. 3). Decided July 31, 2010.

The Lansing Schools Education Association, MEA/NEA, and four of its member teachers who alleged that they were physically assaulted by students in grade six or above brought an action in the Ingham Circuit Court against the Lansing Board of Education and the Lansing School District. Plaintiffs sought a declaratory judgment regarding the parties' rights and legal relations under MCL 380.1311a, which concerns physical assaults by students in grade six or above against a person employed by or engaged as a volunteer or contractor by a school board. Plaintiffs also sought a writ of mandamus ordering defendants to expel, rather than suspend, the students and a permanent injunction prohibiting defendants from violating the statute in the future. The court, Thomas L. Brown, J., granted summary disposition for defendants, ruling that the school board has the discretion to determine whether a physical assault occurred within the meaning of the statute and concluding that the court should not oversee the individual disciplinary decisions of a local school board. Plaintiffs appealed. The Court of Appeals, SAAD, C.J., and FITZGERALD and BECKERING, JJ., affirmed, holding that plaintiffs had not established the elements of constitutional standing required under *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001). 282 Mich App 165 (2009). The Supreme Court granted plaintiffs' application for leave to appeal. 485 Mich 966 (2009).

In an opinion by Justice CAVANAGH, joined by Chief Justice KELLY and Justices WEAVER (in part) and HATHAWAY, the Supreme Court *held*:

The standing doctrine adopted in *Lee* lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing. Therefore, *Lee* and its progeny are overruled and Michigan standing jurisprudence is restored to its historical limited, prudential approach. In this case, plaintiffs have standing because they have a substantial interest in the enforcement of MCL 380.1311a that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced.

1. Standing developed in Michigan as a limited, prudential doctrine that was intended to ensure sincere and vigorous advocacy by litigants. Where a cause of action was not provided at law, the Court, in its discretion, would consider whether a litigant had standing based on a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large, or because, in the context of a statutory scheme, the Legislature had intended to confer standing on the litigant. It was not necessary to address the merits of the case in order to address standing.

2. There is no support in either the text of the Michigan Constitution or in Michigan jurisprudence for the adoption by *Lee* and its progeny of standing as a constitutional requirement, or for adopting the federal standing doctrine. Unlike the Michigan Constitution, the federal constitution enumerates the cases and controversies to which the judicial power extends, and the federal standing doctrine is largely derived from this case-or-controversy requirement. The Michigan Constitution lacks an express basis for importing this requirement into Michigan law. Further, strictly interpreting the judicial power of Michigan courts to be identical to the federal court's judicial power does not reflect the fact that state courts hold broader power than their federal counterparts.

3. A litigant has standing whenever there is a legal cause of action. Meeting the requirements of MCR 2.605 is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Reversed and remanded to the Court of Appeals.

Justice WEAVER concurred in all of the majority opinion except the part pertaining to stare decisis. She wrote separately to state that *Lee* and its progeny defied common sense and fairness by ignoring the Michigan Constitution and imposing unprecedented judge-made restrictions on access to the courts. With regard to stare decisis, she stated that past precedent should generally be followed, but when deciding to overrule wrongly decided precedent, to serve the rule of law, each case should be looked at individually on its own facts and merits through the lens of judicial restraint, common sense, and fairness.

Justice HATHAWAY fully concurred with the majority opinion and agreed with Justice WEAVER's criticisms of *Lee*. She wrote separately to state her view that stare decisis is a principle of policy and not a rule or law subject to a particularized test in all circumstances. The approach taken will depend on the facts and circumstances presented. The special and compelling justifications for overruling *Lee* are overwhelming in this case.

Justice CORRIGAN, joined by Justices YOUNG and MARKMAN, dissenting, would affirm the decision of the Court of Appeals, stating that the majority's decision granting standing to the plaintiffs to seek court-ordered expulsion of students from their schools is untenable because MCL 380.1311a(1) does not create an enforceable right in teachers and because the students' constitutional due process rights cannot be protected since the students are not parties to this collateral suit. The majority's decision to overrule *Lee*—thereby also overruling at least eight other significant cases—ignores that standing requirements define the judicial power and thus are constitutionally based and integral to the separation of powers inherent in a tripartite system of government. *Lee* acknowledged the constitutional restraints on judicial power and adopted the following practical, workable test that has been used successfully in Michigan and many other jurisdictions: the plaintiff must have suffered an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent; there must be a causal connection between the injury and the conduct complained of; and it must be likely that the injury will be redressed by a favorable decision of the court. The majority's amorphous new approach to standing, in contrast, is unprincipled, is opportunistic, and aggregates limitless power in the courts. In overruling *Lee,* the majority further damages the rule of law because it disregards the doctrine of stare decisis by failing to analyze its decision under any consistent standard for overruling precedent. The majority's positions with regard to standing and stare decisis are also directly contrary to its own views in the past, when members of the current majority advocated against overruling precedent and adopted the *Lee* test as correct and binding. The majority's decision will create instability throughout Michigan law and encourage spurious lawsuits.

1. ACTIONS — STANDING.

A litigant has standing whenever there is a legal cause of action.

2. ACTIONS — STANDING — DECLARATORY JUDGMENTS.

Meeting the requirements of MCR 2.605 is sufficient to establish standing to seek a declaratory judgment.

3. ACTIONS — STANDING.

Where a cause of action is not provided at law, a court should, in its discretion, establish whether a litigant has standing by determining whether the litigant has a special injury or right, or a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or whether the statutory scheme implies that the Legislature intended to confer standing on the litigant.

White, Schneider, Young & Chiodini, P.C. (by *Michael M. Shoudy* and *Dena Lampinen Lorenz*), for plaintiffs.

Thrun Law Firm, P.C. (by *Margaret M. Hackett*), for defendants.

Amici Curiae:

Neil S. Kagan for the National Wildlife Federation.

Clark Hill PLC (by *David D. Grande-Cassell* and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

Brad A. Banasik for the Michigan Association of School Boards.

CAVANAGH, J. The issue in this case is whether teachers have standing to sue the school board for failing to comply with its statutory duty to expel students who have allegedly physically assaulted those teachers. We hold that the standing doctrine adopted in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and extended in later cases, such as *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing. Therefore, we overrule *Lee* and its progeny and hold that Michigan standing

jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's longstanding historical approach to standing. Under the proper standing doctrine, we further hold that the Court of Appeals erred in determining that plaintiffs lacked standing. Therefore, we reverse and remand to the Court of Appeals to address the parties' remaining issues, including whether plaintiffs meet the requirements to bring an action for a declaratory judgment under MCR 2.605.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs are the Lansing School Education Association (LSEA), the Michigan and National Education Associations (MEA/NEA), and four teachers who are employed by defendants, the Lansing School District and the Lansing Board of Education. Each of the four teachers alleges that they were physically assaulted in the classroom by a student who was in grade six or higher, and each of the incidents was reported to a school administrator.[1] The students were suspended but not expelled. Plaintiff Penny Filonczuk alleges that the assaultive student was returned to her building, but not to her classroom, and none of the other teachers alleges that the student was returned to the same classroom or school.

Plaintiffs filed suit, alleging that defendants failed to comply with their mandatory duty under MCL 380.1311a(1) to expel students who physically assault a

[1] Cathy Stachwick alleges that a seventh grader threw a leather wristband with metal spikes towards her back, and the wristband bounced off the blackboard and struck her in the head. Penny Filonczuk and Ellen Wheeler allege that students in sixth grade or higher intentionally threw chairs at them. Elizabeth Namie alleges that a student in grade six or higher intentionally slapped her back.

teacher.[2] They sought a writ of mandamus and declaratory and injunctive relief. In support of the action, three of the teachers filed affidavits stating that they believe that failing to expel students who physically assault a teacher increases the likelihood of other assaults and threatens the safety of the school environment. Plaintiff Filonczuk further stated that she felt discomfort due to the student's return to her building, and the other two teachers stated that they would have felt unsafe if the students who assaulted them had returned to their buildings.

Defendants moved for summary disposition, arguing that plaintiffs lack standing, the statute does not create a private cause of action, and plaintiffs' claims fail as a matter of law because the school district did not abuse its discretionary authority in determining that none of the students had committed an "assault." The trial court granted the motion, reasoning that the court lacked the authority to supervise the school district's exercise of its discretion.

Plaintiffs appealed, and the Court of Appeals affirmed the trial court's grant of summary disposition on different grounds. *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 282 Mich App 165; 772 NW2d 784 (2009). The Court concluded that plaintiffs lacked standing under *Lee* and did not reach the case's merits. This Court granted plaintiffs' application for leave to appeal. 485 Mich 966 (2009).

II. ANALYSIS

The issue in this case is whether the *Lee*/*Cleveland Cliffs* majority erred in adopting a standing doctrine

[2] MCL 380.1311a(1) provides in relevant part that "[i]f a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board," and the assault is reported to the school, then the school board "shall expel the pupil from the school district permanently . . . ."

that departed dramatically from Michigan's historical approach to standing. We hold that they did and that Michigan's standing doctrine should be restored to an approach that is consistent with the limited, prudential approach used historically. Under this approach, plaintiffs do not lack standing.

A. THE HISTORICAL DEVELOPMENT OF MICHIGAN'S STANDING DOCTRINE

The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to "ensure sincere and vigorous advocacy." *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). Thus, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (quotation marks and citations omitted). This doctrine has deep roots in Michigan law, and, although it has been used with increasing frequency in modern jurisprudence, before *Lee* it remained a limited, prudential doctrine.

Historically, the standing doctrine grew out of cases where parties were seeking writs of mandamus to compel a public officer to perform a statutory duty. See, e.g., *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 429-430; 4 NW 274 (1880); *People ex rel Drake v Univ of Mich Regents*, 4 Mich 98, 101-102 (1856). Standing was a prudential limit, which is to say that the court's decision to invoke it was "one of discretion and not of law." *Ayres*, 42 Mich at 429. See, also, *Toan v McGinn*, 271 Mich 28, 33-34; 260 NW 108 (1935); *Thompson v Secretary of State*, 192 Mich 512, 522; 159 NW 65 (1916); *Drake*, 4 Mich at 103. The general rule was that a court would not hear a case where "an individual citizen, who is only

interested in common with all other citizens of the state in the subject matter of [the] complaint," was suing a public entity to force compliance with a legal duty. *Drake*, 4 Mich at 101-102. Generally, the court exercised its discretion to hear a case if the citizen had "some individual interest in the subject matter of [the] complaint which is not common to all the citizens of the state . . . ." *Id.* at 103. This was sometimes articulated as a special or specific injury or interest. *Inglis v Pub Sch Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964); *Hastings Bd of Ed v Gilleland*, 191 Mich 276, 278; 157 NW 609 (1916); *Brophy v Schindler*, 126 Mich 341, 347; 85 NW 1114 (1901).

This rule was eventually applied in other cases where a party sought enforcement of a public right without a clear cause of action under the law, including where a plaintiff was seeking an injunction against a state agency on the basis that the agency's actions were unconstitutional. *Home Tel Co v Michigan R Comm*, 174 Mich 219, 223-226; 140 NW 496 (1913). See, also, *Gilleland*, 191 Mich at 278, listing remedies to which the rule had been extended. Notably, these cases only discussed the doctrine when no cause of action was clearly provided under law and the Court was deciding whether, within its discretion, to allow the party to bring the claim despite the lack of an express cause of action. Further, the standing inquiry was distinct from the merits of the case. Thus, although the Court sometimes reached the merits of a case despite concluding that a party lacked standing, the Court did not find it necessary to determine whether a party's claim had merit in order to determine whether a party had standing.

References to standing became more frequent in Michigan's modern jurisprudence, and the doctrine was developed more extensively but remained a prudential

limit that could, within the Court's discretion, be ignored.[3] Further, the fact that there was a cause of action under law, or the Legislature expressly conferred standing, was sufficient to establish standing.[4] Where a party was seeking declaratory relief, the Court repeatedly held that meeting the requirements of the court rule governing declaratory actions was sufficient to establish standing. *House Speaker v Governor*, 443 Mich 560, 572-573; 506 NW2d 190 (1993); *Allstate*, 442 Mich at 69-70; *Sloan v Madison Hts*, 425 Mich 288, 294-295; 389 NW2d 418 (1986). See, also, *East Grand Rapids Sch Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 392-395; 330 NW2d 7 (1982); *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 492 n 1; 274 NW2d 373 (1979); *Shavers v Attorney General*, 402 Mich 554, 588-592; 267 NW2d 72 (1978). The Court also reaffirmed that "[s]tanding does not address the ultimate merits of the substantive claims of the parties." *Detroit Fire Fighters Ass'n*, 449 Mich at 633 (opinion by WEAVER, J.). See also *Eide v Kelsey-Hayes Co*, 431 Mich

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[3] See *Detroit City Council v Detroit Mayor*, 449 Mich 670, 679 n 10; 537 NW2d 177 (1995) (stating that the Court was not reaching the standing issue because the parties did not raise or brief it); *People v Kevorkian*, 447 Mich 436, 447 n 1; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (noting that it was not addressing standing because the parties had not raised it); *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 371-372; 505 NW2d 820 (1993) (noting that federal courts had split on whether subrogees had standing to sue under a federal act but the Court would permit a subrogee to sue "as a matter of public policy"); *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 103 n 6; 367 NW2d 1 (1985) (opinion by LEVIN, J.) (deciding to give a decision on the merits regardless of whether the plaintiff had standing because "this litigation has been pending for a number of years and the Legislature and the people need a decision").

[4] See, generally, *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 45; 576 NW2d 641 (1998) (CAVANAGH, J., dissenting) (discussing the historical importance and validity of the Michigan environmental protection act's citizen-standing provision); see, also, *Walterhouse v Ackley*, 459 Mich 924 (1998); *Frame v Nehls*, 452 Mich 171, 177-178; 550 NW2d 739 (1996).

26, 50 n 16; 427 NW2d 488 (1988) (opinion by GRIFFIN, J.) (treating standing as an inquiry that was distinct from whether the plaintiff's requested remedy was available).

While the doctrine continued to serve the purpose of ensuring "sincere and vigorous advocacy" by litigants, over time the test for satisfying this requirement was further developed. In cases involving public rights, the Court held that a litigant established standing by demonstrating a "substantial interest [that] will be detrimentally affected in a manner different from the citizenry at large." *House Speaker*, 443 Mich at 572 (quotation marks and citations omitted). Additionally, however, the Court recognized that even if a statute did not expressly grant standing, it could be implied from duties created by law. See *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 741; 322 NW2d 152 (1982) (stating that there were cases in which "standing was not expressly granted by statute [but] standing was implied by the duties and obligations that were expressly stated)". Thus, where a statute did not expressly grant standing, this Court would consider whether the Legislature nonetheless intended to confer standing on the plaintiffs.[5] *Bradley v Saranac Bd of Ed*, 455 Mich 285, 296; 565 NW2d 650

[5] Although the Court splintered on how to articulate when standing could be implied from a statutory scheme that does not expressly grant standing in the last major pre-*Lee* case addressing this issue, *Detroit Fire Fighters Ass'n*, Justice WEAVER's lead opinion articulated general principles consistent with the historical approach. *Detroit Fire Fighters Ass'n*, 449 Mich at 633. Further, Justice MALLETT's statement that the key issue is "whether the plaintiff can demonstrate any special right, injury, or zone of interest that deserves the protections of the law," is consistent with the historical doctrine. *Id*. at 663 (MALLETT, J., concurring in the result only). Justice RILEY's concurrence, however, erred in conflating the distinct inquiries of whether a plaintiff has standing under a statutory scheme and whether there is an implied statutory cause of action. *Id*. at 644-645.

(1997); *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992); *Girard v Wagenmaker*, 437 Mich 231, 235; 470 NW2d 372 (1991); *Shavers*, 402 Mich at 587. In a case involving private rights, the Court explained that the litigant should have "some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Bowie*, 441 Mich at 42 (quotation marks and citation omitted).

In summary, standing historically developed in Michigan as a limited, prudential doctrine that was intended to "ensure sincere and vigorous advocacy" by litigants. If a party had a cause of action under law, then standing was not an issue. But where a cause of action was not provided at law, the Court, in its discretion, would consider whether a litigant had standing based on a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large, or because, in the context of a statutory scheme, the Legislature had intended to confer standing on the litigant. It was not necessary to address the merits of the case in order to address standing.

B. THE *LEE*/*CLEVELAND CLIFFS* STANDING DOCTRINE

Despite the consistency of the historical development of the standing doctrine in Michigan, *Lee* and its progeny abruptly departed from precedent and radically changed the standing doctrine. This doctrine's flaws are many.

1. OVERVIEW OF THE *LEE*/*CLEVELAND CLIFFS* MAJORITY'S APPROACH TO STANDING

In *Lee*, a majority of the Court determined, for the first time in Michigan jurisprudence, that standing was *required* by the Michigan Constitution, and, further, that

Michigan's standing doctrine should be abandoned in favor of the standing doctrine adopted by the United States Supreme Court in the context of the federal constitution. The reasoning presented in *Lee*, and expanded in *Cleveland Cliffs*, is that standing is essential to Michigan's separation of powers doctrine. See *Lee*, 464 Mich at 735. The *Lee*/*Cleveland Cliffs* majority explained that Article III, § 1 of the federal constitution grants federal courts only the "judicial power" and Article III, § 2 limits the judicial power to certain "Cases" or "Controversies." *Lee*, 464 Mich at 735. Although the Michigan Constitution does not include "Cases" or "Controversies" requirements, the *Lee*/*Cleveland Cliffs* majority concluded that the Michigan Constitution is analogous to the federal constitution because it expressly requires the separation of powers and grants courts only the judicial power. *Cleveland Cliffs*, 471 Mich at 615; *Lee*, 464 Mich at 737-738. The majority further determined that the cornerstone of the judicial power is the case-or-controversy requirement. *Id.*[6] The *Lee*/*Cleveland Cliffs* majority thus concluded that Michigan should adopt the federal constitutional standing test from *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992), as the "irreducible constitutional minimum of standing . . . ."[7]

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[6] *Lee* cited older Michigan caselaw to define the judicial power as "the power to hear and determine controversies between adverse parties, and questions in litigation," and "the authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Lee*, 464 Mich at 738, quoting *Daniels v People*, 6 Mich 381, 388 (1859), and *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884) (emphasis omitted). The *Cleveland Cliffs* majority, however, only cited federal caselaw in support of its contention that "[p]erhaps the most critical element of the 'judicial power' has been its requirement of a genuine case or controversy between the parties . . . ." *Cleveland Cliffs*, 471 Mich at 615.

[7] The test requires that the plaintiff show (1) an injury-in-fact, meaning the "invasion of a legally protected interest which is (a) concrete and

The *Lee*/*Cleveland Cliffs* majority also held that a litigant must meet the *Lujan* standing requirements regardless of whether the Legislature expressly created a cause of action or conferred standing on the litigant because, although the Legislature has the power to create causes of actions, it does not have the power to expand the judicial authority granted to the courts by the Michigan Constitution. See *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 302-303; 737 NW2d 447 (2007). The Court also held that a litigant must meet *Lujan*'s requirements in order to bring a declaratory action. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 124-127; 693 NW2d 374 (2005). Thus, after *Lee* and its progeny, little remained of the historical limited, prudential approach to standing, and the doctrine was significantly expanded.

2. CRITICISMS OF THE *LEE*/*CLEVELAND CLIFFS* MAJORITY'S APPROACH TO STANDING

The flaws in the *Lee*/*Cleveland Cliffs* approach are many.[8] Perhaps most egregiously, however, the *Lee*/*Cleveland Cliffs* majority dramatically distorted Michigan jurisprudence to invent out of whole cloth a constitutional basis for the standing doctrine and then, perplexingly, determined that Michigan's standing doc-

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particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) causality, meaning that the injury is "fairly trace[able]" to the challenged conduct; and (3) redressability, meaning that it is "likely" that a favorable decision would "redress" the injury. *Lee*, 464 Mich at 739 (quotation marks and citation omitted).

[8] Only the fundamental legal error most relevant to the stare decisis analysis will be reviewed because other criticisms have been thoroughly addressed in various opinions of this Court. For further discussion, however, see, e.g., *Cleveland Cliffs*, 471 Mich at 651-675, (WEAVER, J., concurring); *Mich Citizens for Water Conservation*, 479 Mich at 310-322 (WEAVER, J., dissenting).

trine should be essentially coterminous with the federal doctrine, despite the significant differences between the two constitutions and the powers held by the respective court systems. There is no support in either the text of the Michigan Constitution or in Michigan jurisprudence, however, for recognizing standing as a constitutional requirement or for adopting the federal standing doctrine.

To begin with, there is no textual basis in the Michigan Constitution for concluding that standing is constitutionally required, and there are important differences between the two constitutions. The Michigan Constitution provides for the separation of powers between the legislative, judicial, and executive branches and vests the courts with the judicial power. Const 1963, art 3, § 2; art 6, § 1. The federal constitution similarly vests the judicial power in the courts. US Const, art III, § 1. Unlike the Michigan Constitution, however, the federal constitution enumerates the cases and controversies to which the judicial power extends, and the federal standing doctrine is largely derived from this Article III case-or-controversy requirement. See *Lujan*, 504 US at 560 (stating that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III)". Additionally, strictly interpreting the judicial power of Michigan courts to be identical to the federal courts' judicial power does not reflect the broader power held by state courts. Whereas federal courts only have the powers enumerated in the United States Constitution, the states retain powers not ceded to the federal government. US Const, Am X. See also *Cleveland Cliffs*, 471 Mich at 683-684 (KELLY, J., concurring). As this Court has stated, in Michigan, "[w]hile the legislature obtains legislative power and the courts receive judicial power by grant in the State Constitution, the whole of such power reposing in the sovereignty is granted to those bodies except as it may

be restricted in the same instrument."[9] *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 680; 229 NW 618 (1930). Given that the text of the Michigan Constitution lacks an express basis for importing the federal case-or-controversy requirement into Michigan law, the justification for doing so, if one can be found, must lie elsewhere.

The *Cleveland Cliffs* majority dismissed the lack of a textual case-or-controversy requirement in the Michigan Constitution as irrelevant because it held that the case-or-controversy requirement is a limitation inherent in the judicial power.[10] However, even assuming arguendo that the judicial power implicitly extends only to cases or controversies, there is no basis for rejecting the understanding Michigan courts traditionally had of this power to instead give it the same meaning it has in the very different context of the federal constitution. This conclusion is certainly not required by federal law, as the United States Supreme Court has "recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." *ASARCO Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989).[11] There is also

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[9] As noted in Justice WEAVER's *Cleveland Cliffs* concurring opinion, and discussed in her concurrence in this case, adopting standing as a constitutional doctrine potentially may even violate the separation of powers doctrine under the Michigan Constitution. *Cleveland Cliffs*, 471 Mich at 668-669.

[10] The *Cleveland Cliffs* majority dismissed the cases-or-controversies requirements in art III, § 2 of the federal constitution as merely explaining the types of cases and controversies over which the Court had jurisdiction, rather than as the source of the case-or-controversy requirement itself, which it considered to be inherent in the grant of judicial power in art III, § 1. 471 Mich at 626-627.

[11] As the dissent notes, some of our sister states have chosen to adopt a standing doctrine similar to the *Lujan* test. But, of course, other states'

no basis for doing so in Michigan law, as this Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not. *Washington-Detroit Theatre Co*, 249 Mich at 679-680.[12]

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courts' interpretations of their own constitutions are not binding or even necessarily instructive with regard to our interpretation of the Michigan Constitution. Furthermore, many states have either declined to adopt the *Lujan* standing test or do not apply it exclusively. See, e.g., *Kellas v Dep't of Corrections*, 341 Or 471, 478; 145 P3d 139 (2006) (noting that "[t]he Oregon Constitution contains no 'cases' or 'controversies' provision" and declining to "import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government"). See also *Coalition for Adequacy & Fairness in School Funding, Inc v Chiles*, 680 So 2d 400, 403 (Fla, 1996) (holding that a citizen taxpayer has standing to challenge the legislature's exercise of its taxing and spending power without demonstrating a special injury and stating that "in Florida, unlike the federal system, the doctrine of standing has not been rigidly followed"); *Lebron v Gottlieb Mem Hosp*, 2010 Ill LEXIS 26, *52 (Ill, 2010) (explaining that "[t]his court is not required to follow federal law on issues of standing, and has expressly rejected federal principles of standing"); *Nefedro v Montgomery Co*, 2010 Md LEXIS 210, *8 n 3 (Md, 2010) (explaining that the *Lujan* standing doctrine did not apply because it "is not applicable to state courts"); *Tax Equity Alliance for Massachusetts v Comm'r of Revenue*, 423 Mass 708, 714; 672 NE2d 504 (1996) (explaining that under Massachusetts's "public right doctrine," a citizen has standing to "seek relief in the nature of mandamus to compel the performance of a duty required by law"); *Jen Electric, Inc v Essex Co*, 197 NJ 627, 645; 964 A2d 790 (2009) (explaining that, in New Jersey, "[s]tanding is a creature of the common law" and a "liberal rule[]" because "overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on the ultimate merits") (quotation marks and citations omitted).

[12] The dissent offers quotations from delegates to the Michigan Constitutional Convention to support its position that the judicial power extends only to cases or controversies. Even setting aside whether there is a truly logical distinction between the dissent's criticisms of the use of

Most importantly, however, not only does the federal standing jurisprudence have no basis in Michigan law, it is contrary to it. As explained above, before *Lee*, the standing doctrine was not treated as a constitutional requirement in Michigan jurisprudence; that is, the Court never concluded that a lack of standing equated to the lack of a controversy necessary for the invocation of the judicial power under the Michigan Constitution. As discussed, before *Lee*, from the doctrine's inception this Court has at times addressed a case's merits despite concluding that the parties lacked standing. And, more generally, before *Lee*, "controversy" was never interpreted, as it is under *Lujan*, to refer only to instances where the party suffered a concrete and particularized injury caused directly by the challenged conduct. Thus, the Michigan Constitution does not compel adoption of the federal standing doctrine, and there is no support for doing so in this Court's historical jurisprudence.

Indeed, the *Lee*/*Cleveland Cliffs* majority, and the dissent in this case, make unsupported logical, or, rather, illogical, leaps. They expend significant energy explaining that Michigan law has historically required a case or a controversy to invoke the judicial power. See, e.g., *Cleveland Cliffs*, 471 Mich at 626-628. Then, citing only cases that stand for that limited proposition, and without distinguishing or overruling the volume of precedent discussed in this opinion, they conclude that simply because this Court has stated that the judicial

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legislative history to interpret a statute and its use of a delegate's preenactment impressions of constitutional text to interpret that text, these quotations provide no support that any delegate believed that standing was a constitutional requirement. They merely demonstrate that certain delegates believed that the judicial power extended to cases and controversies, which, at that time, had never been interpreted to incorporate standing as a constitutional requirement in Michigan.

power extends to cases and controversies, standing is therefore required by the Michigan Constitution and must be equivalent to the federal standing doctrine adopted in *Lujan*. *Id.* at 628-629. They utterly fail to explain, however, why decades of Michigan standing jurisprudence must be sacrificed on the altar of the United States Supreme Court's interpretation of the *federal* case-or-controversy requirement, despite the lack of support in Michigan caselaw for understanding a "controversy" to exist only in the same, limited circumstances explained in *Lujan* and despite the conflict with *Michigan's* historic approach to standing.

C. STARE DECISIS

In light of the fact that the Michigan Constitution's reference to the judicial power does not inherently incorporate the federal case-or-controversy requirement, and, in fact, importing this requirement is inconsistent with this Court's historical view of its own powers and the scope of the standing doctrine, the question arises as to whether this Court should continue to apply the *Lee*/*Cleveland Cliffs* doctrine. Under the longstanding doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (quotation marks and citations omitted). The importance of the stare decisis doctrine is well established, for, as Alexander Hamilton stated, to " 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .' " *Petersen v Magna Corp*, 484 Mich 300, 314-315; 773 NW2d 564 (2009) (opinion by KELLY,

C.J.), quoting The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961). As the United States Supreme Court has stated, the doctrine "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." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991).

Despite its importance, stare decisis is neither an "inexorable command," *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940). Ultimately, it "attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors." *Petersen*, 484 Mich at 314 (opinion by KELLY, C.J.). To reflect this balance, while there is a presumption in favor of upholding precedent, this presumption may be rebutted if there is a special or compelling justification to overturn precedent. *Id.* at 319-320. In determining whether a special or compelling justification exists, a number of evaluative criteria may be relevant, *id.*,[13] but overturning precedent requires more than a mere belief that a case was wrongly decided, see *Brown*, 452 Mich at 365.[14]

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[13] In *Petersen*, Chief Justice KELLY provided a nonexhaustive list of criteria that may be considered, but none of the criteria are determinative, and they need only be evaluated if relevant. See *Petersen*, 484 Mich at 320.

[14] In addition to firing its standard shot impugning my commitment to the doctrine of stare decisis, today the dissent also claims that the justices of this Court must adopt a uniform approach to stare decisis and criticizes me for applying a "minority" approach rather than *Robinson v Detroit*, 462 Mich 439, 464-466; 613 NW2d 307 (2000). As discussed in

In this case, the question is whether there is a special or compelling justification to overrule the *Lee*/*Cleveland Cliffs* majority's decision to dramatically depart from this Court's deeply rooted standing doctrine. We hold that there is.

To begin with, a case may be given less deference when it was an abrupt departure from longstanding precedent and lacks a constitutional basis. *Adarand Constructors, Inc v Peña*, 515 US 200, 231-234; 115 S Ct 2097; 132 L Ed 2d 158 (1995). In such cases, "[b]y refusing to follow [the erroneous precedent], then, we do not depart from the fabric of the law; we restore it."

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concurrences by Justice WEAVER and Justice HATHAWAY, however, justices may take varying approaches to stare decisis. Indeed, the United States Supreme Court has not applied one strict standard or a single "commonly accepted . . . test," *post* at 449, when considering stare decisis issues and has applied various approaches, even within the same year. For example, in *Montejo v Louisiana*, 556 US 778, ___; 129 S Ct 2079, 2088-2089; 173 L Ed 2d 955, 967 (2009), in an opinion authored by Justice Scalia, the Court explained that "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." The Court also stated that other relevant factors include "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." Yet, in *Pearson v Callahan*, 555 US 223, 233; 129 S Ct 808; 172 L Ed 2d 565 (2009), in an unanimous opinion authored by Justice Alito, the Court stated that "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."

Ironically, the very doctrine and approach that the dissent claims to vehemently adhere to today was not so faithfully applied by the members of the dissent in the past. Indeed, the members of the dissent have overruled caselaw without even paying lip service to *Robinson*, see, e.g., *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006), or after engaging in a cursory, or limited, analysis of the factors that they claim fidelity to today, see, e.g., *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 91 n 13; 746 NW2d 847 (2008); *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 297 n 10; 731 NW2d 29 (2007); *Neal v Wilkes*, 470 Mich 661, 667 n 8; 685 NW2d 648 (2004); *People v Hickman*, 470 Mich 602, 610 n 6; 684 NW2d 267 (2004); *Mack v Detroit*, 467 Mich 186, 203 n 19; 649 NW2d 47 (2002).

Id. at 233-234. As discussed, *Lee* and its progeny departed dramatically from historical jurisprudence in Michigan, and the bounds of the constitutional text, when they interpreted the *Michigan* Constitution to compel a standing doctrine that is essentially coterminous with the federal standing doctrine. Thus, by reinstating the decades-old precedent from which *Lee* departed, we are restoring, not departing from, the fabric of the law and this Court's fidelity to the Michigan Constitution.[15]

Further, regardless of the level of deference due *Lee* and *Cleveland Cliffs*, there is a compelling justification to overrule the standing doctrine adopted in those cases. I find several evaluative criteria to be relevant, including: (1) "whether the rule has proven to be intolerable because it defies practical workability"; (2) "whether reliance on the rule is such that overruling it would cause a special hardship and inequity"; (3) "whether upholding the rule is likely to result in serious detriment prejudicial to public interests"; and (4) "whether the prior decision was an abrupt and largely unexplained departure from precedent." *Petersen*, 484 Mich at 320.[16]

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[15] Contrary to the mewling of the dissenters, who would enshrine their disembowelment of 10 to 50 years of this Court's jurisprudence, in *Lee* and many other cases, this majority's reversal of their recent activist efforts simply brings this Court back to the *status quo ante*. Indeed, the dissenters' stare decisis protestations should taste like ashes in their mouths. Although the dissenters paid absolutely no heed to stare decisis as they denigrated the wisdom of innumerable predecessors, the dissenters would now wrap themselves in its benefits to save their recent precedent.

[16] The other criteria suggested by Chief Justice KELLY in *Petersen* are not applicable to this case or are neutral. For example, perhaps because the case was recently decided, there are no related principles of law that have eroded the rule and there are no significant changed facts or circumstances. Further, as noted, the jurisprudence from other states

The first criterion weighs slightly in favor of affirming the *Lee*/*Cleveland Cliffs* standing doctrine because, although confusion sometimes arises over the application of the factors, the test does not rise to the level of defying practical workability.

The second criterion, the strength of reliance on the rule, weighs in favor of overruling *Lee* and *Cleveland Cliffs* because it seems unlikely that potential future defendants, including the government, have been violating laws on the basis of the assumption it could not be challenged because no party would have standing under *Lee* to do so. To the extent that such interests exist, they are not the type of reliance interests that this Court seeks to protect.

The third criterion weighs heavily in favor of overruling *Lee* because the doctrine is likely to result in serious detriment to the public interest. The purpose of the standing doctrine in Michigan has always been to "ensure sincere and vigorous advocacy." But the *Lee*/*Cleveland Cliffs* standing doctrine is, at the expense of the public interest, broader than this purpose because it may prevent litigants from enforcing public rights, despite the presence of adverse interests and parties, and regardless of whether the Legislature intended a private right of enforcement to be part of the statute's enforcement scheme. As noted by Chief Justice KELLY's *Cleveland Cliffs* concurrence, the *Lee*/*Cleveland Cliffs* standing doctrine "creates a self-inflicted wound" that prevents the Court from serving justice and protecting the public interest. *Cleveland Cliffs*, 471 Mich at 689. Further, as many commentators have noted, the federal standing doctrine has the effect

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and jurisdictions has limited value because it is based on distinct jurisprudential history and constitutions, and, regardless, there are states that have followed *Lujan* and there are states that have rejected it.

of encouraging courts to decide the merits of a case under the guise of merely deciding that the plaintiff lacks standing, thus using "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." *Valley Forge Christian College v Americans United for Separation of Church & State*, 454 US 464, 490; 102 S Ct 752; 70 L Ed 2d 700 (1982) (Brennan, J., dissenting) (quotation marks and citation omitted).[17] Thus, the *Lee*/*Cleveland Cliffs* standing doctrine is overly broad compared to the doctrine's historical purpose and development and unjustifiably "slams the courthouse door" on numerous controversies that present legitimately adverse parties and interests.

Finally, the fourth criterion weighs heavily in favor of overruling precedent because, as discussed above, by adopting the *Lujan* test as a constitutionally required standing doctrine, the majority casually displaced decades of inconsistent precedent without notice or adequate explanation and thus implemented an abrupt and insufficiently explained departure from precedent.

In light of these considerations, we hold that *Lee* and its progeny should be overruled.[18]

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[17] See, e.g., *Allen v Wright*, 468 US 737, 782; 104 S Ct 3315; 82 L Ed 2d 556 (1984) (Brennan, J., dissenting), quoting numerous academic commentaries to explain that "[m]ore than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims." Indeed, there is perhaps no better example of this than the dissenting opinion in this case, which, in order to apply the *Lee* standing test, also voluminously addressed the merits of each of plaintiffs' claims and the availability of the remedies they sought.

[18] The cases extending or applying *Lee* and *Cleveland Cliffs* include: *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007); *Mich Citizens for Water Conservation*; and *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006). Further, *Associated Builders & Contractors*, 472 Mich at 126-127, is

D. THE PROPER STANDING DOCTRINE

1. OVERVIEW OF THE PROPER APPROACH TO STANDING

The question then becomes what standing doctrine this Court should adopt in lieu of *Lee*/*Cleveland Cliffs*. We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing.[19] Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.[20] Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

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overruled to the extent that it required a litigant to establish the *Lee*/*Cleveland Cliffs* standing requirements in order to bring an action under MCR 2.605.

[19] The dissent's Chicken Little-esque wails of the impending stampede to the courthouse that will result from today's decision ignore that we do nothing more than restore an approach to standing that is consistent with the approach that this Court followed for decades without courts being overburdened with a flood of litigation before *Lee* was decided a mere *nine* years ago.

[20] The pre-*Lee*/*Cleveland Cliffs* standard, which was also incorporated into *Associated Builders & Contractors*, remains: "The essential requirement of the term 'actual controversy' under the rule is that plaintiffs 'plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.' " *Associated Builders & Contractors*, 472 Mich at 126, quoting *Shavers*, 402 Mich at 589.

2. APPLICATION OF THE STANDING DOCTRINE TO THIS CASE

The next question is whether, in this case, plaintiffs have standing. Plaintiffs seek a declaratory judgment, a writ of mandamus, and injunctive relief.[21] We hold that plaintiffs have standing to pursue at least some of their claims.

To begin with, under the proper approach to standing, plaintiffs may seek a declaratory judgment if the requirements in MCR 2.605 are met. We remand to the Court of Appeals to decide whether plaintiffs meet the requirements of MCR 2.605 because it did not previously address this issue.

Further, we must decide whether plaintiffs have standing to pursue the rest of their claims because the Revised School Code, MCL 380.1 *et seq*., does not create an express cause of action or expressly confer standing on plaintiffs to enforce the act's provisions.[22] We hold that, in this case, plaintiffs have standing because they have a substantial interest in the enforcement of MCL 380.1311a(1) that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced.

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[21] It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest. See, e.g., *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). Thus, because we hold that the plaintiff-teachers have standing, and it is not disputed that the plaintiff-teachers are members of the plaintiff-organizations, the plaintiff-organizations have standing as well.

[22] In dicta, the Court of Appeals decision in this case suggested that there is no implied private cause of action to enforce the Revised School Code. We do not reach the merits of that issue, however, because plaintiffs are not seeking a private cause of action for damages. See, generally, *Lash v Traverse City*, 479 Mich 180, 196-197; 735 NW2d 628 (2007), explaining that a party may seek remedies other than monetary damages, such as declaratory relief under MCR 2.605(A)(1), against a governmental unit without having to demonstrate that a statute has an implied private right of action.

To begin with, the text of MCL 380.1311a itself suggests that plaintiffs have a substantial and distinct interest. It requires that a qualifying student be expelled for physically assaulting an employee of the school, which is defined to include the plaintiff-teachers. Given that the students are expelled for assaulting employees of the school, and not the citizenry at large, it is apparent from the statute that the plaintiff-teachers have a substantial interest in the enforcement of this provision distinct from the general public. The members of the general public might never be in a school, and, even for those who are, an assault on those members would not necessarily lead to the expulsion of the assaultive student.

Moreover, the legislative history to the 1999 legislative amendments that adopted MCL 380.1311a(1) into the Revised School Code make clear that the purpose of the section is to create a safer school environment and, even more specifically, a safer and more effective working environment for teachers.[23] The enrolled analysis of the public act adopting the amendments explained that

[23] The dissent suggests that the same limitations that apply to using legislative history to *interpret* a statute should be applied to determining whether a party has a substantial and distinct interest in the statute's enforcement that is sufficient to establish standing. We disagree. If the Legislature unambiguously expresses an intent to confer standing through a statute's text, then it would certainly be sufficient to confer standing. But the inquiry into whether a party has a substantial and distinct interest in the enforcement of the statute is a much broader inquiry for which legislative history may be instructive. Indeed, before *Lee*, this Court would sometimes consider legislative history in determining whether a party had standing. See, e.g., *Frame v Nehls*, 452 Mich 171, 176-180; 550 NW2d 739 (1996); *Girard*, 437 Mich at 244-247. Further, while analyzing legislative intent is essential if a party is attempting to demonstrate that the Legislature intended to confer standing or create a private right that the party would have standing to enforce, this Court has not historically found an analysis of legislative intent necessary for a party to demonstrate that the party has a substantial interest in the

the rationale for their enactment is that "[i]n Michigan, school safety is an ongoing concern," and, although an earlier public act "addresses several aspects of school violence, additional concerns remain," and "[i]n particular, it has been suggested that students should be expelled or suspended when they physically or verbally assault teachers or other school personnel . . . ." Senate Legislative Analysis, SB 183, SB 206, HB 4240, and HB 4241, July 21, 1999. The analysis explains that the arguments in favor of the act included that "additional measures are necessary to create and maintain a safe educational environment" because "*[t]eachers who are subject to student assaults cannot effectively teach*, and pupils who feel endangered cannot learn." (Emphasis added.) It further explained that "[s]ince just one miscreant can disrupt an entire classroom, and a handful can ruin the atmosphere of a school, removing these individuals will promote efforts to educate and to learn, as well as *protect the physical safety of school personnel* and students" and concluded by explaining that "[a] comprehensive State approach toward student violence should deter future assaults and other disciplinary problems." (Emphasis added.) In other words, the legislative history of the act indicates that the intended purposes of MCL 380.1311a(1) are exactly what common sense would suggest based on the statutory text: to make the school and classroom environment safer in general and specifically to protect teachers' physical safety and their ability to effectively teach by removing miscreants and assisting in deterring future assaults. The plaintiff-teachers' affidavits indicate that, consistent with these purposes, the alleged

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enforcement of a statute relating to a public right that is distinct from that of the general public. See, e.g., *House Speaker v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993).

failure of the school board to comply with the statute increases the threat to their safety.

In light of these purposes, and the plaintiff-teachers' affidavits, it is even more clear that teachers have a substantial interest in the enforcement of MCL 380.1311a(1) that is distinct from that of the general public. The legislative history specifically contemplates that the statute is intended to not only make the general school environment safer but additionally to specifically protect *teachers* from assault and to assist them in more effectively performing their jobs. These are hardly interests that are shared by the general public.[24] Thus, teachers who work in a public school have a significant interest distinct from that of the general public in the enforcement of MCL 380.1311a(1).

We agree that, as stated by the dissent, the issue in this case is whether "a teacher [can] sue a school board for its failure to expel a student who allegedly assaulted

[24] Indeed, because of this, plaintiffs' claim to having a more substantial interest than that of the general public is greater than that of the plaintiff-firefighters in *Detroit Fire Fighters Ass'n*. In that case, Justice WEAVER's lead opinion explained that, in her view, firefighters did not have a substantial interest in the effects of reduced funding for the fire department that was sufficiently distinct from that of the general public because, although firefighters were subject to a greater risk of harm if the number of total firefighters was reduced, members of the public who were trapped in burning houses were also subject to a greater likelihood of injury, and, thus, "[b]oth segments of society are at greater risk when there is a dearth of fire fighters." *Detroit Fire Fighters Ass'n*, 449 Mich at 638 (quotation marks and citation omitted). Other justices, including myself, would have concluded that the firefighters did have a sufficiently distinct interest to establish standing. But, regardless, it is apparent that plaintiffs' interest in this case is even more distinct than that of the firefighters. As noted by the dissent, a teacher is more likely to be at a school, just as a firefighter is more likely to be at a fire. But whereas all members of the public are at risk of being in a building that may catch fire, all members of the public are not necessarily in schools so that they are at risk of being assaulted in a classroom or, even if they are in a school, of being affected by a less effective teaching environment.

that teacher[.]" *Post* at 390. In its many erroneous blanket statements about what we are holding today, the dissent seems to assume that we have answered that question with a definitive "yes." To the contrary, however, we have not. We have only held that if a teacher cannot sue the school board for allegedly failing to comply with MCL 380.1311a(1), *standing* is not the reason why. In their motion for summary disposition, defendants raised several arguments as to why plaintiffs cannot sue the school board besides standing, including that plaintiffs have failed to plead a cause of action and that their claims fail as a matter of law.[25] Plaintiffs appealed those issues. Because the Court of Appeals decided the case on the basis of standing alone, and did not reach the other issues, we remand to that Court to address the remaining issues.[26]

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[25] As discussed, the merits of a party's claims and their right to the requested remedies were frequently intertwined in the standing analysis erroneously adopted in *Lee*. Indeed, the dissent in this case perfectly models this troubling aspect of that decision. But, under the proper approach to standing, the issues of whether plaintiffs have sufficiently pleaded a cause of action and are entitled to the requested remedies are independent of the standing inquiry. Indeed, the issues the dissent raises regarding whether students' rights would be violated if a court decided to review the school board's disciplinary hearings and discretionary decision *and* found that plaintiffs were entitled to an injunction expelling the students are certainly premature at this point.

[26] Just as the dissent's cries that the historical standing test, in general, will lead to a stampede to the courthouse ignore that we are reversing a decision that is only *nine* years old, the dissent's cries regarding the stampede of lawsuits that will result from this specific case ignore that the Revised School Code predated *Lee* and yet the courts were not overburdened with similar cases before *Lee*. The reason for this lack of lawsuits is self-evident, as standing is certainly not the only hurdle to prevailing in a case, including winning on the merits. As noted, we are not holding that there is an implied cause of action for private damages under the Revised School Code. Thus, the plaintiff-teachers seeking enforcement of MCL 380.1311a(1) must meet the requirements for some other cause of action, such as a writ

In summary, we hold that plaintiffs have standing because plaintiffs have a substantial interest in the enforcement of MCL 380.1311a(1) that is detrimentally affected in a manner distinct from that of the general public if the statute is not enforced.

III. CONCLUSION

We overrule the standing test adopted in *Lee* and its progeny and restore Michigan standing jurisprudence to be consistent with the doctrine's longstanding, prudential roots. We reverse the Court of Appeals judgment and remand to that Court to determine whether plaintiffs meet the requirements of MCR 2.605. Further, because we hold that plaintiffs have standing to pursue their remaining claims, we also remand to the Court of Appeals for consideration of the issues that it did not previously reach.

KELLY, C.J., and WEAVER (except for part II[C]) and HATHAWAY, JJ., concurred with CAVANAGH, J.

WEAVER, J. (*concurring*). I concur in and sign all of the majority opinion except part II(C), entitled "Stare Decisis."

I write separately to expand on footnote 8 of the majority opinion by providing some of the additional criticisms of *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and its progeny mentioned in that footnote.

As I stated in my dissenting opinion in *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 311; 737 NW2d 447 (2007):

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of mandamus under MCR 3.305 or a declaratory action under MCR 2.605(A)(1). As the dissent's analysis indicates, these may be difficult hurdles to clear.

Beginning with *Lee v Macomb Co Bd of Comm'rs*, the majority overruled Michigan precedent establishing prudential standing as the traditional doctrine of legal standing in Michigan. In place of Michigan's doctrine of prudential standing, the majority erroneously adopted a constitutional doctrine of standing based on the federal courts' doctrine of standing, as stated in *Lujan v Defenders of Wildlife*.[1]

I further stated:

Before *Lee*, no Michigan case had held that the issue of standing posed a constitutional issue.[2] Nor did any case hold that Michigan's judicial branch was subject to the same case-or-controversy limitation imposed on the federal judicial branch under article III of the United States Constitution.[3] In fact, article III standing derived from *Lujan* was not even an issue raised or briefed by the parties in *Lee*. On its own initiative, the majority of four raised *Lujan*'s standing test and erroneously transformed standing in Michigan into a constitutional question. [*Id*. at 312-313.]

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[1] *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

[2] Before *Lee*, the Michigan standing requirements were based on prudential, rather than constitutional, concerns. See, generally, *House Speaker v State Admin Bd*, 441 Mich 547, 559 n 20; 495 NW2d 539 (1993), and Justice RILEY's concurrence in *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 643; 537 NW2d 436 (1995).

[3] As I wrote in my concurrence in *Lee*:

> In *House Speaker* we stated that "this Court is not bound to follow federal cases regarding standing," pointing out that "[o]ne notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts may issue opinions only where there is an actual case or controversy." [*House Speaker*, 441 Mich at] 559, including n 20. Justice Kennedy, writing for the Court in *ASARCO Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989), acknowledged:
>
> "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . ." [*Lee*, 464 Mich at 743 n 2.]

After the majority in *Lee* created a constitutional standing test for Michigan, the same "majority of four" (former Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) "next questioned the Legislature's ability to confer standing on citizens through the use of statutes granting standing when a citizen alleges a specific wrong." *Id*. at 314-315. As I further stated in *Nestlé*:

> In *Nat'l Wildlife* [*Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004)], the majority of four attacked [the Michigan Environmental Protection Act, MCL 324.1701 *et seq*. (MEPA)] by stating at length, all in dicta, that the Legislature cannot grant citizens standing. The majority based this argument on the premise that the Legislature would be taking away the power to enforce laws, an essential component of the "executive power," and giving that power to the judicial branch. The majority proudly proclaimed that it was "*resisting* an expansion of power—not an everyday occurrence in the annals of modern government."[4] Unfortunately, that statement was not accurate, because the majority showed its lack of judicial restraint by compromising the Legislature's constitutional duty to enact laws for the protection of the environment and enlarging the Court's capacity to overrule statutes under the guise of the majority's self-initiated, erroneous "constitutional" doctrine of standing.[5] [*Nestlé*, 479 Mich at 315.]

As Justice CAVANAGH's majority opinion in this case states at footnote 9, I described in *Nat'l Wildlife* how the *Lee* standing doctrine violated separation of powers under the Michigan Constitution. In *Nat'l Wildlife*, I stated:

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[4] *Nat'l Wildlife*, 471 Mich at 639 (emphasis in original).

[5] "[F]aux judicial restraint is judicial obfuscation." *Fed Election Comm v Wisconsin Right to Life, Inc*, 551 US 449, 499 n 7; 127 S Ct 2652; 168 L Ed 2d 329 (2007) (Scalia, J., concurring in part and concurring in the judgment).

> While pretending to limit its "judicial power," the majority's application of *Lee*'s judicial standing test in this case actually expands the power of the judiciary at the expense of the Legislature by undermining the Legislature's constitutional authority to enact laws . . . . [*Nat'l Wildlife*, 471 Mich at 654 (WEAVER, J., concurring).]

In expanding the judicial power by making standing a constitutional concern, the "majority of four" took

> the area of legal standing out of the hands of the Legislature and the people and placed it exclusively at [the majority of four's] mercy. To make standing a constitutional concern when our Michigan Constitution is completely silent regarding which of the government's branches has power to grant standing represents judicial activism of the most objectionable sort." [*Rohde v Ann Arbor Pub Sch*, 479 Mich 336, 373; 737 NW2d 158 (2007).]

Lee and its progeny clearly defied common sense and fairness, as those cases ignored Michigan's Constitution and imposed "unprecedented, judge-made restrictions on . . . access to the courts." *Nat'l Wildlife*, 471 Mich at 654 (WEAVER, J., concurring). The *Lee* standing doctrine represented an unprecedented and unrestrained expansion of judicial power that dishonored our Michigan Constitution and decimated the rule of law and therefore it must be reversed. Accordingly, for the reasons I have given over the last nine (9) years since *Lee* was decided and for the reasons in Justice CAVANAGH's majority opinion in this case, I vote to overrule *Lee* and its progeny.

With regard to the policy of stare decisis, my view is that past precedent should generally be followed but that to serve the rule of law, in deciding whether wrongly decided precedent should be overruled, each case should be looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness. I agree with the sentiment recently expressed by Chief

Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v Fed Election Comm*, 558 US ___, ___; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010), when he said that

> *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 [123 S Ct 2472; 156 L Ed 2d 508] (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 [60 S Ct 444; 84 L Ed 604] (1940) . . . . If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967).

Chief Justice Roberts further called stare decisis a "principle of policy" and said that it "is not an end in itself." *Id*. at ___; 130 S Ct at 920; 175 L Ed 2d at 807. He explained that "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id*. at ___; 130 S Ct at 921; 175 L Ed 2d at 807.[6]

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[6] It appears that the dissent in this case does not agree with Chief Justice Roberts. The dissent refers to cases that have been overruled by this Court in the past 18 months. While the dissenting justices may feel aggrieved by this Court overruling those cases, amongst those cases were some of the most egregious examples of judicial activism that did great harm to the people of Michigan. Those decisions were made by the

I agree with Chief Justice Roberts that stare decisis is a policy and not an immutable doctrine. I chose not to sign Chief Justice KELLY's lead opinion in *Petersen v Magna Corp*, 484 Mich 300, 316-320; 773 NW2d 564 (2009), because it proposed to create a standardized test for stare decisis. Likewise, I do not sign the majority opinion's stare decisis section in this case because it applies *Petersen*. There is no need for this Court to adopt any standardized test regarding stare decisis. In fact, it is an impossible task. There are many factors to consider when deciding whether or not to overrule precedent, and the importance of such factors often changes on a case-by-case basis.[7]

"majority of four," including the dissenting justices, under the guise of ideologies such as "textualism" and "judicial traditionalism." One of the dissenting justices, Justice YOUNG, expressed his apparent contempt for the common law and common sense in his 2004 article in the Texas Review of Law and Politics, where Justice YOUNG stated:

> Consequently, I want to focus my remarks here on the embarrassment that the common law presents—or ought to present—to a conscientious judicial traditionalist. . . .
>
> To give a graphic illustration of my feelings on the subject, I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party. Grandpa's presence is undoubtedly a cause of mortification to the host. But since only the most ill-bred of guests would be coarse enough to comment on Grandpa's presence and condition, all concerned simply try ignore him. [Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 301-302 (2004).]

[7] Over the past decade, the principal tool used by this Court to decide when a precedent should be overruled is the set of guidelines that was laid out in *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), an opinion written by former Justice TAYLOR, signed by Justices CORRIGAN, YOUNG, and MARKMAN and myself, and that I have used numerous times. By no means do I consider the *Robinson* guidelines a "be-all, end-all test" that constitutes precedent of this Court to be used whenever this Court considers overruling precedent. I view *Robinson* as merely providing guidelines to assist this Court in its legal analysis when pertinent.

In the end, the consideration of stare decisis and whether to overrule wrongly decided precedent always includes service to the rule of law through an application and exercise of judicial restraint, common sense, and a sense of fairness—justice for all.

In serving the rule of law and applying judicial restraint, common sense, and a sense of fairness to the case at hand, I agree with and join the majority opinion's holding that *Lee* and its progeny are overruled.

HATHAWAY, J. (*concurring*). I fully concur with Justice CAVANAGH's analysis and conclusion in this matter and I support overruling *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). Further, I agree with the additional criticisms of *Lee* articulated in Justice WEAVER's thoughtful concurrence. I write separately to express my thoughts on the doctrine of stare decisis.

Given the debate amongst the justices of this Court concerning what constitutes the proper stare decisis analysis, I find it insightful to review how our United States Supreme Court has treated the doctrine. Stare decisis is a principle of policy that commands judicial respect for a court's earlier decisions and the rules of law that they embody. See *Harris v United States*, 536 US 545, 556-557; 122 S Ct 2406; 153 L Ed 2d 524 (2002); *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940). "*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." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). However, when balancing the need to depart from precedent with the need to

adhere to established precedent, it is important to bear in mind that stare decisis is neither an "inexorable command," *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering*, 309 US at 119. "If it were, *segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants*. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967)." *Citizens United v Fed Election Comm*, 558 US __, __; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010) (Roberts, C.J., concurring).

I too believe that stare decisis is a principle of policy. As stated in *Helvering*:

> We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.[1]

I do not agree with any approach to stare decisis that suggests or implies that it is a "rule" or "law" subject to

[1] *Helvering*, 309 US at 119.

a particularized test to be used in all circumstances. Any particular approach to stare decisis, such as the one taken in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), is not "law" or "established precedent" that would require us to overrule, reject or modify its analysis. The *Robinson* approach to stare decisis, just as the one taken in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009), is one among many varying approaches, and no particular approach, in and of itself, is inherently superior to another. As with any policy determination, the approach taken in any given case will depend on the facts and circumstances presented.

Historically, the United States Supreme Court has utilized many different approaches to stare decisis, including such approaches as those involving a "compelling justification,"[2] "special justification,"[3] and a determination that a case was "wrongly decided."[4] Each of these approaches is valid and offers a different nuance to stare decisis consideration.[5] However, because stare decisis is a policy consideration, which must be considered on a case-by-case basis, the particular analytical approach will differ from case to case. Most importantly, the critical analysis should be on the rationale regarding whether or not to change precedent.

It is also worthy to note that not only has the United States Supreme Court historically not taken one single approach to the application of stare decisis, the Court

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[2] See *14 Penn Plaza LLC v Pyett*, 556 US 247, 280; 129 S Ct 1456; 173 L Ed 2d 398 (2009) (Souter, J., dissenting).

[3] *Arizona v Rumsey*, 467 US 203, 212; 104 S Ct 2305; 81 L Ed 2d 164 (1984).

[4] *Seminole Tribe of Florida v Florida*, 517 US 44, 66; 116 S Ct 1114; 134 L Ed 2d 252 (1996).

[5] Any of these approaches to stare decisis can be valid depending on the issues before the court. However, the factors used in any of these tests may or may not be applicable in any given case.

has not felt compelled to discuss stare decisis in all cases when precedent is being overturned. Many landmark cases that overruled well-established precedent did not discuss or even mention the phrase "stare decisis." For example, *Brown* overruled *Plessy*, thereby ending segregation in our public schools, without mentioning the phrase "stare decisis," much less articulating and following a particularized test. Similarly, *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), which established the rights of indigents to have counsel in all criminal cases, not merely capital offenses, overruled *Betts v Brady*, 316 US 455; 62 S Ct 1252; 86 L Ed 1595 (1942), again without mentioning "stare decisis" or a particularized test. Instead, both of these cases focused on the important policy considerations that weighed in favor of overruling precedent.[6]

With these principles in mind, any analysis of the impact of stare decisis must focus on the individual case and the reason for overruling precedent. Thus, the reasons for overruling *Lee* are paramount to any articulated test and the special and compelling justifications to do so are overwhelming in this case. As I agree with the well-articulated reasons expressed by Justice CAVANAGH and Justice WEAVER, I will not repeat them here.

CORRIGAN, J. (*dissenting*). I dissent. In one fell swoop, the majority permits unlimited interference by courts in the local educational process and rewrites the entire constitutionally based legal doctrine governing stand-

[6] See Supreme Court Decisions Overruled By Subsequent Decisions, available at <http://www.gpoaccess.gov/constitution/pdf2002/048.pdf> (accessed July 28, 2010), for a partial list of United States Supreme Court cases (covering the period from 1810 to 2001) that overrule precedent. Numerous additional examples can be found on this list of cases that do not mention or discuss the phrase "stare decisis" despite the fact that the case overrules precedent.

ing in Michigan. Contrary to the majority's decision, the lower courts correctly concluded that the plaintiff teachers here have no statutory right to demand the permanent expulsion of four particular children, and potentially innumerable other children, from all Michigan schools. Under any meaningful test for standing, plaintiffs cannot enlist the courts to compel locally elected school boards to expel students under the circumstances presented here.

The majority reverses the lower courts' rulings, however, by creating a vague new standing "test"—which is really no test at all—that violates the constitutional separation of powers mandate and gives courts unbounded discretion to overturn the decisions of other branches of government. In its haste to overrule this Court's standing jurisprudence, instead of addressing the issues framed by the parties, the majority asks and answers a question solely of its own making: whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), was correctly decided.[1] In doing so, the majority jettisons years of binding precedent on the basis of four justices' current estimation that the public would be better served by opening the courts to all manner of challenges to acts of the legislative and executive branches. In overruling numerous cases, the majority throws into question the analyses and results in *no fewer than eight* significant, precedent-setting disputes including: *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008); *Rohde v Ann Arbor Pub Sch*, 479 Mich

[1] The parties addressed this issue only after the majority directed them to do so in this Court's order granting plaintiffs' application for leave to appeal. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009). Before this order issued—indeed, from the inception of this case—the parties agreed that *Lee* was the governing legal authority; each side affirmatively argued that *Lee* controlled and urged that *Lee* supported its position.

336; 737 NW2d 158 (2007); *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006); *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117; 693 NW2d 374 (2005); *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004); *Crawford v Dep't of Civil Serv*, 466 Mich 250; 645 NW2d 6 (2002); and, of course, *Lee* itself.

Moreover, in concluding that plaintiffs have standing here, the majority illustrates the fundamental problem with its approach: it adopts no meaningful limitations for a binding doctrine that applies in *every* civil lawsuit brought in this state. Here it opens the courthouse doors for any school teacher, volunteer, contractor or student to demand that a court expel children from their schools even though a local school board has concluded that expulsion was inappropriate. The majority thus authorizes courts not only to invade the provinces of school districts and the state board of education, but also to deprive children of their rights to public education without affording them any due process protections or legal representation. Indeed, none of the children targeted for expulsion are even named as parties in this suit. It is unfathomable that a court nonetheless has the power to permanently expel them from school—yet the majority so holds.

Critically, in overruling the entire body of Michigan's existing standing jurisprudence, the majority eschews the clear understanding of the "judicial power" held by the framers of our state constitution. It also eliminates our workable, principled standing test, which mirrors that of the federal courts and of many state courts *with constitutions similar to our own*. Indeed *no* state in the

union incorporates explicit "case or controversy" language into its constitution, yet many states explicitly employ the federal test—which is rooted in the traditional case or controversy requirement—that we adopted in *Lee*.

Finally, in effecting these unprecedented changes to Michigan's standing jurisprudence, the majority ignores the doctrine of stare decisis while paying lip service to it. The majority inexplicably concludes that *Lee* was clearly wrongly decided, and that "*Lee* and its progeny departed dramatically from historical jurisprudence," although each member of the current majority who served on this Court during the relevant time period—Justice CAVANAGH, Chief Justice KELLY, and Justice WEAVER—adopted *Lee* as the correct test at some point in the past.[2]

For each of these reasons, I vigorously dissent. I would affirm the decision of the Court of Appeals, which faithfully and appropriately applied the law of this state in concluding that plaintiffs did not have standing to pursue this action.

I. THE QUESTION PRESENTED

This case, brought by four Lansing teachers and their union, originally presented a straightforward question: can a teacher sue a school board for its failure to expel a student who allegedly assaulted that teacher? To be clear, this case does not ask whether the public has an interest in the welfare of its teachers; our desire for their safety is indisputable. Nor does the case ask whether § 1311a of the Revised School Code, MCL 380.1

[2] See *Associated Builders*, 472 Mich at 126-127 (WEAVER, J.); *Lee*, 464 Mich at 750 (KELLY, J., dissenting, joined by CAVANAGH, J.); *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 651-652; 537 NW2d 436 (1995) (CAVANAGH, J., dissenting in part and concurring in part).

et seq., requires a school board to expel a student who "commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board," MCL 380.1311a(1); the parties do not dispute the unambiguous language of this provision. Further, the defendant school board and school district do not argue that they may ignore this mandate despite their conclusion following a student disciplinary proceeding that a student committed a physical assault as defined by the code. Rather, the parties dispute whether plaintiffs have standing to intervene, by way of a collateral civil suit, when they disagree with defendants' underlying decision that the acts of the students at issue did not constitute physical assaults for purposes of applying the mandatory expulsion provision of MCL 380.1311a(1).

Accordingly, this case specifically asks whether the *courts* may decide, at the behest of a particular teacher, that a school board *must* permanently expel a particular student without any notice to the student or his parents. The plaintiff teachers argued that they should be empowered to seek a court order directing permanent expulsion of students under MCL 380.1311a(1). The majority agrees and holds, under its broad new standard, that plaintiffs have standing to proceed.

This holding is contrary both to settled principles of law regarding when a party has statutory and constitutional standing to bring a claim, as well as to the result demanded by the particular facts and circumstances of this case. The school code itself clearly establishes that the mandate in MCL 380.1311a(1) is to be enforced by the state executive branch and the locally elected school boards. Moreover, it is for the school districts—not the courts or individual teachers—to decide whether a particular student committed an assault requiring ex-

pulsion. Plaintiffs offer no justification for the judicial branch to usurp these powers, which are specifically delegated to other branches of government.

Finally, plaintiffs have *never* described how the courts could successfully intervene. Their analysis fails to account for the fact that a board's decision to expel a student occurs only after a disciplinary proceeding where the *student's* constitutional rights are protected and where the board must make a careful, discretionary, factual decision concerning whether the student had the requisite intent to commit a "physical assault" as defined by the school code. According to the Michigan Association of School Boards, more than 100,000 such disciplinary proceedings occur in Michigan each school year. Yet plaintiffs seek to intervene after the fact in a case where the students are not represented, asking the Court to revisit and overrule innumerable decisions of the elected school boards. Moreover, plaintiffs never explain why other enforcement mechanisms—including not only the explicit statutory enforcement provisions, but also negotiations with the school board under their collective bargaining agreement—are inadequate to ensure appropriate enforcement of the applicable statute.

Thus, like the lower courts, I cannot conclude that teachers have standing to obtain court orders compelling expulsion of students in contravention of a school board's decision that the students' acts did not require expulsion. Perhaps most significantly, by choosing to overrule this Court's constitutional standing doctrine *sua sponte*, the majority gives the courts carte blanche to invade the school board's decision-making province, depriving those boards of their constitutionally delegated responsibilities and depriving students of their rights to public education without affording them due process. This case thus illustrates the absolutely unten-

able nature of the majority's new approach—an approach that, unfortunately, is characteristic of the majority's assault on the rule of law.

A. LOCAL SCHOOL DISTRICTS AND THE REVISED SCHOOL CODE

1. GENERAL POWERS AND DUTIES OF SCHOOL DISTRICTS

The Revised School Code, originally enacted in 1976,[3] describes the "rights, powers, and duties" of school districts. MCL 380.11a(3). The powers and duties originate from the Michigan Constitution, which established that the "legislature shall maintain and support a system of free public elementary and secondary schools . . . ." Const 1963, art 8, § 2. Consistent with this mandate, the Legislature enacted the school code and provided that school districts would be governed by locally elected school boards. MCL 380.11a(5), (7). The constitution also vested "[l]eadership and general supervision over all public education" in the elected members of the state board of education. Const 1963, art 8, § 3.

Significantly, both the constitution and the school code make plain that school districts' central purposes are the education and protection of students. Const 1963, art 8, § 2, requires a system of free public schools and states simply: "Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." The school code, in turn, defines district functions to include "[e]ducating pupils," MCL 380.11a(3)(a), and "[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity," MCL 380.11a(3)(b). A district's functions with regard to

[3] 1976 PA 451.

employees, however, center on "[h]iring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and others to carry out school district powers." MCL 380.11a(3)(d).

2. DISCIPLINARY POWERS AND DUTIES OF SCHOOL DISTRICTS

School districts' powers and duties with regard to students include disciplinary measures subject to varying degrees of discretion by the board and its employees. For example, a district has discretion to suspend or expel a student who is "guilty of gross misdemeanor or persistent disobedience if, in the judgment of the school board or its designee, as applicable, the interest of the school is served" by suspension or expulsion. MCL 380.1311(1). A school board must permanently expel[4] a student under certain circumstances, including possession of a weapon (subject to some exceptions), arson, or criminal sexual conduct on school grounds. MCL 380.1311(2). Even under these circumstances, however, the student or his parent may petition for reinstatement to public education when a period of up to 180 days has elapsed after his expulsion. MCL 380.1311(5).

The statutory provision at issue in this case, MCL 380.1311a(1), was added to the school code by the Legislature in 1999 as one of several bills—including the safe schools and communities law, 1999 PA 23—addressing school safety and student discipline.[5] The 1999 bills mandated a statewide school safety information policy to be collaboratively adopted by the Superintendent of Public Instruction, the Attorney General,

[4] Permanent expulsion generally means that a student may not attend any public school in Michigan. But expelled students may be eligible to attend alternative education programs and strict discipline academies or to receive in-home instructional services. MCL 380.1311(3).

[5] 1999 PA 102 to 104; 1999 PA 23.

and the director of the Department of State Police. MCL 380.1308(1). The bills also enacted guidelines for student discipline under various circumstances and established strict discipline academies, MCL 380.1311b, for particular students, including those expelled from their regular public schools, MCL 380.1311g(3)(b) and (c).

MCL 380.1311a(1) requires permanent expulsion "[i]f a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board" and the assault is properly reported to school officials. For purposes of this section, "physical assault" means "intentionally causing or attempting to cause physical harm to another through force or violence." MCL 380.1311a(12)(b).

3. ENFORCEMENT

The school code's provisions are enforced by several mechanisms. First, school board members, school officials, and any "other person who neglects or refuses to do or perform an act" required by the code, or "who violates or knowingly permits or consents to a violation" of the code, is subject to misdemeanor prosecution. MCL 380.1804. Second, under MCL 380.1806, a school board "may dismiss from employment and cancel the contract of a superintendent, principal, or teacher who neglects or refuses to comply" with the code. Third, because the members of school boards and the state board of education are elected officials, their acts and policies are regularly reviewed—and accepted or rejected—by the electorate.

It is also significant that the Legislature has enacted a comprehensive, carefully monitored scheme to address safety within our schools. For example, the statewide school safety information policy requires school

officials to report various school incidents to law enforcement agencies for investigation. MCL 380.1308(2)(a) and (3). Incidents that require reporting under this section are defined by members of the executive branch, MCL 380.1308(1), "taking into account the intent of the actor and the circumstances surrounding the incident," MCL 380.1308(2)(b). School boards are required to submit reports that state the number of students expelled during each year and the reasons for expulsion, MCL 380.1310a(1), and list crimes, including those "involving physical violence," committed at schools, MCL 380.1310a(2). These reports are ultimately intended, in part, to help policymakers, school districts, communities, and law enforcement officials "identify the most pressing safety issues confronting their school communities," "enhance campus safety through prevention and intervention strategies," "prevent further crime and violence and . . . assure a safe learning environment for every pupil." MCL 380.1310a(2)(c) and (d). Finally, it is noteworthy that many school districts are now empowered to create law enforcement agencies within their school systems. MCL 380.1240.

B. TEACHERS' STANDING TO SUE UNDER SECTION 1311a OF THE REVISED SCHOOL CODE

1. STANDING AND GROUNDS FOR COURT INTERVENTION

Despite the Legislature's comprehensive system, through which executive branch officials and local districts set evolving policies and monitor responses to school safety, the plaintiff teachers here ask the courts to intervene and dictate the Lansing School District's responses to four past incidents—and potentially innumerable future incidents—involving student misbehavior. Each of the named plaintiffs alleges that she was

physically assaulted by a middle school student[6] and, therefore, that the court should order permanent expulsion of each student under MCL 380.1311a(1). Plaintiffs further asked the court to: permanently enjoin defendants from violating MCL 380.1311a in the future; find school officials and board members guilty of misdemeanors for violating the school code under MCL 380.1804; and cancel the contracts of the superintendent and any principal for failing to comply with the school code under MCL 380.1806.

Plaintiffs sought this relief by requesting a declaratory judgment under MCR 2.605, which permits a court to "declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." MCR 2.605(A)(1). They also sought a writ of mandamus under MCR 3.305, which requires a plaintiff to prove "it has a clear legal right to performance of the specific duty sought to be compelled and the defendant has a clear legal duty to perform such act." *Baraga Co v State Tax Comm*, 466 Mich 264, 268; 645 NW2d 13 (2002) (quotation marks and citations omitted). Defendants moved for summary dismissal of plaintiffs' complaint, arguing that plaintiffs did not have standing to seek either remedy.

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[6] Plaintiffs allege that one student threw a leather wristband with metal spikes, which hit a bulletin board "about two inches" from the plaintiff teacher's head, bounced, and hit the teacher in the face. Plaintiffs further allege that two students separately hit plaintiff teachers with chairs. Each teacher suffered bruises as a result. A fourth student allegedly slapped a plaintiff teacher on the back with enough force to cause stinging and to leave a pink mark. Plaintiffs state that each of these incidents was properly reported to school officials and *each student was suspended* but not expelled. The parties agree that the defendant school board apparently concluded that none of the four students named in the complaint committed "physical assaults" as defined by the code and, therefore, expulsion was *not* mandated by MCL 380.1311a(1).

Traditional standing principles apply to plaintiffs seeking declaratory relief, *Associated Builders,* 472 Mich at 125, or writs of mandamus, e.g. *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). As this Court explained in *Associated Builders*, addressing declaratory actions:

> "[I]f a court would not otherwise have subject matter jurisdiction over the issue before it or, if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it." [*Associated Builders*, 472 Mich at 125, quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993).]

Accordingly, *Associated Builders* explicitly held, in an opinion authored by Justice WEAVER, that the test enunciated in *Lee*, 464 Mich 726, governs standing in declaratory actions and, as here, in actions where a plaintiff seeks to enforce an alleged statutory right but the statute does not confer standing by its own terms. *Associated Builders*, 472 Mich at 127 n 16. Therefore, until today, plaintiffs bore the burden of establishing each of the following elements of standing in order to invoke court jurisdiction:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d

351 (1992) (citations omitted); quoted and adopted by *Lee*, 464 Mich at 739; quoted and applied to declaratory actions in *Associated Builders*, 472 Mich at 126-127.]

Here plaintiffs have not established a legally protected interest in, or clear legal right to, expulsion of students under MCL 380.1311a(1). Plaintiffs also have not shown that defendants had a clear legal duty to expel the students under the facts presented or that plaintiffs' interests can be addressed by a favorable court decision. Therefore, they cannot establish standing to seek relief against the school board under MCL 380.1311a(1).

2. THE ALLEGED RIGHT TO RELIEF ASSERTED BY PLAINTIFFS

Plaintiffs argue that the text of MCL 380.1311a(1) creates an enforceable right in teachers and a corresponding duty owed by school districts to teachers. To determine whether a plaintiff has standing created by a statute, the court begins by considering "the statutory language to determine legislative intent." *Miller v Allstate Ins Co*, 481 Mich 601, 610; 751 NW2d 463 (2008). As an initial matter, many of the cases cited by plaintiffs on this point are inapposite because they address whether a statute creates or implies a right of action for damages against a *private* party.[7] The inquiry is different when, as here, a governmental agency is involved. Because governmental agencies are generally immune

[7] E.g., *Gardner v Wood*, 429 Mich 290, 312-314; 414 NW2d 706 (1987) (finding no implied cause of action against a private party for violating a provision of the former Liquor Control Act, MCL 436.26c); *Pompey v Gen Motors Corp*, 385 Mich 537, 552-553, 560; 189 NW2d 243 (1971) (permitting suit against a private employer for violation of the plaintiff's statutorily created civil rights); *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998) (finding no implied cause of action against a private party for violating the child care organizations act, MCL 722.111 *et seq.*).

from suit under the governmental tort liability act, MCL 691.1407,[8] a plaintiff may sue a governmental agency for damages only when the Legislature *expressly* so authorizes. *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007); *Mack v Detroit*, 467 Mich 186, 195-196; 649 NW2d 47 (2002). These cases do not establish that a plaintiff may infer a private cause of action for damages against a governmental agency. Rather, in a suit against a governmental agency, a plaintiff generally may seek only injunctive or declaratory relief upon showing that the particular plaintiff has a clear, legally enforceable right that the particular defendant had a duty to protect. *Lash*, 479 Mich at 196.

Some of the relief requested by plaintiffs is clearly unavailable because they improperly ask the court to require the executive branch and the school district to make discretionary decisions *in a particular manner*. Although a plaintiff may seek to compel the *exercise* of discretion through a writ of mandamus, he may *not* compel the exercise of discretion "*in a particular manner*." *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 666; 425 NW2d 80 (1988) (emphasis added). Courts are not empowered to require the school board to cancel an employee's contract for failing to comply with the school code. Rather, MCL 380.1806 clearly establishes that a decision to terminate an employee under these circumstances lies within the board's discretion because the statute states that the board "may" dismiss an employee for violating the code. A statute's use of the word "may" in this context

[8] A school district, its board members, and its employees generally qualify for governmental immunity. See MCL 691.1407(1) and (2) (establishing that a "governmental agency" and its board members and employees are generally immune from tort liability); MCL 691.1401(b) and (d) (defining "governmental agency" to include a "political subdivision" of the state and defining "political subdivision" to include school districts).

conveys discretion to act; it does not *require* the act. See *Warda v Flushing City Council*, 472 Mich 326, 332; 696 NW2d 671 (2005). Similarly, a court has no power to find individual officials guilty of misdemeanors under MCL 380.1804 in this civil case. "The power to determine whether to charge a defendant [with a criminal offense] and what charge should be brought is an executive power, which vests exclusively in the prosecutor." *People v Gillis*, 474 Mich 105, 141 n 19; 712 NW2d 419 (2006); Const 1963, art 3, § 2.[9] Indeed, not only is this a civil case, but plaintiffs failed to name any individual defendants, so no potentially liable individuals are even parties against whom relief may be sought.

Accordingly, the only obtainable relief sought by plaintiffs depends on their argument that they have a clear, legally protected right to the expulsion of the four students described in the complaint and, potentially, to innumerable future students. They stress that MCL 380.1311a(1) addresses assaults on a specific, circumscribed group of people—any "person employed by or engaged as a volunteer or contractor by the school board"—that includes teachers like themselves. But nothing in the code suggests that the statute therefore creates an enforceable right in, or a duty to, this group of people. As explained above, the text of the 1999 statutory amendments is aimed at creating a comprehensive, statewide program of student discipline governed by the state board of education and the local districts. There is no indication of a legislative intent to

[9] See also *People v Chavis*, 468 Mich 84, 94 n 6; 658 NW2d 469 (2003): "It is invariably the case that the prosecutor always has great discretion in deciding whether to file charges. Such executive branch power is an established part of our constitutional structure." The prosecutor's powers in this regard are tempered by "systemic protections afforded defendants" incident to criminal trials and by "elections, which call all office holders to account to their constituents." *Id*.

create new rights in teachers beyond their explicit statutory and contract rights.[10]

Plaintiffs cite two cases in which courts entertained suits brought by teachers who sought interpretation of school code provisions: *Detroit Federation of Teachers v Detroit Bd of Ed*, 396 Mich 220; 240 NW2d 225 (1976) (addressing the former code that predated the 1976 revised code), and *Roek v Chippewa Valley Sch Dist*, 122 Mich App 76; 329 NW2d 539 (1982). In *Detroit Federation of Teachers*, this Court agreed with the circuit court's declaratory decision stating that the defendant board "shall enter into a written, individual contract with each 'duly qualified' teacher in its employ" because written contracts with teachers were required by former MCL 340.569, but we concluded that the lower courts erred by directing the kind of contract individual teachers would receive. 396 Mich at 222, 226. In *Roek*, the Court resolved the parties' dispute over language in MCL 380.1236(2), concluding on the basis of undisputed facts that the plaintiff qualified, as a matter of law, as a teacher employed as a substitute teacher for 120 days or more during a school year and thus had the basic right to be given first opportunity to accept or reject a contract under certain circumstances. 122 Mich App at 78-79. Neither of these cases supports plaintiffs' claim for standing here.

These cases were concerned with teachers seeking judicial action with regard to *teacher* contracts. Thus, the cases addressed issues germane to teachers as *direct* parties to statutorily specified employment relationships. Moreover, because the cases involved the defendants' duties to teachers in the employment context,

[10] The only authority plaintiffs cited to support their oft-stated conclusion that MCL 380.1311a(1) was specifically intended to protect employee safety is HB 5802, which became 2000 PA 230. But 2000 PA 230 did not enact MCL 380.1311a, as plaintiffs incorrectly assumed.

the subject matter fell directly within the scope of specified district functions with regard to employees, which include "contracting." MCL 380.11a(3)(d). More importantly, *Detroit Federation of Teachers*, in particular, is most significant for what it did *not* do. Although *Detroit Federation of Teachers* confirmed the mandatory requirement for written contracts under the school code, it reversed the circuit court's writ of mandamus "directing the kind of contract particular teachers would receive." 396 Mich at 224. It concluded that the "right protected by the code is the right to a written contract evidencing the employment relationship, not to a particular kind of contract." *Id.* at 227. Accordingly, the court had no power to govern the details of the parties' contractual powers and duties, which the statute left to be determined through their collective bargaining process or the grievance procedure provided by their collective bargaining agreement. *Id.*

The case before us does not arise from the parties' request for the court to interpret, as a matter of law, mandatory statutory language addressing teacher contracts. Rather, the parties agree that the statutory language is unambiguous and needs no further interpretation. Instead, plaintiffs asked the court to revisit a school board's discretionary *factual* decision as it relates to a disciplinary scheme governing defendants' responses to *student* behavior in *student* disciplinary proceedings. Thus, instead of supporting plaintiffs' argument, the holdings of *Detroit Federation of Teachers* and *Roek* depend on contrasting facts and illustrate that this case does *not* involve a statute creating a clear right in plaintiffs or a clear duty on defendants' part as their employer.

Crucially, plaintiffs' reasoning is by no means limited to teachers. Upon accepting plaintiffs' claim that they

have an enforceable right under MCL 380.1311a(1), the majority establishes that *every* person mentioned in the student disciplinary statutes now has standing to challenge a decision of a school board declining to expel a student who is accused of assault. As previously discussed, MCL 380.1311a(1) addresses disciplinary measures with regard to students who assault school employees, volunteers, and contractors. MCL 380.1310(1), in turn, addresses disciplinary measures when a "pupil enrolled in grade 6 or above commits a physical assault at school against another pupil." The two provisions are similarly worded and, therefore, the majority's conclusion that the teachers have standing to sue here applies with equal force not only to other school employees, volunteers and contractors, but to every student who alleges he was physically assaulted by another student. Yet nothing in the school code indicates that the Legislature intended to create a new right in *all* school volunteers, contractors, employees, or students to compel the expulsion of students, thus opening the floodgates for—and overwhelming the courts with—collateral litigation whenever one such person is dissatisfied with a board's resolution of a student disciplinary proceeding. For these reasons, plaintiffs simply have not met their burden to show that the Legislature intended to create a legally protected right in teachers when it enacted MCL 380.1311a(1).

3. PLAINTIFFS' REMEDIES

Plaintiffs' claims fail primarily for the above reason: the Revised School Code does not clearly create legal rights in teachers to compel expulsion of students under MCL 380.1311a(1). But plaintiffs have also failed to show that the Legislature intended to authorize private suits to enforce MCL 380.1311a(1) or that the other

statutory enforcement mechanisms are not exclusive under these circumstances. These latter failures independently defeat plaintiffs' claim that judicial relief is available to them in this case.

With regard to plaintiffs' mandamus complaint, relief is available *only* if "the law has established no specific remedy" for a duty created by law. *Houghton Sch*, 430 Mich at 667. The cases cited by plaintiffs similarly hold that, when a right or duty is imposed by statute, "the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive." *Pompey*, 385 Mich at 552. As already discussed, the Legislature clearly vested enforcement of the code and its provisions in the executive branch, through misdemeanor prosecutions under MCL 380.1804, and local school districts, which have discretionary power to terminate employees and officials who violate the terms of the code, MCL 380.1806. With regard to school safety, the code provides an additional layer of local and executive branch monitoring and enforcement through the statewide school safety information policy, MCL 380.1308, and reporting requirements, MCL 380.1310a. Thus, the code's express terms provide particular remedies applicable to MCL 380.1311a. This should end the inquiry; these remedies generally should be deemed exclusive.

Plaintiffs argue, nonetheless, that they may still seek declaratory or mandamus relief if the statutory remedies are inadequate. This Court has never accepted the argument that courts may create new remedies for the violation of statutory duties on the basis of a party's claim that existing statutory remedies are inadequate. In *Lash*, this Court rejected the argument—which is rooted in dictum from *Pompey,* 385 Mich at 552 n 14—that an additional remedy might be permitted to

supplement a statutory remedy if the statutory remedy is "plainly inadequate"; we noted that this dubious principle "has never since been cited in any majority opinion of this Court" and "appears inconsistent with subsequent caselaw." *Lash*, 479 Mich at 192 n 19. Plaintiffs nonetheless suggest that the principle was followed in a Court of Appeals case, *Lane*, 230 Mich App 696, which cited *Pompey* and *Long v Chelsea Community Hosp*, 219 Mich 578, 583; 557 NW2d 157 (1996), for the proposition that "a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions." Yet *Lane* itself concluded that the plaintiff could *not* bring suit in part because the act at issue—the child care organizations act, MCL 722.111 *et seq.*—"adequately provides for enforcement of its provisions" through provisions similar to those present in the school code, including criminal penalties and proceedings instituted by the Attorney General. *Lane*, 231 Mich at 696. Notably, the comparable statutory remedies available in this case are ignored by the majority opinion.

In any event, plaintiffs certainly have not shown that the available enforcement mechanisms are inadequate. In addition to the statutory mechanisms discussed above—and in addition to the fact that school board members, as elected officials, must answer to the public for their acts and policies—plaintiffs never address why their contractual bargaining process is inadequate to address their safety concerns. Indeed, plaintiffs *concede* that their bargaining agreement with defendants includes provisions to protect the workplace safety of its members.[11] Thus, consistent with the code's acknowl-

[11] Plaintiffs expressly affirm in their brief that the plaintiff union "has bargained language in its master agreement with Defendants-Appellees to protect the workplace safety of its members."

edgment of the *contract*-based relationship between a teacher and a school district, it appears clear that plaintiffs not only have an enforcement mechanism at hand but—as in *Detroit Federation of Teachers* with regard to the non-justiciable contract terms—may make use of their bargaining process or grievance procedure to address alleged violations of their alleged rights to workplace safety. Defendants also reasonably argue that plaintiffs are clearly empowered to protect themselves by reporting alleged student assaults to their local prosecutor for criminal investigation.

Finally, in light of the broad powers the school code establishes in executive branch officials and local school boards, permitting individual plaintiffs to enforce MCL 380.1311a could violate both the terms of the code and the Michigan Constitution. Although this Court continues to debate the constitutional ramifications of our standing doctrine, we do not disagree about the constitutionally mandated separation of powers among our three branches of government: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in th[e] constitution." Const 1963, art 3, § 2. Thus, it is clear that the courts cannot exercise powers expressly allocated to other branches of government. Here, the constitution expressly granted the power to create and supervise public schools to the state board of education, Const 1963, art 8, § 3, and the Legislature, Const 1963, art 8, § 2, which has delegated governance of the schools in part to the local school boards, MCL 380.11a(5) and (7). Accordingly, the constitution itself supports the conclusion that courts may not compel acts of the local school boards without express, constitutionally sound authorization to do so. The trial court made this very point in its decision granting summary disposition:

> Basically, the premise here is that this Court in some fashion or another has the right to look behind the exercise of discretion by the Lansing School District. I don't think we have any more right to do that than we have to [sic] the Lansing City Council. The Lansing City Counsel [sic] is another branch of government. It's not our prerogative. That's not—that's not something for the Court to do.

4. REDRESSABILITY AND THE EFFECTS ON STUDENTS' CONSTITUTIONAL RIGHTS

On a related significant point, plaintiffs offer no workable means by which a court could enforce their alleged rights to expulsion of students under MCL 380.1311a(1) even if the court had some power to intervene through declaratory relief or a mandamus order. Plaintiffs' failure in this regard informs and strengthens the conclusion that the statute does not create legally enforceable rights in, or duties to, plaintiffs at all.

Plaintiffs' complaint depends entirely on their allegation that the four named students committed "physical assaults" as defined by the code. Plaintiffs tacitly proceed as if this allegation were undisputed or could be decided by the court. To the contrary, the parties agree that the factual determination whether a student committed a physical assault for purposes of the school code is a discretionary one for the school board. Although no authority suggests that a teacher has standing to appeal a school board's disciplinary decision with regard to a particular student, the Court of Appeals has concluded that when a *student* appeals such a decision, "in reviewing the disciplinary orders of a school administration, the courts of this state are bound by that administration's factual findings so long as they are supported by competent, material and substantial evidence." *Birdsey v Grand Blanc Community Sch*, 130 Mich App 718,

723-724; 344 NW2d 342 (1983). Thus the courts have imported the highly deferential standard applicable to administrative agencies under Const 1963, art 6, § 28. *Id.* at 723. *Birdsey* also relied on *Wood v Strickland*, 420 US 308, 325; 95 S Ct 992; 43 L Ed 2d 214 (1975), which concluded that a court is bound to accept a school administration's finding of fact if there is any evidence in the record to support it. Despite this deferential standard for *direct* appeals of administrative decisions, both the plaintiffs and the majority would accord *no* deference *in a collateral appeal* to the school board's apparent determination that the four named students did not commit physical assaults as defined by MCL 380.1311a(12)(b).

Although we accept as true the *facts* alleged by a plaintiff in a complaint for purposes of a defendant's motion for summary disposition under MCR 2.116(C)(8), *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008), plaintiffs' characterization of each event as a "physical assault" as defined by MCL 380.1311a(12)(b) is a *conclusion* drawn from the statutory terms—not a fact.[12] Accordingly, a court cannot simply accept this allegation as true or presume that, if

[12] Compare *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006) ("Plaintiff's reliance on her allegation in her complaint that the city was engaged in a proprietary activity is unwarranted because only factual allegations, not legal conclusions, are to be taken as true under MCR 2.116(C)(7) and (8)."). Moreover, although plaintiffs have not properly placed in issue the school board's determinations, I note that the students' alleged acts, see note 6 of this opinion, do not unquestionably constitute physical assaults under MCL 380.1311a(12)(b), as plaintiffs simply presume. Particularly because the statutory definition of "physical assault" includes a specific intent element—"intentionally causing or attempting to cause physical harm," MCL 380.1311a(12)(b)—the finder of fact at a disciplinary proceeding could conclude, on the basis of the mental state of the student or the circumstances surrounding each assault, that the student did not affirmatively *intend* to cause *physical harm* to his or her teacher.

the case proceeds, it can be resolved in plaintiffs' favor by a finder of fact at trial. Rather, the allegation has apparently already been resolved *to the contrary* by the entity that plaintiffs concede is the proper forum—the school board. Under these circumstances, plaintiffs could achieve relief only if they can show, first, that the school board abused its discretion when it determined that the four students' acts did not constitute physical assaults and, second, that the court has the power to conclude that the board erred and then to overturn the board's determination *in a suit brought by teachers*. But plaintiffs never explain whether or how the court could review or overturn the board's determinations in student disciplinary proceedings that have long since concluded, let alone by way of this collateral suit in which the students at issue are not even represented.

Indeed, all other issues aside, plaintiffs' claims with regard to the four named students appear moot *in any event* because the disciplinary proceedings concluded years ago. The alleged assaults occurred in January 2007, September 2006, May 2006, and October 2005. Even if some of the students are still enrolled in the district, plaintiffs provide no authority suggesting that they could be expelled *now*; had they been expelled at the time of the incidents, by now each of them could have petitioned for reinstatement to public school under MCL 380.1311a(5)(b) (a court may grant a petition for reinstatement beginning 180 days after the date of expulsion).[13]

With regard to future students, plaintiffs do not explain how a declaratory judgment requiring defen-

[13] Further, because it was the *students'* behavior that injured plaintiffs, plaintiffs' prayer for relief with regard to the four named students appears untenable for the simple reason that the alleged injuries were not caused by *defendants'* failure to expel the students *after* the assaults.

dants to comply with MCL 380.1311a(1) would have any effect whatsoever. Whether a student committed a physical assault is determined on a case-by-case basis depending on the particular facts and in accordance with the student's constitutional rights. Therefore, the most a court could do would be to redundantly repeat the undisputed terms of the statute itself: "If a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board . . . , then the school board . . . *shall* expel the pupil from the school district permanently, subject to possible reinstatement . . . ." MCL 380.1311a(1) (emphasis added). Plaintiffs' claimed relief thus supports defendants' suggestion that what plaintiffs really desire is for the court—or the plaintiffs themselves—to determine whether a "physical assault" occurred for purposes of applying MCL 380.1311a(1).

Finally, as noted, permitting plaintiffs' complaint to proceed here permits *any* person who alleges he is the victim of student misbehavior to independently sue the board when the board concludes that the student's acts did not qualify for mandatory suspension or expulsion. That is, under the majority's analysis, any employee, volunteer, or contractor of the school may now collaterally sue on the basis of assault allegations under MCL 380.1311a(1). And any student may sue, seeking suspension or expulsion of a fellow student, on the basis of assault allegations under MCL 380.1310(1). And these suits may be filed although the student disciplinary proceeding is over and although the accused student's rights are not represented because he is not a party to the lawsuit.

Crucially, neither the majority nor plaintiffs *ever* address the rights of the accused students. Students

have a property interest in their entitlement to public education that cannot be "taken away for misconduct without adherence to the minimum procedures required by [the Due Process Clause of the Fourteenth Amendment]," US Const, Am XIV. *Goss v Lopez*, 419 US 565, 574; 95 S Ct 729; 42 L Ed 2d 725 (1975);[14] see also *Birdsey*, 130 Mich App at 726 (applying *Goss*). Accordingly, plaintiffs certainly cannot seek expulsion of students in the present proceeding, where the students are not represented and have no opportunity to contest plaintiffs' allegations against them. *Goss*, 419 US at 579. Yet the majority permits plaintiffs to proceed, thereby rendering *additional* lawsuits—brought by the expelled students claiming violation of *their* rights—inevitable.

5. CONCLUSION: PLAINTIFFS CLEARLY LACK STANDING AND THE MAJORITY'S CONCLUSION TO THE CONTRARY ILLUSTRATES THE FATAL PROBLEMS WITH ITS NEW APPROACH TO STANDING

Plaintiffs have not borne their burden to show that they satisfy *any* of the applicable requirements for standing under *Lee*, as both lower courts correctly concluded. Plaintiffs have not shown that MCL 380.1311a(1) creates a legally protected and redressable interest *in teachers* for which the courts may provide relief, particularly in a case involving only the teachers and the school district, but not the students at issue. Further, the foregoing discussion shows that plaintiffs could not satisfy *any* meaningful standing test.

Indeed, plaintiffs could not assert standing even under the former tests the majority cites with approval. Significantly, the parties essentially agree that the

[14] *Goss* applies because Michigan maintains a public school system, Const 1963, art 8, § 2, and requires children to attend, MCL 380.1561. See *Goss*, 419 US at 574.

outcome here would be the same whether standing is analyzed under *Lee*, *Detroit Fire Fighters*, 449 Mich 629, or *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993). We agree. First, as discussed above, we see no indication that the Legislature intended to create a right or "substantial interest" in *plaintiffs*, see *House Speaker*, 443 Mich at 572, by enacting MCL 380.1311a(1). Further, to the extent plaintiffs refer to their general interest in their personal safety while at work, this interest is separate and independent from the student discipline provisions of the Revised School Code; plaintiffs can protect this interest through all the normal channels, including contract negotiations and complaints to local law enforcement. Second, plaintiffs' general interest in a safe school environment is analogous to the safety interests claimed by the plaintiffs in *Detroit Fire Fighters*, where Justice WEAVER agreed that the plaintiff firefighters and their collective bargaining unit did not have standing to challenge an alleged violation of the Detroit City Charter. *Detroit Fire Fighters*, 449 Mich at 631-632. Justice WEAVER concluded that the firefighters did not have a "substantial interest" that "will be detrimentally affected in a manner different from the public at large" although they claimed that lack of funding for additional firefighters subjected them to increased risk of injury, among other things. *Id.* at 633 (opinion by WEAVER, J.). Specifically, she opined that the plaintiffs could not show "injury distinct from the general citizenry" because a lack of firefighters also threatened injury to members of the general public who occupied buildings that catch fire. *Id.* at 638. The Legislature's purported interests in ensuring safe and effective learning environments similarly benefit the public at large. Safe schools, and the removal of violent students when appropriate, benefit not only all employees, volunteers, contractors and

students, but also parents, families, and any other member of the public who has occasion to enter a school. Indeed, the *entire community* that supports a school system has "an interest" in school safety: safe school environments benefit taxpayers, who fund all aspects of school functions. Although not every member of the public is affected *equally* by school environments, the same was true in *Detroit Fire Fighters*; clearly not every member of the public frequently finds himself at risk inside a burning building, and clearly firefighters find themselves inside burning buildings more often than other individual citizens.[15]

Yet the majority rejects this Court's standing test and concludes, without any examination of the school code or the ramifications for students' constitutional rights, that plaintiffs—and, by necessary analogy, all school employees, contractors, volunteers and fellow students—have standing. As I have explained, the school code is replete with clear indications that the Legislature did not intend to create a right of action in teachers under MCL 380.1311a(1) and intended for the school code to be enforced under MCL 380.1804 and MCL 380.1806. The majority concludes otherwise by simply observing that MCL 380.1311a "*suggests* that plaintiffs have a substantial and distinct interest." (Emphasis added.) Then, without citation and contrary to the most essential tenet of statutory interpretation, the majority expressly departs from the statutory text and states that, although the Legislature has not unambiguously expressed an intent to confer standing, a court may confer

[15] Most critically, the disciplinary provisions of the school code name not just teachers, but all employees, contractors, volunteers and students. The statutory language nowhere suggests that the Legislature intended for all these subclasses of the public to bring their individual complaints concerning school boards' disciplinary proceedings to the courthouse.

standing by consulting legislative history at will.[16] This assertion is indisputably erroneous. The proper interpretation of a statute *always* begins with the unambiguous statutory text. As this Court recently affirmed in a unanimous opinion authored by Chief Justice KELLY, the "first step" in discerning the intent of the Legislature "is to review the language of the statute." *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 76; 780 NW2d 753 (2010). "[W]e 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). If the statutory language is unambiguous, we presume that the Legislature intended the meaning expressed in the statute. *Briggs Tax Service*, 485 Mich at 76. Accordingly, as Justice CAVANAGH himself stated in *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999), "judicial construction is neither required *nor permissible*." (Emphasis added.) Further, there has simply never been any question that, to determine whether the Legislature intended to confer standing under a particular statute, we employ the normal rules of statutory interpretation and proceed by "analyz[ing] the statutory language." *Miller*, 481 Mich at 607, 610.

Therefore, as in all cases requiring us to interpret an unambiguous statute, resort to legislative history is inappropriate. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Further, even when reference to legislative history is appropriate, staff analyses created within the legislative branch "are entitled to little judicial consideration" because "[i]n no way can a 'legislative analysis' be said to officially

[16] See *ante* at 374 n 23.

summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process, the members of the House and the Senate and the Governor." *Id.*[17] Indeed, the legislative analysis cited here expressly states: "This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations *and does not constitute an official statement of legislative intent*." Senate Legislative Analysis, SB 0183, SB 0206, HB 4240, and HB 4241, July 21, 1999 (emphasis added).

Thus, the majority grants plaintiffs standing in direct derogation of the Legislature's text and without any attention to the actual rights and remedies at stake, which include the constitutional rights of the unrepresented students. The majority's application of its vague new test demonstrates the test's unprincipled nature and far-reaching consequences. This Court's opinion in *Lee* was aimed precisely at avoiding such consequences by acknowledging that courts do not have unfettered discretion to grant or deny standing at will, but should adhere to a common standard. A common standard prevents the expansion of the judicial power beyond its constitutional bounds which, in turn, protects both the rights of citizens and the separate purviews of the other branches of government.

II. *LEE* WAS CORRECTLY DECIDED AND ITS ARTICULATION OF STANDING IS A NECESSARY COMPONENT OF THIS STATE'S CONSTITUTIONAL JURISPRUDENCE

Relying on decades of developments in federal courts, the United States Supreme Court in *Lujan* set forth three elements so basic to the concept of what is needed

[17] Further, contrary to the majority's characterization of such analyses, clearly the pre-enactment statements of a legislative staffer are by no means comparable to statements made by *official, voting delegates* to our constitutional convention, which I reference below.

for any party to bring a lawsuit that it labeled this standard the "irreducible constitutional minimum" of federal standing jurisprudence. *Lujan*, 504 US at 560. First, a party wishing to bring a suit must have suffered a concrete and actual or imminent *injury*. Second, there must be a fairly traceable *causal connection* between the injury and the defendant's conduct. And third, a legal decision in favor of the party must be likely to *redress* the harm. *Id.* at 560-561. By a nearly unanimous vote, this Court's decision in *Lee* expressly incorporated this "irreducible constitutional minimum" into our state's existing standing jurisprudence, *Lee*, 464 Mich at 740, in an effort to identify when the courts have the authority to exercise "[t]he judicial power of the state," Const 1963, art 6, § 1. Because the doctrine of standing touches every civil lawsuit brought in this state, it is a doctrine of the utmost importance, with serious constitutional and practical implications.

Unfortunately, none of these considerations has deterred the majority in this case from *reducing* Michigan's standing requirements from the clear, developed standards articulated in *Lee* and its progeny to a broad and amorphous principle that promises to be nearly impossible to apply in a society that operates under the rule of law. The majority does so by relying on arguments and legal theories that have been considered and rejected as inconsistent with Michigan's constitutional requirements. The majority also does so notwithstanding that *Lee* and its progeny provided Michigan with a clear, well-understood standing framework that clarified the law for the better by identifying the proper scope of judicial authority. The majority today upends and reverses this entire body of Michigan law in vindication of the personal views of the majority justices, but to the detriment of this state's constitutional jurisprudence.

A. STANDING *IS* A CONSTITUTIONAL REQUIREMENT IN MICHIGAN

The Michigan Constitution both separates the powers of the various branches of government and limits the power of the judicial branch to hear cases when actual disputes exist. Thus, standing *is* a constitutional requirement. Because the Constitution vests "[t]he judicial power of the state . . . exclusively in one court of justice," Const 1963, art 6, § 1, the source and boundary of this power is constitutional in nature. *Lee* therefore properly held that federal constitutional standards regarding standing may serve as a benchmark in Michigan.

Perhaps the most fundamental doctrine in American political and constitutional thought is the separation of powers of government into a tripartite system. This principle has been explicitly incorporated in Michigan's constitutions.[18] The importance of distribution of power is reaffirmed explicitly in our current Constitution, which states: "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."[19] Const 1963, art 3, § 2. There can be no doubt, then, that the scope of the judiciary's power is both created and constrained by Michigan's Constitution.

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[18] See, e.g., Const 1908, art 4, § 1 ("The powers of government are divided into three departments: The legislative, executive and judicial."); *id.* at art 4, § 2 ("No person belonging to 1 department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.").

[19] The Michigan Constitution also explicitly provides that the Legislature is to exercise the "legislative power" of the state, Const 1963, art 4, § 1, the Governor is to exercise the "executive power," Const 1963, art 5, § 1, and the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1.

The *Lee* Court did not newly create this constitutional principle out of whole cloth. Contrary to the majority's belief, and inconvenient to the majority's conclusion, Michigan has consistently acknowledged that the state's constitution limits the judicial power to hearing disputes involving *actual* cases or controversies. Understanding this most basic of principles is imperative to defining what, precisely, this state's doctrine regarding "standing" should be because there is a clear link between the doctrine of standing and the separation of powers. The United States Supreme Court made this clear in *Allen v Wright*, 468 US 737; 104 S Ct 3315; 82 L Ed 2d 556 (1984):

> The requirement of standing . . . has a core component derived directly from the Constitution. . . .
>
> * * *
>
> . . . [T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. . . .
>
> . . . [Q]uestions . . . relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." [*Id.* at 751-752, quoting *Chicago & G T R Co v Wellman*, 143 US 339, 345; 12 S Ct 400; 36 L Ed 176 (1892), and *Flast v Cohen*, 392 US 83, 97; 88 S Ct 1942; 20 L Ed 2d 947 (1968).]

The Court reaffirmed this principle in *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996), stating that "the doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." In applying these principles as articulated in the Michigan Constitution, we have previously explained:

As part of this endeavor to preserve separation of powers, the judiciary must confine itself to the exercise of the "judicial power" and the "judicial power" alone. "Judicial power" is an undefined phrase in our constitution, but we noted in *Nat'l Wildlife* that

"[t]he judicial power has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making." [471 Mich at 614-615.]

We went on in *Nat'l Wildlife* to distill this litany of considerations arising from the proper exercise of the "judicial power," and we determined that "the most critical element" is "its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute." [*Nestlé Waters*, 479 Mich at 292-293 (brackets in original).]

Moreover, these basic principles have been affirmed time and again by Michigan courts, as this Court traced in *Lee*:

Concern with maintaining the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches. Early on, the great constitutional scholar Justice THOMAS M. COOLEY discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor in *Sutherland v Governor*, 29 Mich 320, 324 (1874):

"Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers

> alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."
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> This position followed from the even earlier iteration of the standing doctrine by Justice CAMPBELL in 1859 when, speaking for this Court, he said:
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> "By the judicial power of courts is generally understood the power to hear and determine *controversies* between adverse parties, and questions in litigation." [*Daniels v People*, 6 Mich 381, 388 (1859) (emphasis added).]
>
> Later, in *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884), this Court explained:
>
> "The judicial power referred to is the authority to hear and decide *controversies*, and to make binding orders and judgments respecting them." [Emphasis added.]
>
> More recently, *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959), reaffirmed this concept by quoting this portion of *Risser*. [*Lee*, 464 Mich at 737-738 (brackets in original).]

And this history is certainly not exhaustive. For example, in 1920 this Court relied on the separation of powers and the development of judicial power in declaring unconstitutional a statute that would have conferred standing upon citizens to invoke the jurisdiction of the courts "not in the determination of actual controversies where rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it." *Anway v Grand Rapids R Co*, 211 Mich 592, 606; 179 NW 350 (1920). The Court explained:

> This court and the court from which this case came by appeal draw their power from the Constitution. The power given to both under the Constitution was judicial power. . . . This act confers powers not judicial and requires performance of acts non-judicial in character. For these reasons it is void in its entirety. [*Id.* at 622.]

Following the decision in *Anway*, the Legislature amended the act to remove the offending provisions that had allowed courts to exercise powers outside of the case and controversy context, and this Court upheld the revised act in *Washington-Detroit Theatre Co v Moore*, 249 Mich 673; 229 NW 618 (1930). Notably, the Court found significant that the act had been amended to apply "only to 'cases of actual controversy.' " *Id.* at 676. It concluded that "[t]here must be an actual and *bona fide* controversy as to which the judgment will be *res adjudicata*. Such a case requires that all the interested parties shall be before the court." *Id.* at 677.

In *House Speaker v State Admin Bd*, 441 Mich 547, 556; 495 NW2d 539 (1993), this Court again recognized the indisputable relationship between standing and the separation of powers, holding that "[i]t would be imprudent and violative of the doctrine of separation of powers to confer standing upon a legislator simply for failing in the political process." More recently, in *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002), we reaffirmed and explicitly declared that the "principal duty of this Court is to decide actual cases and controversies." *Id.* at 112, citing *Anway*, 211 Mich at 610, and *In re Midland Publishing Co, Inc*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984). As this history makes clear, Michigan has consistently acknowledged that our state constitution limits the judicial power to hearing cases involving actual cases or controversies.

This is true notwithstanding the lack of an explicit "case or controversy" requirement in the Michigan Constitution. Indeed, exceptions to the general "case or controversy" limitation on judicial power have been explicitly made in the text of our Constitution itself, thereby recognizing the rule that a case or controversy is otherwise required. For example, Const 1963, art 9, § 32, confers upon "any taxpayer of the state" standing to bring suit to enforce the provisions of the Headlee Amendment. Const 1963, art 11, § 5, empowers "any citizen of the state" to bring injunctive or mandamus proceedings to enforce the civil service laws of the state. Perhaps most significantly, Const 1963, art 3, § 8, allows either house of the Legislature to request that this Court issue an advisory opinion on the "constitutionality of legislation."

Indeed, the delegates' discussion of this last section, when it was ratified at the Constitutional Convention, eliminates any doubt about the framers' understanding of the judicial power in Michigan and directly confirms the *Lee* Court's interpretation of the judicial power.[20] In considering whether the Court should have the power to issue advisory opinions in nonadversarial proceedings at the request of other branches of government, the delegates' entire discussion was clearly premised on the *unquestioned assumption* that the judicial power, generally, was rooted in a case or controversy requirement. At the outset, Delegate Harold Norris explicitly asked with regard to the proposed section: "Does that mean that as far as this committee is concerned, they do

[20] It is appropriate to consult constitutional convention debates when, as here, " 'we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept.' " *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 656; 698 NW2d 350 (2005), quoting *Univ of Mich Regents v Michigan*, 395 Mich 52, 60; 235 NW2d 1 (1975).

not wish to preserve *the traditional notion that there must be a case or controversy presented before the court may exercise its judicial power*?" 1 Official Record, Constitutional Convention 1961, p 1544 (emphasis added). When the question was raised whether the power to issue an advisory opinion would be equivalent to the courts' preexisting power to issue declaratory judgments, Delegate Eugene Wanger similarly specified that the courts' preexisting power, even in the arena of declaratory judgments, distinctly required "an actual controversy between individuals . . . ." *Id.* at 1545. Delegate Raymond King may have expressed the understanding most clearly when he remarked:

> *We are indeed contemplating a very serious change in what I think to be the history and the tradition of justice in this country*. Mr. Wanger has pointed out the troubles that the Massachusetts supreme court got into when they allowed themselves *to leave the theory of case and controversy*. [*Id.* at 1546 (emphasis added).]

Indeed, even with regard to the limited expansion[21] of judicial power represented by the proposed advisory opinion provision, delegates were expressly concerned that it would "adversely affect[] the separation of powers doctrine . . . ." *Id.* at 1545 (Delegate Wanger); see also *id.* at 1546 (Delegate Jack Faxon indicating that the convention "should be wary of any violation of the

[21] The delegates agreed that the constitutional advisory opinion provision was unique and intended to be very limited. For example, Delegate Wanger observed: "It has been emphasized by everyone supporting the advisory opinion practice that the courts will exercise restraint, that they will be very careful not to answer every question that is asked but merely to answer those which are of a very, very vital nature." 1 Official Record, Constitutional Convention 1961, p 1548. Delegate Robert Danhof expressed a similar concern, advocating that the language of the provision should include "an admonition to the supreme court that it is desirable that this particular power be exercised very sparingly and, just as we mean, only upon the most solemn occasions upon very important questions of law." *Id.* at 1549.

separation of powers"); *id.* at 1547 (Delegate King stating: "I think we have established through the English common law and our adherence thereto a system of justice, a system of separation of powers which has proven itself, and I think we ought to be very reluctant at this time to try something new.").

The framers' discussion on these points reinforces the *Lee* Court's understanding of the judicial power and presaged the critical problems—which I express here and which have been expressed by my colleagues in the past—with expanding the judicial power beyond its traditional limit. It also reinforces our conclusion, in *Nat'l Wildlife*, that

> [t]o the extent that the people of Michigan, through their constitution, have chosen to confer upon the judiciary three specific authorities potentially beyond the traditional "judicial power," it seems unlikely that the people intended that any other such nontraditional authority could simply be incorporated as part of the "judicial power" by a simple majority of the Legislature. [471 Mich at 625.]

In sum, it is clear that the framers of Michigan's constitution believed, first, that the judicial power is generally circumscribed by the case or controversy requirement and, second, that the only way to expand judicial power beyond the traditional case or controversy limitation was through affirmative amendment of the constitution. In accord, this Court has held that the constitutional standing test articulated in *Lee* must not be applied to limit judicial power otherwise expressly conferred in the Michigan Constitution. See *Mich Coalition of State Employee Unions v Mich Civil Serv Comm*, 465 Mich 212, 217-219; 634 NW2d 692 (2001).

Yet, since the decision in *Lee*, several members of the current majority have advanced the view that, because the Michigan Constitution does not expressly use the

words "case" and "controversy" like the federal constitution, Michigan has no constitutional standing requirement. This argument fundamentally misunderstands both the Michigan and federal constitutions and misapprehends the constitutional standing theory. In *Nat'l Wildlife* we explained that the provisions of the federal constitution describing the limited "cases" and "controversies" that federal courts have the power to hear

> is not a definitional provision that seeks to give meaning to the "judicial power." Rather, art III, § 2 is a provision defining the *limited* judicial power of the federal judiciary, in contrast to the *plenary* judicial power of the state judiciary. The respective legislative articles of the two constitutions are analogous to the judicial articles: the legislative article of the Michigan Constitution does not purport to define the authority of its Legislature (for example, nothing is said therein concerning its authority over marriage, divorce, child custody, child support, alimony, or foster care), while the legislative article of the federal constitution *does* affirmatively confer authority upon the Congress, article I, § 8. The state judicial power, as with the state legislative power, is plenary, requiring no affirmative grant of authority in the state Constitution. The federal judicial power, on the other hand, as with the federal legislative power, is limited. Such power is exclusively a function, or a creation, of the federal constitution, and, therefore, must be affirmatively set forth. In similar fashion, the federal judicial power must also be affirmatively set forth, for it is also a function, or creation, of the federal constitution. Thus, US Const, art III, § 2 does not *define* the "judicial power;" rather it defines what *part* of the "judicial power" within the United States belongs to the federal judiciary, with the remaining part belonging exclusively to the state judiciary. That art III, § 2 variously employs the terms "cases" or "controversies" is not to confer a particular meaning upon the "judicial power," but merely is to employ words that are necessary to the syntax of allocating the "judicial power" between the federal and

state governments. The concurrence/dissents would confuse the allocation of a power with its definition, and would thereby define the federal "judicial power" in the narrowest possible manner by limiting it through reference *alone* to the existence of a "case." Even from the perspective of the concurrence/dissents, is there *no* more permanent aspect of the "judicial power" than that it pertain to a "case"?

In fact, the "judicial power" in the Michigan Constitution, with the several exceptions enumerated [explicitly in the Constitution], is the same "judicial power" as in the federal constitution, and it is the same "judicial power" that has informed the practice of both federal and state judiciaries for centuries. These historical principles were recognized by *Lee*, and we continue to adhere to them today. [*Nat'l Wildlife*, 471 Mich at 626-628.][22]

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[22] In *Nestlé Waters*, we further rejected this argument when a party argued that the Legislature had conferred statutory standing on it, which should be sufficient even if the party could not meet the basic strictures of constitutional standing. We stated:

> Justice WEAVER persists in her argument that the textual differences between the federal constitution and our state constitution prove that the exercise of "judicial power" or the doctrine of separation of powers in our constitution means something radically different than it does under the federal constitution. This argument that separation of powers should be understood differently in the Michigan Constitution because the words "case" and "controversy" are not in our constitution suggests to us that Justice WEAVER fundamentally misunderstands the doctrine of separation of powers. She refuses to accept that there is a constitutional limit on the Legislature's authority to expand "judicial power" in the area of standing. In response, we stated in *Nat'l Wildlife* that
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> "[a]s the Michigan Constitution makes clear, the duty of the judiciary is to exercise the 'judicial power,' and, in so doing, to respect the separation of powers. While as a *general proposition*, the proper exercise of the 'judicial power' will obligate the judiciary to give faithful effect to the words of the Legislature—for it is the latter that exercises the 'legislative power,' not the judiciary—such effect cannot properly be given when to do so would contravene the constitution itself. Just as the judicial branch owes

Yet this argument that Michigan does not have a constitutional basis for its standing test—based on "caricatured textualism" that has been handily rejected—persists nonetheless.[23] In particular, Justice WEAVER has championed this dubious theory, which—given Chief Justice KELLY's and Justice CAVANAGH's recent metamorphoses on the issue of standing, and Justice HATHAWAY's election to the Court—presents a convenient argument as the majority grasps at straws to explain why *Lee* and its progeny should be overruled. The fact remains that in neither the majority opinion in

> deference to the legislative branch when the 'legislative power' is being exercised, so too does the legislative branch owe deference to the judicial branch when the exercise of the 'judicial power' is implicated. Even with the acquiescence of the legislative and executive branches, the judicial branch cannot arrogate to itself governmental authority that is beyond the scope of the 'judicial power' under the constitution. The 'textual' approach of [Justice WEAVER] is a caricatured textualism, in which the Legislature is empowered to act *beyond* its authority in conferring powers upon other branches that are also *beyond* their authority." [*Nat'l Wildlife,* 471 Mich at 637 (citations omitted; emphasis in original).] [*Nestlé Waters*, 479 Mich at 307-308.]

[23] The majority cites *Washington-Detroit Theatre Co*, 249 Mich 673, for the proposition that "this Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not." This is precisely correct, but not in the way the majority applies it. In fact, it actually *undermines* the majority's conclusion. The majority here either fails to understand or willfully ignores the fact that the federal "case or controversy" requirement limits only the *range* of controversies that may be heard in federal courts, and that this is distinct from the requirement that an actual case or controversy *exists* in the first place. In short, *that Michigan courts may decide types of controversies that the federal courts lack authority to decide does not mean that Michigan has no constitutional threshold for when a plaintiff may bring such a controversy*. The *Lee*/*Lujan* standing test does not govern what *types* of cases/controversies may be brought, only whether a case/controversy *exists* in the first instance.

this case, nor any of the majority justices' concurring or dissenting opinions in prior cases, has a member of the majority ever articulated a sufficient response to these serious criticisms. This case has greater significance than prior cases, however, because the majority proceeds on these false understandings in order *to remove altogether the limits imposed by our Constitution*.

The proposition that Michigan courts are limited by an actual case or controversy requirement is beyond reproach. Michigan's case or controversy requirement is not drawn from the federal "case or controversy" language, but rather the parallel limitations imposed in Michigan's own constitution. This fact has been recognized by more than a century worth of *Michigan* caselaw, and thus it formed the basis for this Court's decision in *Lee* to incorporate a standing test that reflected this reality. The majority's author need only read his own opinions to realize as much. For example, in *People v Richmond*, this Court recently reaffirmed that "it is the 'principal duty of this Court . . . *to decide actual cases and controversies*.' That is, ' "[t]he judicial power . . . is the right to determine *actual controversies* arising between adverse litigants, duly instituted in courts of proper jurisdiction." ' " *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010) (majority opinion by CAVANAGH, J.) (citations omitted, emphasis added, ellipsis and brackets in original), citing *Federated Publications*, 467 Mich at 112, and *Anway*, 211 Mich at 610, 616.[24] These

[24] In *Richmond*, three members of the current majority held that the prosecutor's case was moot, and therefore did not present an actual case and controversy, although the prosecutor had an interest in appealing the trial court's adverse evidentiary rulings before voluntarily dismissing the charges. Here, plaintiffs have no recognized interest separate from that of the general public, and no private right of action to vindicate. Thus, ironically, the majority is content to block *certain* parties from proceeding based on "case and controversy" grounds, while allowing *other* parties to

principles apply with as much force in ensuring that this Court does not hear moot cases, or controversies that are not yet ripe.[25] More generally, one has to wonder whether the majority may also wish to overrule all Michigan cases that rely on federal precedent involving standing's sister doctrines of mootness and ripeness? If not, the majority is left in the intellectually inconsistent position of defending those bodies of caselaw, which have the same constitutional foundation regarding justiciability as the standing principles articulated in *Lujan* and *Lee*. Indeed, these doctrines are based *exclusively* on the very case or controversy requirement, implicit in the Michigan Constitution, that the majority here rejects.

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proceed although they have *no* legal interests. I can discern no pattern or method other than that the majority wishes to use these cases as vehicles to overturn precedents with which it disagrees, or that it seeks to assist certain parties in achieving their political ends. Neither, of course, is legitimate.

[25] As this Court explained in *Mich Chiropractic Council*:

> In seeking to make certain that the judiciary does not usurp the power of coordinate branches of government, and exercises only 'judicial power,' both this Court and the federal courts have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action. These include the doctrines of standing, ripeness, and mootness.
>
> Federal courts have held that doctrines such as standing and mootness are constitutionally derived and jurisdictional in nature, because failure to satisfy their elements implicates the court's constitutional authority to exercise only 'judicial power' and adjudicate only actual cases or controversies. . . . Likewise, our case law has also viewed the doctrines of justiciability as affecting 'judicial power,' the absence of which renders the judiciary constitutionally powerless to adjudicate the claim. . . .
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> * * *
>
> Thus, we reiterate that questions of justiciability concern the judiciary's *constitutional jurisdiction* to adjudicate cases containing a genuine controversy. [*Mich Chiropractic Council*, 475 Mich at 370-374 (emphasis in original).]

Like this Court in *Lee*, other courts have rejected the majority's imprecise and overly broad analysis regarding the constitutional basis for standing on similar grounds. For example, in *Bennett v Napolitano*, the Arizona Supreme Court recently stated:

> Article VI of the Arizona Constitution, the judicial article, does not contain the specific case or controversy requirement of the U.S. Constitution. But, unlike the federal constitution in which the separation of powers principle is implicit, our state constitution contains an express mandate, requiring that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately. This mandate underlies our own requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue. [*Bennett v Napolitano*, 206 Ariz 520, 525; 81 P3d 311 (2003).]

The majority's flawed constitutional analysis allows it to advance the false dichotomy that this state's standing jurisprudence must be based either on prudential concerns or on constitutional underpinnings, but not both. As the above analysis demonstrates, however, the constitutional separation of powers constraints explicitly provided in Michigan's constitution give rise to minimal constitutional standing requirements, which this Court may augment when additional, prudential concerns arise.[26] Thus, the interpretation of Michigan's constitution—in particular, its explicit limitations on judicial power and requirements of an actual case or

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[26] Cf. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001) ("Justiciability doctrines such as standing 'relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.' "), quoting *Allen*, 468 US at 750, quoting *Vander Jagt v O'Neill*, 226 US App DC 14, 26-27; 699 F2d 1166 (1983) (Bork, J., concurring).

controversy—provides a direct basis for applying the prudent and well-defined federal test.

B. *LEE* AND ITS PROGENY: CREATING CERTAINTY IN MICHIGAN JURISPRUDENCE

Although the concept of "standing" touches every civil action filed in this state, prior to the adoption of the *Lujan* standard in Michigan this Court had only produced a general description of the principles governing standing. The most recent description that garnered support from a majority of this Court is found in *House Speaker v State Admin Bd*,[27] which stated:

> Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. [*House Speaker*, 441 Mich at 554.]

Unsurprisingly, such a general proposition for a doctrine as important and far-reaching as standing proved difficult to apply. This fact became all too obvious in *Detroit Fire Fighters*, when this Court next examined Michigan's standing doctrine. *Detroit Fire Fighters* resulted in a split decision in which no majority could be found to explain what elements were essential to standing in Michigan.[28] Indeed, although all four opinions cited the same boilerplate language from *House Speaker* in support of their respective positions, the justices did

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[27] *House Speaker* was decided by this Court before the United States Supreme Court released its opinion in *Lujan*.

[28] *Detroit Fire Fighters*, 449 Mich at 631 (opinion by WEAVER, J.) (lead opinion); *id*. at 650 (CAVANAGH, J., joined by BOYLE, J., concurring in part and dissenting part); *id*. at 641 (RILEY, J., joined by BRICKLEY, C.J., concurring); and *id*. at 661 (MALLETT, J., joined by LEVIN, J., concurring in the result only).

not agree on such fundamental questions as what standing is in Michigan, what test should govern standing, and whether the plaintiffs had standing in that particular case.[29] This hodgepodge of disparate opinions compelled the Court to reach the merits of the case without a clear consensus on the threshold question whether the plaintiffs even had standing to bring the case.

This background formed the context in which this Court again confronted this state's standing principles in *Lee* where, by a vote of six to one, this Court adopted and incorporated *Lujan* into our standing jurisprudence. As we stated then:

> In our view, the *Lujan* test has the virtues of articulating clear criteria and of establishing the burden of demonstrating these elements. Moreover, its three elements appear to us to be fundamental to standing; the United States Supreme Court described them as establishing the "irreducible constitutional minimum" of standing. We agree. [*Lee*, 464 Mich at 740.]

Consistent with this Court's constitutional obligations, the nearly unanimous majority in *Lee* correctly noted that the *Lujan* test provides a practical and workable framework for addressing what was previously an amorphous and often difficult concept. In its most basic form, the doctrine of standing can be properly reduced to the *Lujan* factors. What is standing if not the requirement that a plaintiff either has suffered or is in

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[29] As this Court aptly summarized in *Lee*, among the various opinions in *Detroit Fire Fighters*,

> [s]ome focused on whether the plaintiff could establish an injury distinct from that of the public, others on whether the plaintiffs were in the zone of interest the statutory or constitutional provision at issue is designed to regulate. Perhaps the clearest template was set forward by Justice CAVANAGH, who, along with Justice BOYLE, advocated adopting the United States Supreme Court's *Lujan* test. [*Lee*, 464 Mich at 739.]

imminent danger of suffering an actual harm, that the harm is allegedly caused by the defendant, and that the result of the court's action can redress the wrong or injury? While the federal and state constitutions are not coterminous, they have developed on a parallel track, and the interpretation of federal constitutional law may inform state constitutional law when they share common elements. Although the majority has littered its opinion with instinctive repetitions that this state's standing jurisprudence is "prudential," the majority cannot explain what is *im*prudent about the "irreducible" and traditional description of the standing doctrine articulated in *Lujan*.

By introducing an objective framework based on three well-developed and readily understandable criteria—injury in fact, causation, and redressability—the *Lee* decision simplified and made more practical the doctrine of standing in this state. As is evidenced by how justices on *this Court* could not previously agree about what, exactly, standing meant in Michigan under *House Speaker*, 443 Mich 560, the *Lee* framework provides certainty. The progeny of *Lee* bear this out: in a decade's worth of cases, Michigan trial and appellate courts have consistently and appropriately applied Michigan's standing doctrine.[30] Indeed, during this time the doctrine itself has not changed. Only the personal views of justices on this Court—and only those who now overrule a decade's worth of cases—have changed.

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[30] See *Lee*, 464 Mich at 739-740 (incorporating the federal standing analysis articulated in *Lujan* into Michigan standing jurisprudence); *Nat'l Wildlife*, 471 Mich at 628-629 (organizational standing and legislative authority to grant citizen standing); *Nestlé Waters*, 479 Mich at 295-296, 302-303 (legislative authority to grant citizen standing); *Rohde*, 479 Mich at 354-355 (taxpayer and qui tam standing); *Mich Chiropractic Council*, 475 Mich 363; *Associated Builders & Contractors*, 472 Mich 117 (standing necessary in order to seek a declaratory judgment pursuant to MCR 2.605).

As a matter of simple prudence and proper exercise of this Court's constitutional authority, this Court is empowered to create clear rules that are easily accessible and applicable in the future. Aside from ensuring that Michigan courts only hear genuine cases and controversies in accord with its constitutionally mandated judicial powers, adopting the well-defined *Lujan* test provides the additional benefit of ensuring that Michigan's standing doctrine is guided by clearly articulated and well-developed rules. A well-understood and practical standing test serves to uphold the separation of powers and promote the sound administration of justice. Indeed, only such a framework can ensure that courts will be governed by the rule of law, which itself ensures equality of treatment under the law. Inexplicably, the majority apparently celebrates that, prior to *Lee*, Michigan's standing doctrine suffered from inconsistent application, and, in some cases, was not analyzed or applied at all.[31] Unfortunately, the majority's test can promise no better in the future; this is particularly true since, by its explicit terms, standing can now be determined at the "discretion" of trial courts.

Notably, *Lee* did not supplant or "sacrifice" this Court's standing jurisprudence, as the majority in this case erroneously states. Rather, it adopted the *Lujan* test as a means of "*supplementing* the holding in *House Speaker* [441 Mich 547], as well as this Court's earlier standing jurisprudence, e.g., *Daniels* and *Risser*." *Lee*, 464 Mich at 740 (emphasis added). The majority today is not so kind. Characteristic of its reckless treatment of this Court's precedent and its willingness to rewrite entire areas of the law rather than letting them develop over time, the majority today jettisons a decade of this state's caselaw, which itself was based on nearly a century of

[31] See *ante* at 357 n 3.

rules and principles developed by the United States Supreme Court. And it does so in favor of what? A general, one paragraph articulation of "prudential" standing that proved so utterly unworkable a mere fifteen years ago under *House Speaker*, 443 Mich 560. Michigan citizens deserve better from their highest court.

Reliance on the accessible and well-understood federal test was a proper and prudent course of action for this Court to take in *Lee*. Indeed, this Court has often affirmed the principle that it is not questioned that the "powers of Michigan's judiciary . . . are modeled after the federal judiciary . . . ." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592 n 24; 513 NW2d 773 (1994) (opinion by RILEY, J.); see also *Nat'l Wildlife*, 471 Mich at 627-628. This is particularly true in the context of standing where "Michigan courts previously have relied upon federal authority when deciding standing questions." *House Speaker*, 441 Mich at 560 n 21. And Michigan is not alone. Because states' judicial powers are plenary whereas federal judicial power is limited, *no* state in this country has an explicit "case or controversy" requirement in its constitution analogous to that of the federal constitution. Nonetheless, nearly half the states have adopted the *Lujan* test or its equivalent as their own in accordance with their state constitutional requirements regarding standing.[32] Like this Court in

[32] E.g., the following states do *not* have an explicit "case or controversy" requirement in their constitutions, yet have adopted or relied on the federal standing test as articulated in *Lujan*. Alabama—*Stiff v Alabama Alcoholic Beverage Control Bd*, 878 So 2d 1138, 1142 (Ala, 2003) (applying the *Lujan* test for standing); Alaska—*Chenega Corp v Exxon Corp*, 991 P2d 769, 785 (Alas, 1999) (recognizing *Lujan*); Arizona—*Bennett*, 206 Ariz at 525 (noting that, although "[a]rticle VI of the Arizona Constitution, the judicial article, does not contain the specific case or controversy requirement of the U.S. Constitution," "federal case law [is] instructive" due to separation of powers principles and as a

Lee, these states realize the wisdom behind the federal

"matter of sound jurisprudence"); Connecticut—*Gay & Lesbian Law Students Ass'n v Bd of Trustees*, 236 Conn 453, 466 n 10; 673 A2d 484 (1996) (stating that "[t]here is little material difference between what we have required and what the United States Supreme Court in *Lujan* demanded of the plaintiff to establish standing"); Delaware—*Dover Historical Society v Dover City Planning Comm*, 838 A2d 1103, 1111 (Del, 2003) (noting that "[t]his Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware"); Georgia—*Granite State Outdoor Advertising, Inc v City of Roswell*, 283 Ga 417, 418; 658 SE2d 587 (2008) (recognizing *Lujan* as the appropriate test for standing and noting that "[i]n addition to the constitutional requirements for standing, there is a subset of 'prudential' standing requirements that have been developed by the United States Supreme Court"); Hawaii—*Akinaka v Disciplinary Bd of Hawai'i Supreme Court*, 91 Hawaii 51, 55; 979 P2d 1077 (1999) (utilizing a test comparable to the *Lujan* test derived from federal caselaw); Idaho—*Young v City of Ketchum*, 137 Idaho 102, 104; 44 P3d 1157 (2002); Iowa—*Godfrey v State*, 752 NW2d 413, 418 (Iowa, 2008) (noting that "our doctrine on standing parallels the federal doctrine," and applying *Lujan* in the context of a public interest claim); Mississippi—*Clark Sand Co, Inc v Kelly*, ___So 3d ___; 2010 Miss LEXIS 94 (Miss, 2010)* (utilizing the *Lujan* test); New Mexico—*Forest Guardians v Powell*, 130 NM 368, 375; 24 P3d 803 (NM App, 2001), quoting *United Food & Commercial Workers Union Local 751 v Brown Group, Inc*, 517 US 544, 551; 116 S Ct 1529; 134 L Ed 2d 758 (1996) (quoting federal law and applying the same standing criteria used in *Lujan*), and *John Does I through III v Roman Catholic Church of the Archdiocese of Santa Fe, Inc*, 122 NM 307, 311-314; 924 P2d 273 (NM App,1996) (noting that "[i]t is not enough to establish standing that an identifiable interest has been injured," citing the federal definition of "injury in fact," and concluding that although the "New Mexico Constitution does not speak of Cases or Controversies," "we are aware of no basis for concluding that those requirements are stricter than those imposed by the federal Constitution") (citation omitted); North Carolina—Neuse River Foundation, Inc v Smithfield Foods, Inc, 155 NC App 110, 114; 574 SE2d 48 (2002) (quoting the *Lujan* test); Ohio—*Bourke v Carnahan*, 163 Ohio App 3d 818, 824; 840 NE2d 1101 (2005) (citing *Lujan* for the three prong test); Oklahoma—*Cities Serv Co v Gulf Oil Corp*, 1999 OK 16, ¶ 3; 976 P2d 545 (Okla, 1999) (citing the *Lujan* test); South Carolina—*Sea Pines Ass'n for Protection of Wildlife, Inc v South Carolina Dept of Natural Resources*, 345 SC 594, 601; 550 SE2d 287 (2001) (stating that "*Lujan* set forth the 'irreducible constitutional minimum of standing,' " and adopting the *Lujan* stan-

standing test and how it provides a practical and workable standing framework that operates within the bounds of their similar constitutional separation of powers requirements by giving *meaning* to those requirements. Moreover, *no* state's highest court has adopted the federal standing test as its own only to decide, a few short years later, to abandon the doctrine and return to a prior amorphous test that parties and the courts found difficult to apply. Although Justice WEAVER repeatedly calls the test established by *Lee* "unprecedented," clearly it is the majority's decision today—not *Lee*—that defies precedent.

Ultimately, the majority's decision today redounds only to the benefit of those who wish to use the courts—the least politically accountable branch of government—to

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dard); South Dakota—*Benson v State*, 2006 SD 8, ¶ 22; 710 NW2d 131 (SD, 2006) (recognizing *Lujan* as the test for standing); Tennessee—*ACLU of Tennessee v Darnell*, 195 SW3d 612, 620 (Tenn, 2006) (citing *Lujan* and applying the federal test for standing); Vermont—*Parker v Town of Milton*, 169 Vt 74, 77-78; 726 A2d 477 (1998) (noting that Vermont has adopted the test for standing articulated in *Lujan*); West Virginia—*Findley v State Farm Mut Auto Ins Co*, 213 W Va 80, 94; 576 SE2d 807 (2002) (citing *Lujan*); Wyoming—*White v Woods*, 2009 WY 29A, ¶ 20; 208 P3d 597 (Wy, 2009) (stating that *Lujan* established "the irreducible constitutional minimum of standing" and adopting it as the state's test). Additionally, the following states, whose constitutions also lack an explicit "cases or controversy" requirement, employ a test that is substantially similar to the federal test. Illinois—*Greer v Illinois Housing Dev Auth*, 122 Ill 2d 462, 492-493; 524 NE2d 561 (1988) (citing federal caselaw and determining that, in order to have standing, "the claimed injury, whether actual or threatened, must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief") (citations omitted); Kansas—*Sumner Co Bd of Co Comm'rs v Bremby*, 286 Kan 745, 761; 189 P3d 494 (2008) (requiring that "a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct"); Virginia—Va Code Ann 62.1-44.29 (statutorily adopting the same three prong test in the context of water-related claims).

*Withdrawn and substituted, *Clark Sand Co, Inc v Kelly (On Rehearing)*, 60 So 3d 149 (Miss, 2011)—REPORTER.

legislate and regulate increasingly larger spheres of Michigan life and politics.[33] In this regard, we are quite sure the majority opinion suffers from a typographical error when it states that "[w]e hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine," because what the majority gives us today is anything but a "limited" doctrine. Indeed, with this case, the majority overrules those principles and rules that ensured that the doctrine would have articulated and meaningful limits in Michigan. Writing for the Court in *Nat'l Wildlife*, Justice MARKMAN foreshadowed the unfortunate turn of events altering Michigan's standing jurisprudence that today has come to pass:

> By their diminishment of a traditional check and balance upon the exercise of the "judicial power," the concurring/dissenting Justices [CAVANAGH, KELLY, and WEAVER] would, if their position were ever to gain a majority, inflict considerable injury upon our system of separation of powers and the rule of law that it has produced. [*Nat'l Wildlife*, 471 Mich at 628.]

Justice HATHAWAY has now provided those justices with their fourth vote, and with it surely will come the inevitable breakdown of the rule of law in the domain of standing that only *Lee* and its progeny had stood athwart.

III. THE MAJORITY'S SELF-SERVING AND INCONSISTENT APPROACH TO THE DOCTRINE OF STARE DECISIS

Finally, the far-reaching, deleterious impact of the majority's decision in this case is equally inherent in its methods for overruling significant, precedential opinions of this Court. The majority's claim that it has good reason to overrule *Lee* and its progeny, in contravention of the doctrine of stare decisis, is bankrupt and self-

[33] See, generally, *Nat'l Wildlife*, 471 Mich at 617-623.

serving. Most significantly, in jettisoning *Lee*, the four justices constituting the majority fail to apply *any* agreed-upon test to examine whether this change in law is justified. The only clear commonality is their shared conclusion that *Lee* was clearly wrongly decided. This conclusion is mystifying because it is directly counter to the past positions of three members of the current majority, *who supported* Lee*—and the case or controversy requirement underpinning* Lee*—in previous cases*. Finally, the majority's determination that overruling *Lee* will benefit the public depends entirely on circular, self-serving reasoning; the majority simply concludes that its preferred regime would better serve the public without any attention to the actual desires of the Michigan public—as expressed, for example, in the Michigan Constitution—or to the commonplace conclusion of courts throughout the nation that the test articulated in *Lujan* well serves the nation's courts and citizens.

A. THE MAJORITY'S STANDARDLESS APPROACH TO OVERRULING PRECEDENT

In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court articulated several factors for consideration before a court should overrule established precedent. "The first question, of course, should be whether the earlier decision was wrongly decided." *Id.* at 464. But "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Id.* at 465. Rather, "[c]ourts should also review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Id.* at 464.

The majority's conclusion that *Lee* was wrongly decided is untenable. The test *Lee* enunciated is loyal to the Michigan Constitution, is consistent with our jurisprudence, and has been adopted and successfully applied throughout the nation by states with constitutions similar to our own. Next, there is no indication that the *Lee* test "defies 'practical workability,' " that "reliance interests would work an undue hardship," or that "changes in the law or facts no longer justify" it. *Robinson*, 462 Mich at 464. To the contrary, in standardizing factors for standing throughout the state based on the well-established and accepted federal test, *Lee* created a predictable analytic tool. It thus enhanced workability for courts and parties and protected parties' interests from potentially unanticipated discretionary decisions of individual courts, which did not have the benefit of concrete, guiding principles before *Lee*.

In jettisoning this Court's constitutional standing jurisprudence, however, Justice CAVANAGH chooses not to rely on the *Robinson* factors. Instead, he cites Chief Justice KELLY's analysis in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009). There, the Chief Justice expressed her disapproval of *Robinson*.[34] *Petersen*, 484 Mich at 316-317. She thus articulated her own preferred standard, albeit while "neglect[ing] even to apply her new stare decisis standard to determine whether *Robinson* itself should be overruled." *Id.* at 388 n 42 (MARKMAN, J., dissenting). *Only* Justice CAVANAGH concurred in the Chief Justice's stare decisis analysis in

[34] Notably, Chief Justice KELLY concluded that "*Robinson* is insufficiently respectful of precedent" and indicated that she "would modify it by shifting the balance back in favor of precedent." *Petersen*, 484 Mich at 316-317. This allegiance to precedent is remarkably absent in this case despite the majority's reliance on Chief Justice KELLY's *Petersen* formulation.

Petersen, and only the Chief Justice expressly joins Justice CAVANAGH's reliance on *Petersen* here.

In declining to join Justice CAVANAGH's discussion of stare decisis, Justices WEAVER and HATHAWAY go one step further. In their concurrences, they expressly advocate *no* standardized approach to overruling precedent. Concluding that "[t]here is no need for this Court to adopt any standardized test regarding stare decisis," Justice WEAVER advocates for a "case-by-case" analysis based on undefined notions of "judicial restraint, common sense, and fairness." Her application of these notions to this case exemplifies the unprincipled nature of her position. She simply advances the empty, circular conclusion: "In serving the rule of law and applying judicial restraint, common sense, and a sense of fairness to the case at hand, I agree with and join the majority opinion's holding that *Lee* and its progeny are overruled." Justice HATHAWAY describes a judge's duty when deciding whether to overrule precedent as a "policy determination" that "will be dependent upon the facts and circumstances presented." Like Justice WEAVER, she votes to overrule *Lee* based on an empty, unexplained conclusion: "the reasons for overruling *Lee* are paramount to any articulated test and the special and compelling justifications to do so are overwhelming in this case."

Justices WEAVER and HATHAWAY have each espoused their troubling views that reviewing whether a case should be overruled is merely a "policy" determination that need not be guided by any standard in several other recent cases, including *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), and *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010). Their professed approaches rely entirely on their personal, subjective views of the law. As Justice YOUNG

noted in his dissent to *Univ of Mich Regents*, their approaches are "the very antithesis of the 'rule of law' . . . ." *Univ of Mich Regents*, 487 Mich at 325 (YOUNG, J., dissenting). He observed:

> The rule of law, by definition, requires judges to decide cases on the basis of principles, announced in advance, rather than on a personal or subjective preference for or against a party before them. This ensures stability in the law despite the diversity of judges' personal beliefs. Whether we, as judges, "like" the outcome is, quite simply, *irrelevant* to whether it reflects a correct conclusion of law. It is harrowing that Justices WEAVER and HATHAWAY either do not understand this concept or refuse to subscribe to it, preferring to base their decisions on subjective "policy consideration[s]." [*Id.* at 327.]

Justice MARKMAN also warned that the primary problem with this approach is that

> "litigants will, of course, have no notice beforehand of which ['analytical approach'] will be employed, for the justices themselves will not know this beforehand." *Petersen*, 484 Mich at 380 (MARKMAN, J., dissenting). Under the concurring justices' "analytical approaches,"
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> "there [would be] no consistently applied . . . process with which the judge promises beforehand to comply. He or she may promise to be 'fair,' and he or she may seek to be fair, but there are no rules for how this fairness is to be achieved. There is only the promise that the judge will address each [precedent] on a case-by-case basis, using whatever ['policy considerations'] he or she believes are required in that instance. And the suspicion simply cannot be avoided that these varying and indeterminate ['policy considerations'] may be largely a function of the outcome preferred by the judge and by his or her personal attitudes toward the parties and their causes." [*Id.* at 340 n 10 (MARKMAN, J., dissenting), quoting *Petersen*, 484 Mich at 381-382 (MARKMAN, J., dissenting).]

These warnings have come full circle in this case where the majority overrules an entire body of law without

relying on any agreed-upon factors to decide whether overruling precedent is appropriate.

B. AFTER SUPPORTING *LEE* IN THE PAST, THE MAJORITY NOW INEXPLICABLY CONCLUDES THAT IT WAS WRONGLY DECIDED

Significantly, the majority's decision to overrule *Lee* under the various "standards" espoused individually by each justice depends, of course, on its threshold conclusion that *Lee* was wrongly decided. But this conclusion itself is belied by the reliance of Chief Justice KELLY, Justice WEAVER, and Justice CAVANAGH on the wisdom of *Lee*. Chief Justice KELLY and Justice CAVANAGH *expressly joined* the Court's adoption of the *Lujan* test in *Lee*. *Lee*, 464 Mich at 750 (KELLY, J., joined by CAVANAGH, J., dissenting but "agree[ing] with the majority's adoption of the *Lujan* test").[35] Indeed, Justice CAVANAGH was the *first* justice of this Court to propose adopting the *Lujan* test; he expressly employed and advocated for adoption of the *Lujan* test in concluding that the plaintiffs had standing in the fractured *Detroit Fire Fighters* decision. See 449 Mich at 651-652 (CAVANAGH, J., dissenting in part). Justice WEAVER herself accepted *Lee* in *Associated Builders*, 472 Mich at 127 & n 16, where she explicitly held that *Lee* governs standing in declaratory actions and in cases where a plaintiff seeks to enforce an alleged statutory right but the statute does not confer standing by its own terms. These justices have also explicitly affirmed their agreement with the concept that the judicial power in Michigan is bounded by a case or controversy requirement. E.g., *Richmond*, 486 Mich at 34 (CAVANAGH, J., joined by KELLY, C.J., and MARKMAN and HATHAWAY, JJ.) (stating that " ' "[t]he judicial power . . . is the right to determine actual controversies arising between

[35] See also *Crawford*, 466 Mich at 256-257 (per curiam opinion relying on *Lee* in which CAVANAGH, J., concurred).

adverse litigants, duly instituted in courts of proper jurisdiction" ' ") (citations omitted; ellipsis and brackets in original); *In re Certified Question from the United States Dist Court for Eastern Dist of Mich*, 622 NW2d 518, 519 (2001) (WEAVER, J., dissenting) (" '[J]udicial power' " is " 'the power to hear and determine controversies between adverse parties, and questions in litigation.' ") (citation and quotation marks omitted).

In light of these justices' former positions, I am mystified at their current conclusions that *Lee* was not only wrongly decided, but was *so* misguided that we should now throw Michigan's standing jurisprudence into turmoil in order to overrule *Lee*. Indeed, their result has every appearance of a mere power grab intended to ascribe broad, unconstitutional authority to the Court as it is *now* configured with this new majority at the helm. Ironically, Justice WEAVER's dissenting comments in *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498; 740 NW2d 206 (2007), are apropos. There, she reiterated her lack of support for MCR 7.305(B), which permits this Court to entertain requests for advisory opinions from foreign courts, because the subrule "lacks any limiting language on when the Court may answer a certified question . . . ." *Id.* at 550 (WEAVER, J., dissenting). A lack of express limits, she opined, "leav[es] the door and the docket open to the whims of the majority." *Id.*

As if to illustrate her point, the majority underpins its supposed consideration of the doctrine of stare decisis with its conclusion that our constitutional standing doctrine is "at the expense of the public interest . . . because it may prevent litigants from enforcing public rights, despite the presence of adverse interests and parties, and regardless of whether the Legislature in-

tended a private right of enforcement to be part of the statute's enforcement scheme." But this self-serving, rhetorical formulation of the "public interest" is entirely of the majority's own making.[36] It ignores that, in this case, there is *no* indication that the Legislature intended that plaintiffs have a private right to enforce the statute at issue. Most significantly, it ignores the public's interest *as expressed in our constitution*, and explained in depth above, in courts that do not have unlimited power and, absent exceptions expressly provided by the constitution, should not exceed the traditional judicial power by intruding on the powers of the executive and legislative branches.

C. MICHIGAN JURISPRUDENCE IN TURMOIL: THE MAJORITY'S INCREASING WILLINGNESS TO OVERRULE PRECEDENT WITH WHICH IT DISAGREES

Thus the majority continues to exhibit its absolute disregard for precedent inconvenient to its aims without regard to the consequences. As Justice MARKMAN emphasized in his dissent to the majority opinion in *McCormick*, 487 Mich at 265-266:

> Even a cursory analysis of the majority's treatment of precedent since it ascended to power in January 2009 reveals a lack of sufficient regard for recent precedents that is directly contrary to their own previous assertions of the need not to needlessly overrule cases on account of stare

[36] The majority argues that, in federal courts and the dozens of states who use the *Lujan* framework, those entities' respective constitutions *cause serious detriment to the public interest*. This alarmist reasoning provides no support for overruling *Lee*. Indeed, this whole argument underscores the manipulative nature of the majority's stare decisis test, which here is used to displace a widely accepted and commonly used national standard. More disruptive to the public interest is the state of law to which the majority returns Michigan today: no defined standards, thus allowing litigious individuals to bring unfounded lawsuits against fellow citizens.

> decisis. Past complaints on their part that cases should not be overruled when the only thing that has changed is the membership of the Court have gone by the wayside.

"[A]ll the justices who comprise the majority . . . should more clearly recognize the consequences of what they are doing." *Id.* at 265 (emphasis omitted). Indeed, in overruling numerous significant cases of this Court—the growing list of which is catalogued in *McCormick* by Justice MARKMAN, *id.* at 266-273—in the brief period since the current majority came to power in January 2009, I find the majority's feigned adherence to the doctrine of stare decisis here hard to swallow. Nothing about the majority's decision today " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, [or] contributes to the actual and perceived integrity of the judicial process.' " *Ante* at 367, quoting *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). Rather, the majority throws into turmoil a well-accepted and constitutionally sound standing doctrine *applicable to every civil suit filed in this state* that this Court adopted to rectify the total uncertainty in this area that was evident in cases such as *Detroit Fire Fighters*, 449 Mich 629. Accordingly, I am nonplussed by Justice CAVANAGH's ironic lip service to Alexander Hamilton's warning that, "to ' "avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." ' " *Ante* at 366, quoting *Petersen*, 484 Mich at 314-315 (opinion by KELLY, J.), quoting The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961).

Finally, as Justice MARKMAN has also illustrated, this case presents yet another troubling element of the

majority's current unbounded disregard for precedent. Here as in several other recent cases, see *McCormick*, 487 Mich at 273-274, instead of accepting the issues as framed and argued by the parties throughout the case, the majority instead directed the parties to brief whether a decision by the former majority should be overruled. Yet, as noted, the parties to this case have *always* argued that *Lee* governs their dispute. Even plaintiffs—for whom the majority renders a favorable decision here—never challenged the correctness and applicability of *Lee* to their case. Further, although other groups and members of the public have participated in this case by filing briefs amicus curiae at the majority's invitation, not a *single* brief supports plaintiffs' argument that they have standing *here*.[37]

IV. FURTHER RESPONSE TO THE MAJORITY

Rather than ash, the majority's stare decisis analysis should taste like bile in their mouths: like a bulimic after a three day bender, the majority justices now *purge* a decade's worth of vigorous protestations that they are committed to the principle of stare decisis. As Justice YOUNG demonstrates at length in *Univ of Mich Regents*, 487 Mich at 321-323 (YOUNG, J., dissenting), members of the majority stridently defended stare decisis for many years when past cases supported their dissenting positions. Then-Justice KELLY summed up their posi-

[37] Indeed, of the amici curiae who responded to the majority's request to file briefs analyzing the correctness of *Lee,* only one questioned *Lee* and the cases following it: the National Wildlife Federation (NWF), which was the successful plaintiff in *Nat'l Wildlife,* 471 Mich 608, which applied *Lee*. Most notably, even the NWF does *not* argue that plaintiffs have standing here. Rather, the NWF stresses its belief that *if* the Legislature *expressly* grants a plaintiff standing in a statute, the courts should permit the suit without regard to whether the plaintiff also qualifies for standing under the *Lee*/*Lujan* test.

tion in *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting), stating: "[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable." Yet here they overrule *Lee*, most notably without *ever* addressing their former adherence to the *Lee*/*Lujan* test.

As the Court established in *Lee* and as I recount here, *Lee* was built on this Court's historical concepts of standing. By reversing the line of post-*Lee* cases here, the majority claims that it "brings this Court back to the *status quo ante*." Unfortunately, the pre-*Lee* status quo resulting from *House Speaker*, 443 Mich 560, was confusion and bitter division regarding rules that provided no clear guidance regarding Michigan's constitutional standing requirements.[38] It is this state to which the majority returns Michigan law. *Lee* did not sacrifice Michigan standing jurisprudence, as the majority persists in repeating, nor did *Lee* conclude that federal standing jurisprudence was expressly binding in Michigan. Rather, *Lee* favored the commonly accepted federal test which brought consistency to Michigan courts in light of our lack of a clearly articulated, workable test. Further, as members of the majority have recognized, there simply is no constitutional "conflict" that would prevent Michigan's continued use of the *Lujan*/*Lee* test for standing.[39] These truths—as well as the overall

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[38] The majority persists in suggesting that Michigan had a clear, workable standing doctrine for "decades" before *Lee* was decided. To the contrary, our 1993 decision in *House Speaker*, where the Court was apparently unable to make sense of Michigan's historical approach to standing, left our standing doctrine muddled and impossible to apply with any consistency.

[39] The majority's unexplained suggestion that, in Michigan, "controversy" means something different than throughout the rest of the nation

reasonableness of the *Lee* test—are evident in the near-unanimous acceptance of the test in *Lee* itself. How is it possible that the majority now rejects the very test suggested by Justice CAVANAGH himself in *Detroit Fire Fighters*, accusing the *Lee* Court of adopting a test that "casually displaced decades of inconsistent precedent," "is likely to result in serious detriment to the public interest," and is "contrary" to Michigan law? As Justice YOUNG has observed in a similar context,[40] United States Supreme Court Justice Antonin Scalia may have best described our concerns about the majority's recent about-face with regard to stare decisis as well as its new approach to standing with the following observation:

> Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all. [*Morrison v Olson*, 487 US 654, 712; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (Scalia, J., dissenting).]

Finally, although the majority criticizes me for actually addressing the questions presented in this case, my analysis is necessary *precisely because* the majority applies an unworkable, amorphous approach to standing. The lower courts had little trouble agreeing, in relatively brief decisions, that plaintiffs do not have standing under the principles enunciated in *Lee*. But the majority's approach so obscures the reasons courts impose standing requirements *in the first place* that it

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is without basis. As I explain above, the federal "case or controversy" requirement limits only the *range* of controversies that may be heard in federal courts, and this is distinct from the requirement—common to federal and state law alike—that an actual case or controversy *exists* in the first place.

[40] *Univ of Mich Regents*, 487 Mich at 320-321 (YOUNG, J., dissenting).

leaves the dissent in a position akin to one who must "prove a negative"; thus, I attempt to show why the lower courts' conclusions that plaintiffs clearly could not proceed are indisputably correct under the terms of the statute invoked by plaintiffs to establish standing. Indeed, in light of the express terms of the school code, its enforcement procedures, and its disciplinary provisions, I am baffled by the majority's conclusion, under its own new discretionary approach, that the trial court abused its discretion by concluding that plaintiffs could not proceed here. How is the majority's new non-test for standing anything but a proclamation that *it* will decide, on the basis of personal policy considerations, whether a plaintiff may maintain a suit against a particular defendant?

The majority essentially concludes that plaintiffs have standing because their safety might have been one aim of MCL 380.1311a(1) without any regard to the Legislature's actual intent or to the ramifications of this suit. For example, although *no one* in this suit represents students' rights—and thus no one may consider their rights as the suit proceeds or in an eventual settlement—the majority presumes that the right result will simply come out in the wash after the complaint is authorized on standing grounds. Indeed, under the majority's approach, what prevents *anyone* with a proclaimed "substantial interest" from suing a defendant such as the school board here in an attempt to trample on the rights of an unrepresented third party?[41]

[41] May I sue a landlord under a local noise ordinance for failing to evict my noisy neighbor without notice to my neighbor? May I sue the police department for failing to ticket the teenagers loitering outside my favorite window seat at a local restaurant? In each case, I might allege that the defendant had a duty to enforce a particular law and that I had a "substantial interest" in its enforcement under the facts presented. Further, in each case, the named defendant may be perfectly willing to

Because a plaintiff no longer needs to show a concrete and particularized injury, or that the court actually has the power to grant relief *to me* from *that defendant*, or that the legislative body *intended to create a cause of action,* presumably any such plaintiff can proceed. Particularly by permitting plaintiffs to sue to enforce a governmental agency's *statutory* duties with no attention to whether the Legislature *intended* to create a cause of action, the majority utterly ignores separation of powers principles including the Legislature's sole purview to legislate such duties and to define the proper mechanisms for their enforcement.[42]

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comply with my demands and happy to do so without arguing, as defendants do here, that the case should not proceed because I have no right to govern his relationship with the third party or affect the absent third party's rights. This Court expressed similar concerns regarding the view of the judicial power offered by the dissent in *Nat'l Wildlife*—which the majority today overrules—when discussing environmental suits brought under MCL 324.1701(1) of the Michigan environmental protection act:

> Under th[e former dissenting] view of the "judicial power," "any person," for example, could seek to enjoin "any person" from mowing his lawn with a gas-powered mower because such activity allegedly creates air pollution and uses fossil fuels when other alternatives are available. "Any person" could sue "any person" for using too much fertilizer on his property, or allowing too much runoff from a feedlot on his property. "Any person" could sue "any person" from using excessive amounts of pesticides in his home or garden or farm. "Any person" could sue "any person" for improperly disposing of used petroleum-based oils. "Any person" could sue "any person" for improper backyard grilling practices, excessive use of aerosol sprays and propellants, or wasteful lawn watering. [471 Mich at 649-650.]

At least the scenarios presented in *Nat'l Wildlife* involved suits against the allegedly offending party; here, the majority permits plaintiffs to maintain suit despite the absence of the students they seek to punish.

[42] Members of the executive branch are thus vulnerable to suits filed by any person claiming a substantial interest in their affairs. I note the following timely illustration of what may arise. In the midst of the city of Detroit's ongoing financial woes and the ongoing crisis in its public school

Consistent with the majority's deconstruction of Michigan's guiding legal principles over the last two years, the result boils down to this: in this state, anyone has standing to sue anyone else, any time. As in *McCormick*, 487 Mich 180, for example, where the majority significantly lowered the threshold for suits against Michigan drivers under our automobile no-fault insurance scheme,[43] the majority continues to encourage litigation at a high cost to individuals, the courts, local governments and local officials. This complete destabilization of established law benefits no one.

V. CONCLUSION

For each of these reasons, I dissent. I would affirm the decision of the Court of Appeals, which reached the correct result and properly applied the law of this state. The majority's conclusion that plaintiffs have standing here is devoid of any analysis and incorrect under any meaningful test. Its decision to grant standing here under an amorphous new test of its own making is unprincipled and opportunistic; in its haste to overrule

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system, an activist group joined teachers and school board members to sue Robert Bobb, the emergency financial manager of the Detroit Public Schools, seeking to challenge the salary terms of his contract with the Governor and the state superintendent of schools. A circuit court judge dismissed the suit, concluding that the plaintiffs did not have legal standing. Marisa Schultz, *Judge throws out lawsuit over Financial Manager Bobb's pay*, Detroit News, July 29, 2010. Under the majority's new approach, their suit seems tenable because all they have to allege is an ill-defined "substantial interest" in the management of local schools.

[43] See *McCormick*, 487 Mich at 286-287 (MARKMAN, J., dissenting) ("By nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system.").

yet another precedent of this Court, it grants teachers the right to sue for expulsion of children from our public schools without any regard for the students' rights. Finally, its choice to eschew the well-established *Lee* test aggregates limitless power in the courts, is contrary to our constitution, and will only damage the rule of law in our state.

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

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC

Docket No. 137500. Decided July 31, 2010.

Andre Bezeau, a professional hockey player, was a Michigan resident when he signed a contract in Michigan to play for a Detroit team owned by Palace Sports & Entertainment, Inc. He injured himself in 2000 when he fell off a ladder in New Brunswick, Canada. He was treated there and became a New Brunswick resident. Palace Sports then loaned Bezeau to a Rhode Island team. Bezeau sought workers' compensation benefits after he aggravated the original injury during a game in Rhode Island. The magistrate denied the claim, but the Workers' Compensation Appellate Commission (WCAC) reversed and granted Bezeau an open award of benefits. Palace Sports appealed, and the Court of Appeals, BORRELLO, P.J., and SAWYER and FITZGERALD, JJ., vacated the WCAC's decision and remanded the case in an unpublished opinion per curiam, issued February 28, 2006 (Docket No. 258350). On remand, the WCAC remanded the case to the magistrate for further factual findings. While the case was pending before the magistrate on remand, the Supreme Court decided *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007), holding that MCL 418.845 gave the Workers' Compensation Agency jurisdiction over out-of-state injuries only if (1) the employee was a Michigan resident when the injury occurred and (2) the contract of hire was made in Michigan. In doing so, the Supreme Court overruled *Boyd v W G Wade Shows*, 443 Mich 515 (1993), and gave *Karaczewski* retroactive effect. Palace Sports subsequently argued before the magistrate that the agency did not have subject-matter jurisdiction over this case because Bezeau was a New Brunswick resident when his injury was aggravated. The magistrate agreed and dismissed Bezeau's claim. The WCAC affirmed, and the Court of Appeals denied Bezeau's application for leave to appeal in an unpublished order entered September 5, 2008 (Docket No. 285593). The Supreme Court ordered and heard oral argument on whether to grant Bezeau's application for leave to appeal or take other peremptory action, directing the parties to address whether *Karaczewski*'s holding should be applied in this case. 483 Mich 1001 (2009).

In separate opinions, the Supreme Court *held*:

The holding of *Karaczewski* that gave that decision retroactive effect is overruled.

Justice WEAVER, joined by Justice HATHAWAY, further stated that while Supreme Court decisions are generally given full retroactive effect, a more flexible approach should be adopted when injustice would result from retroactivity, and prospective application may be appropriate when the decision overrules settled precedent. Making *Karaczewski* retroactive failed to give due weight to the interests of employers and employees relying on the well-established law of *Boyd* and *Roberts v I X L Glass Corp*, 259 Mich 644 (1932), and has resulted in a disruption in the administration of justice, as demonstrated by this case in which the parties spent six years in hearings and appeals before the jurisdictional question was first raised after *Karaczewski* was decided. The holding in this case affects claims based on injuries that occurred on or before the date *Karaczewski* was decided, as long as the claim has not already reached final resolution in the court system.

Justice CAVANAGH, concurring, agreed that the interpretation of MCL 418.845 adopted in *Karaczewski* should only have been applied prospectively and that *Karaczewski* should be overruled to the extent that it held otherwise. Justice CAVANAGH joined the lead opinion in full except for part III(B) and wrote separately to state his preference for the modified approach to stare decisis that Chief Justice KELLY articulated in her lead opinion in *Petersen v Magna Corp*, 484 Mich 300, 316-320 (2009). Under that approach, there is a compelling justification to overrule the retroactivity of *Karaczewski*.

Chief Justice KELLY, concurring in part and dissenting in part, agreed that *Karaczewski* should not have been applied retroactively, but further stated that it should be overruled in its entirety. After *Karaczewski* overruled *Boyd* and *Roberts*, the Legislature abrogated *Karaczewski* by enacting 2008 PA 499. Overruling *Karaczewski* entirely would not work an undue hardship, and there are compelling justifications to do so.

Karaczewski's holding concerning retroactivity overruled and case remanded to the WCAC.

Justice WEAVER also wrote separately to address statements in the dissent concerning her position on stare decisis. Specifically, she observed that the lead opinion did not represent any new philosophical majority on the Supreme Court and stated that her treatment of precedent in the lead opinion was entirely consistent with her view that when deciding to overrule wrongly decided

precedent, each case should be looked at individually on its own facts and merits through the lens of judicial restraint, common sense, and fairness.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, dissented from the decision to overrule the retroactive effect of *Karaczewski*, stating that it was a means of substantively overruling the case itself. Giving *Karaczewski* prospective application only essentially renders it an advisory opinion, which is not authorized under Const 1963, art 3, § 8. Justice YOUNG further cited numerous other recent cases in which the justices in the majority in this case retreated from the doctrine of stare decisis.

WORKERS' COMPENSATION — JURISDICTION OVER WORKERS' COMPENSATION CLAIMS — OUT-OF-STATE INJURIES.

Karaczewski v Farbman Stein & Co, 478 Mich 28 (2007), which held that the Workers' Compensation Agency has jurisdiction over out-of-state injuries only if (1) the employee was a Michigan resident when the injury occurred and (2) the contract of hire was made in Michigan, does not apply to claims based on injuries that occurred before the date *Karaczewski* was decided, as long as the claim has not already reached final resolution in the court system (MCL 418.845).

Law Offices of Peter B. Bundarin PLLC (by *Peter B. Bundarin*) and *John A. Braden* for plaintiff.

Conklin Benham, P.C. (by *Martin L. Critchell* and *Walter F. Noeske*), for defendant.

Amicus Curiae:

Daryl Royal and *Adler Stillman, PLLC* (by *Barry D. Adler*), for the Michigan Association for Justice.

WEAVER, J. In this case, we decide whether this Court correctly gave retroactive effect to its decision in *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007). After examination of the *Karaczewski* decision and the effect overruling its retroactivity would have, we overrule the holding of *Karaczewski* that gave the decision its retroactive effect. Accordingly, pursuant

to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the decision of the Workers' Compensation Appellate Commission (WCAC) and remand this case to the WCAC for resolution of this case consistent with the law in effect before the *Karaczewski* decision.

I. FACTS AND PROCEDURAL HISTORY

In 1998, plaintiff Andre Bezeau, a professional hockey player, signed a three-year contract with the Detroit Vipers, a professional hockey team owned by defendant Palace Sports & Entertainment, Inc. At the time, plaintiff was a resident of Michigan, and the contract was signed in Michigan.

In June 2000, plaintiff fell from a 45-foot ladder while working at his father's roofing company in New Brunswick, Canada. As a result of the fall, he injured his groin, lower back, and right thigh. Plaintiff stayed in New Brunswick to receive treatment for his injuries, and he became a resident of New Brunswick.

In October 2000, the Detroit Vipers loaned plaintiff to the Providence Bruins, a professional hockey team located in Rhode Island. In the first game of the 2000-2001 season, which took place in Rhode Island, another player struck plaintiff, aggravating his injury. Plaintiff left the game and has been unable to play hockey since the incident.

In June 2001, plaintiff applied for workers' compensation benefits in Michigan. He claimed that he had developed osteitis pubis as a result of playing professional hockey. A hearing was held before a magistrate in the Worker's Compensation Board of Magistrates. The magistrate ruled in February 2003 that although plaintiff was disabled, there was no persuasive evidence that the incident at the October 2000 hockey game in Rhode

Island caused plaintiff's disabling injuries or aggravated any preexisting injuries.

Plaintiff appealed the decision to the WCAC, which reversed the magistrate's findings. The WCAC panel found that the incident at the October 2000 hockey game was a contributing factor, among many, to plaintiff's disability. The WCAC granted plaintiff an open award of benefits.

Defendant appealed the WCAC's decision in the Court of Appeals. In February 2006, the Court of Appeals issued an unpublished opinion vacating the decision of the WCAC and remanding the case to the WCAC to "determine whether plaintiff asserted an 'aggravation' or 'contribution' theory at trial, whether such a theory was properly raised on appeal, and, if so, whether an award of benefits is proper under *Rakestraw* [*v Gen Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003)]." *Bezeau v Palace Sports & Entertainment, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 258350), p 5.

On remand from the Court of Appeals, the WCAC issued a decision in October 2006 remanding the case to the board of magistrates to determine whether plaintiff's condition after the October 2000 hockey-game incident was medically distinguishable from his condition before the incident.

Meanwhile in May 2007, while the remand to the board of magistrates in the instant case was pending, this Court issued the opinion in *Karaczewski* on the jurisdictional requirements for workers' compensation claims brought in Michigan. In *Karaczewski*, this Court overruled the interpretation of MCL 418.845 set forth in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), and described what it termed an abrogation of the statute by *Boyd*'s precursor, *Roberts v I X L Glass Corp*, 259 Mich

644; 244 NW 188 (1932). *Karaczewski*, 478 Mich at 30, 39-41. The new interpretation of MCL 418.845 set forth in *Karaczewski* stated that for Michigan workers' compensation laws to apply to a claim for benefits, the injured employee must have been a resident of Michigan at the time of the injury and the contract for hire must have been made in Michigan.[1] *Id*. at 33, 44. Under *Boyd* and *Roberts*, Michigan workers' compensation laws applied to claims for benefits even if the injured employee was not a resident of Michigan as long as the contract for hire was made in Michigan. See *id*. at 34, 37-38.

As a result of the *Karaczewski* decision, defendant argued that the board of magistrates did not have subject-matter jurisdiction because plaintiff was a resident of New Brunswick at the time of the October 2000 incident. The magistrate agreed and dismissed plaintiff's claim for benefits. Plaintiff appealed to the WCAC, which affirmed the magistrate's decision. Plaintiff applied for leave to appeal in the Court of Appeals, which denied leave to appeal in an unpublished order entered September 5, 2008 (Docket No. 285593).

Plaintiff applied for leave to appeal in this Court. We ordered oral argument on the application, directing the parties to address "whether the jurisdictional standard established at MCL 418.845, as interpreted by this Court in *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007), should be applied in this case."[2]

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[1] The Legislature has since amended MCL 418.845 to now make it clearly applicable to out-of-state injuries. See 2008 PA 499, effective January 13, 2009. In this case, as an alternative to overruling *Karaczewski*, plaintiff asks that we consider applying 2008 PA 499 retroactively. However, we do not reach that question in this case because we overrule the retroactivity of *Karaczewski* that applied to parties in plaintiff's position of having suffered an injury before *Karaczewski* was decided.

[2] *Bezeau v Palace Sports & Entertainment, Inc*, 483 Mich 1001, 1001-1002 (2009).

II. STANDARD OF REVIEW

Whether this Court's decision in a previous case should be overruled is a question of law that this Court reviews de novo. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009).

III. ANALYSIS

A. THE DECISION IN *KARACZEWSKI*

Karaczewski involved an employee whose contract for hire was made in Michigan, but who became a resident of another state after his employer transferred him. The employee was injured on the job while in the other state. *Karaczewski*, 478 Mich at 30. He filed a claim for workers' compensation benefits in Michigan. *Id*. at 31.

The defendants in *Karaczewski* argued that under the plain language of the Michigan Worker's Disability Compensation Act, the employee's claim was not subject to the jurisdiction of the Michigan's Workers' Compensation Agency because the employee was not a resident of Michigan at the time of the injury. *Id*. at 58. The WCAC and Court of Appeals agreed with the defendants that the plain language of the relevant statute, MCL 418.845, would preclude the employee from bringing his claim in Michigan. *Id*. at 31-32. However, both the WCAC and the Court of Appeals noted that they were unable to rule in the defendants' favor under the binding Michigan Supreme Court precedents of *Boyd* and *Roberts*. *Id*. at 32.

In *Boyd*, this Court interpreted MCL 418.845 when faced with a similar situation involving an employee whose contract for hire was made in Michigan but who was injured and died on the job while a resident of another state. *Boyd*, 443 Mich at 516. The Court exam-

ined MCL 418.845 and *Roberts*, a case interpreting a predecessor of MCL 418.845. *Id*. at 517-520. The *Boyd* Court held that, "pursuant to [MCL 418.845] and *Roberts v IXL Glass Corp*, *supra*, the Bureau of Workers' Disability Compensation shall have jurisdiction over extraterritorial injuries without regard to the employee's residence, provided the contract of employment was entered into in this state with a resident employer." *Id*. at 526.

This Court granted leave in *Karaczewski* to determine whether overruling *Boyd* would be justified.[3] Analyzing the plain language of MCL 418.845, a majority of this Court held that the statute "confers jurisdiction on the Bureau of Worker's Compensation, now the Workers' Compensation Agency, for out-of-state workplace injuries only if (1) the employee is a resident of Michigan when the injury occurs and (2) the contract of hire was made in Michigan." *Karaczewski*, 478 Mich at 30. The *Karaczewski* Court's interpretation of MCL 418.845 directly conflicted with this Court's interpretation of the same statute in *Boyd*, and thus this Court overruled *Boyd*. *Id*. Over the objections of three justices, the majority in *Karaczewski* gave retroactive effect to its new interpretation of MCL 418.845. *Id.* at 44 n 15.

In general, this Court's decisions are given full retroactive effect. *Pohutski v City of Allen Park*, 465 Mich 675, 695; 641 NW2d 219 (2002). However, there are exceptions to this rule. This Court should adopt a more flexible approach if injustice would result from full retroactivity. *Id.* at 696. Prospective application may be appropriate where the holding overrules settled precedent. *Id*. As stated in *Pohutski*:

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[3] *Karaczewski v Farbman Stein & Co*, 474 Mich 1087 (2006).

> This Court adopted from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731, 14 L Ed 2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (GRIFFIN, J.). [*Id.*]

In determining whether *Karaczewski* was incorrectly given retroactive effect, we must first answer the threshold question whether *Karaczewski* clearly established a new principle of law. The decision in *Karaczewski* to overrule *Boyd* established a new interpretation of MCL 418.845 that broke from the longstanding interpretation of the statute. Although the Court interpreted the statute consistently with its plain language, the Court's interpretation established a new rule of law because it affected how the statute would be applied to parties in workers' compensation cases in a way that was inconsistent with how the statute had been previously applied.[4]

Given that *Karaczewski* established a new rule of law, we now weigh the factors set forth in *Pohutski* to determine whether *Karaczewski* was correctly given retroactive application. First, we determine the purpose to be served by the new rule. The majority in *Karaczewski* overruled *Boyd* because the *Boyd* interpretation of MCL 418.845 failed to recognize that the statute's text required that an injured employee must have been a resident of Michigan at the time of the injury and the contract for

[4] *Pohutski*, 465 Mich at 696-697.

hire must have been made in Michigan in order for the employee to be able to successfully file a workers' compensation claim in Michigan. Thus, the purpose of the new rule was to interpret the law consistently with the Legislature's apparent intent when drafting MCL 418.845.

The next two factors to consider in determining whether *Karaczewski* was correctly applied retroactively are reliance interests on the old rule of law under *Boyd* and the effect of *Karaczewski*'s retroactivity on the administration of justice. The concurring and dissenting justices in *Karaczewski* noted that the decision to give *Karaczewski* retroactive effect would seriously undermine the reliance interests of parties regarding the *Boyd*/*Roberts* decisions. Justice KELLY stated in her dissent that "[t]here are significant reliance concerns implicated by the overturning of *Roberts* and *Boyd*. The underlying rationale of these cases has been in place for seven decades. Attorneys, employers, insurance carriers, and various employees have relied on the holdings of *Roberts* and *Boyd*." *Karaczewski*, 478 Mich at 62 (KELLY, J., dissenting). Furthermore, Justice WEAVER noted in her opinion concurring in part and dissenting in part:

> [T]here has been extensive reliance for 14 years on *Boyd*'s interpretation of MCL 418.845. In addition to reliance by the courts, insurance decisions have undoubtedly been predicated on this Court's longstanding interpretation of MCL 418.845 under *Boyd*. Nonresident injured employees, like plaintiff, who initially entered into contracts for hire in Michigan, but later agreed to work outside Michigan, have relied on the ability to obtain workers' compensation benefits based on their employment relationship with Michigan employers. Prospective application acknowledges that reliance and assures the fair resolution of those pending workers' compensation cases. [*Id.* at 46 (WEAVER, J., concurring in part and dissenting in part).]

In addition to *Karaczewski*'s failure to give due weight to that reliance on *Boyd* and *Roberts*, the dissenting justices noted that retroactivity would result in a disruption in the administration of justice. *Id*. (WEAVER, J., concurring in part and dissenting in part); *id*. at 62 (KELLY, J., dissenting). As the instant case shows, it appears that the *Karaczewski* decision has disrupted the administration of justice in cases that came under *Karaczewski*'s retroactive effect. Plaintiff first filed his claim in 2001, and the parties spent six years going through the appellate process to the Court of Appeals and back to the board of magistrates without having any argument over jurisdictional questions regarding MCL 418.845. While the case was on remand at the board of magistrates in 2007, *Karaczewski* was decided and defendant raised the jurisdictional issue for the first time in the tribunal.[5] Because a long-settled part of this well-traveled case suddenly became a new issue and the six years of work expended on this case became moot, we conclude that *Karaczewski*'s retroactive effect disrupted the administration of justice.

Because the *Karaczewski* decision on retroactivity did not give due weight to the interests of employers and employees relying on the well-established law of *Boyd* and *Roberts*, and because it did not give due weight to its effect on the administration of justice, we conclude that the decision to give retroactivity to *Karaczewski* was erroneous.[6]

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[5] Defendant did include a defense in its answer to plaintiff's initial application for workers' compensation benefits, claiming that Michigan law did not cover the claim because the injury occurred in Rhode Island. However, defendant did not raise the issue at the hearing before the magistrate or at any appellate stage through the next six years until after *Karaczewski* was decided.

[6] The purpose of the new rule from *Karaczewski*—interpreting the law consistently with the Legislature's apparent intent when drafting MCL

B. STARE DECISIS

Having established that retroactive effect was erroneous, we next decide whether this Court should overrule the decision that gave retroactive effect to *Karaczewski*. This Court generally adheres to the principle of stare decisis. *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). However, we should reexamine precedent when legitimate questions have been raised about the correctness of a decision. *Id*. at 464. Upon such reexamination, our first step is to determine whether the precedent was wrongly decided. *Id*. Should we determine that precedent was wrongly decided, we also "examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id*. at 466. "As to the reliance interest, the Court must ask whether the previous decision has 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." *Id*.

As we have explained earlier, we conclude that giving retroactive effect to this Court's holding in *Karaczewski* was an erroneous decision. Having determined that the

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418.845—must also be given weight. As can be seen from the concurrences of the justices signing this opinion, some of the justices in the majority agree with Justice YOUNG's dissent that *Karaczewski* correctly interpreted the language of the statute, and some justices disagree with *Karaczewski*'s interpretation of the statute. Nevertheless, we all conclude that the effect of retroactivity on the *Pohutski* factors of reliance and disruption of the administration of justice outweigh the effects of retroactivity that in fact resulted from *Karaczewski*'s interpretation. In this instance, we conclude that the correct interpretation of a statute is better given prospective application when retroactive application seriously undermines parties' reliance on the rule of law and disrupts the administration of justice.

retroactivity holding was wrongly decided, we next turn to the reliance interests involved.

In this case, we are only reviewing the effect of retroactively applying *Karaczewski*'s interpretation of MCL 418.845. By its nature, the retroactivity applied only to claims based on injuries that occurred before the date *Karaczewski* was decided. At the time of the *Karaczewski* decision, the workers' compensation system was operating under the prior precedent of *Boyd* and *Roberts* regarding jurisdictional questions under MCL 418.845. At the time of the *Karaczewski* decision, the only reliance on law regarding MCL 418.845 by parties was a reliance on the *Boyd* and *Roberts* precedents. There could not have been reliance on the law of the *Karaczewski* decision for claims based on injuries that occurred before *Karaczewski* because *Karaczewski* was decided after the bases for those claims had arisen. Thus, we find no reliance interests regarding the retroactive effect of *Karaczewski* on claims in which the injuries had occurred on or before the date *Karaczewski* was decided.

Our next step in examining whether the retroactive effect of *Karaczewski* should be overruled is to determine whether overruling that effect will result in any undue hardships for parties involved in cases affected by our decision. As we have noted, the parties involved in cases affected by this decision had no reliance interests involving *Karaczewski*. By overruling the retroactivity of *Karaczewski*, the only effect on those parties is that their cases will be governed by the precedents that governed their claims when the bases for those claims first arose. We believe that such an effect is not an undue hardship on the parties because they are simply returning to the status quo for their claims.

Further justification for overruling the retroactivity of *Karaczewski* can be found in the inequity in the instant

case, which arose as a result of the retroactivity holding. When the instant case was filed, the *Boyd* and *Roberts* interpretations of MCL 418.845 clearly governed the case, and plaintiff met the requirements of those interpretations. The *Boyd* and *Roberts* interpretations remained the governing interpretations of MCL 418.845 for more than six years while the case made its way from the board of magistrates to the WCAC, then to the Court of Appeals, then back to the WCAC on remand and, finally, back to the board of magistrates. During the entire appellate process, the interpretation of MCL 418.845 was not an issue in this case. But when the case was before the board of magistrates on remand to determine an entirely unrelated factual matter, this Court handed down the *Karaczewski* decision, overruling the *Boyd* and *Roberts* interpretations for all cases in which there had not been a final judgment. The *Karaczewski* decision therefore changed the law of this case in the middle of the appellate process without the parties having raised any issue regarding that specific point of law. We find that outcome to be inequitable, and thus we feel that it should be reversed.

We have concluded that the factors for overruling precedent laid out in *Robinson* weigh in favor of overruling the retroactivity holding of *Karaczewski*. Moreover, we have found further justification for overruling the retroactivity holding as a result of the inequity that has arisen in this case. Accordingly, we overrule the holding of *Karaczewski* that gave retroactive effect to its decision.

It should be particularly noted that our holding today affects only claims based on injuries that occurred on or before the date this Court decided *Karaczewski*, as long as the claim has not already reached final resolution in the court system. We do not overrule any aspect of the *Karaczewski* opinion other than its retroactive effect.

Contrary to the assertions in Justice YOUNG's dissent, which Justices CORRIGAN and MARKMAN also join, there is no majority to overrule *Karaczewski* in its entirety. We note that Chief Justice KELLY concurs with this opinion in part and dissents in part because she would in fact completely overrule *Karaczewski*. Six justices have chosen not to agree with Chief Justice KELLY's position to completely overrule *Karaczewski*, and as a result, the portrayal of the lead opinion contained in Justice YOUNG's dissent is inaccurate. *Karaczewski*'s interpretation of MCL 418.845 remains the law of this state for claims based on injuries that occurred after the date that *Karaczewski* was decided but before the effective date of the amendment of MCL 418.845 by enacting 2008 PA 499.

IV. CONCLUSION

We reverse the decision of the WCAC. We overrule this Court's decision to give retroactive effect to *Karaczewski* because the decision was erroneous, overruling it will not affect any reliance interests of the parties affected by our decision, and no undue hardship will occur as a result of our decision. Our holding affects claims based on injuries that occurred on or before the date this Court decided *Karaczewski*, as long as the claim has not already reached final resolution in the court system. Accordingly, we remand this case to the WCAC to continue proceedings consistent with its actions before the *Karaczewski* decision.

Reversed and remanded.

HATHAWAY, J., concurred with WEAVER, J.

CAVANAGH, J. (*concurring*). I concur in the result, and I join the lead opinion in full except for part III(B). I

agree that the interpretation of MCL 418.845 adopted in *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), should only have been applied prospectively and that *Karaczewski* should be overruled to the extent that it held otherwise. I write separately because whereas the lead opinion applies the stare decisis approach from *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000), I continue to prefer the modified version of this approach articulated by Chief Justice KELLY in *Petersen v Magna Corp*, 484 Mich 300, 316-320; 773 NW2d 564 (2009) (opinion by KELLY, C.J.). The result, however, is the same.

Under my preferred approach to stare decisis, there is a presumption in favor of upholding precedent that may be rebutted only if there is a compelling justification to overturn precedent. *Id.* at 317. In determining whether a compelling justification exists, courts may use a number of evaluative criteria if relevant but, importantly, a compelling justification requires more than a mere belief that a case was wrongly decided.[1] *Id.* at 319-320. In this case, the narrow question presented is whether there is a compelling justification to overrule the *Karaczewski* majority's decision to apply its interpretation of MCL 418.845 retroactively.

One criterion is particularly relevant to this question: the extent of reliance on the prior interpretation of MCL 418.845 and the extent to which overruling it might cause special hardship and inequity. See *id.* at 320. Although the reliance interests usually weigh against overruling a decision or, at best, are neutral,

[1] In *Petersen*, Chief Justice KELLY provided a list of criteria that courts may use to consider whether there is a compelling justification, but the list is nonexhaustive and none of the criteria are determinative. They only need to be evaluated if relevant. See *Petersen*, 484 Mich at 320 (opinion by KELLY, C.J.).

this case presents the unusual situation in which the reliance interests weigh *in favor* of overruling a decision.[2] As noted in the lead opinion, the cases that will be affected by prospective application of *Karaczewski* are only those involving injuries that occurred before *Karaczewski* was decided. In those cases, overruling *Karaczewski*'s retroactive application and restoring the pre-*Karaczewski* status quo is in accordance with the reliance interests.[3] In fact, inequity and hardship could result if the retroactivity of *Karaczewski* is *not* overturned. This is demonstrated by this case, in which the parties, relying on the pre-*Karaczewski* status of the law, had been litigating the merits of the case for *six years* when *Karaczewski* was decided. Thus, because I think that the reliance interests formed in this and other similar cases constitute a compelling justification to overrule precedent, I concur in the majority's decision to overrule the retroactive application of *Karaczewski*'s interpretation of the statute.

KELLY, C.J. (*concurring in part and dissenting in part*). I concur with the lead opinion that *Karaczewski v Farbman Stein & Co*[1] should never have been applied

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[2] Indeed, the usual tensions present in a stare decisis analysis are absent in this case. Generally, stare decisis balances two concerns: "the need of the community for stability in legal rules and decisions and the need of courts to correct past errors." *Id*. at 314. In this case, however, *both* concerns are advanced by overruling the retroactive application of *Karaczewski*.

[3] As stated by then Justice KELLY in *Karaczewski*, the essential rationale of the pre-*Karaczewski* interpretation of MCL 418.845 had been in place for seven decades and was an essential part of the workers' compensation regime in Michigan, such that "[a]ttorneys, employers, insurance carriers, and various employees" had relied on it for years. *Karaczewski*, 478 Mich at 62 (KELLY, J., dissenting).

[1] *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

retroactively. I would overrule *Karaczewski* in its entirety because I continue to believe that it should not have overruled *Boyd v W G Wade Shows*[2] and *Roberts v I X L Glass Corp*.[3] As I stated in my dissent in *Karaczewski*, during the 74 years that *Roberts* was controlling law, the Legislature took no steps to change or amend MCL 418.845.[4] Again, when this Court affirmed that interpretation of MCL 418.845 in *Boyd*, the Legislature did nothing.

Only after this Court upset 74 years of law in *Karaczewski* did the Legislature speak by enacting 2008 PA 499. It abrogated *Karaczewski* scarcely more than two years after it was decided.[5] Although some discard any use of legislative acquiescence as a tool for interpreting legislative intent, it is difficult to take issue with the fact that the Legislature took explicit action here.

Furthermore, I believe that the *Robinson* factors clearly call for overruling *Karaczewski*.[6] First, as discussed previously, the enactment of 2008 PA 499 was a

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[2] *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993).

[3] *Roberts v I X L Glass Corp*, 259 Mich 644; 244 NW 188 (1932).

[4] *Karaczewski*, 478 Mich at 46-47 (KELLY, J., dissenting).

[5] See House Legislative Analysis, SB 1596, December 11, 2008 (stating that "the Michigan Supreme Court reversed longstanding case law" in *Karaczewski* and "eliminated coverage for injuries that had previously been covered under the act, reducing compensation for injured workers, and causing potential problems for employers"); Senate Legislative Analysis, SB 1596, November 12, 2008 (explaining that the purpose of 2008 PA 499 is to restore the Workers' Compensation Agency's jurisdiction in response to *Karaczewski*).

I recognize that 2008 PA 499 ultimately expanded jurisdiction in workers' compensation cases beyond where it had been before *Karaczewski*. But the legislative analyses make clear that the amendment was in direct response to *Karaczewski* and sought to restore jurisdiction to the Workers' Compensation Agency.

[6] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

change in the law that undercut and undermined the original basis for the decision. Allowing the central holding of *Karaczewski* to remain intact has a disturbing effect. It disenfranchises the unfortunate group of out-of-state workers with contracts for hire made in Michigan who were injured on the job after *Karaczewski* was decided but before 2008 PA 499 went into effect. I believe that 2008 PA 499 is evidence that the Legislature did not intend to arbitrarily deprive this group of benefits.

Second, overturning *Karaczewski* would not work an undue hardship. Reliance on it has been minimal, given that it was decided recently. Because it displaced 74 years of precedent in Michigan, it is not "so embedded, so accepted, so fundamental, to everyone's expectations" that overruling it would result in "significant dislocations."[7] *Karaczewski* itself displaced reliance interests by overturning a fundamental part of the workers' compensation regime, even if only for a brief period, thanks to the Legislature's quick enactment of 2008 PA 499.[8]

I believe these compelling justifications necessitate that this Court overrule *Karaczewski*. Accordingly, while I concur with the majority that *Karaczewski* does not apply retroactively, I would overrule it entirely.

WEAVER, J. (*concurring*). I concur fully in and sign the lead opinion reversing the decision of the Workers'

I remain committed to the stare decisis factors I proposed in *Petersen v Magna Corp*, 484 Mich 300, 317-320; 773 NW2d 564 (2009), and I believe that this Court should adopt those factors.

[7] *Robinson*, 462 Mich at 466.

[8] See *Karaczewski*, 478 Mich at 51-61 (KELLY, J. dissenting) (discussing the *Robinson* factors as applied to *Roberts* and *Boyd* and finding that not a single factor supported overruling them).

Compensation Appellate Commission (WCAC), remanding this case to the WCAC, and overruling the holding of *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), that gave the *Karaczewski* decision retroactive effect.

I write separately to correct the mistaken assertions in Justice YOUNG's dissent, which is signed by Justices CORRIGAN and MARKMAN,[1] including the mistaken assertions of these "remaining three" regarding my position on stare decisis.

The dissent attempts to characterize the majority's opinions and decision not to apply *Karaczewski* retroactively as a decision to effectively overrule *Karaczewski*. This characterization is not only incorrect and inaccurate, it is misleading and intellectually deceptive.

Further, the dissent's attempt to characterize the lead opinion as being representative of a so-called new philosophical majority is also false. There is no philosophical majority in this case. While the justices forming the majority each agreed with the result in this case, each justice reached his or her conclusion based on different reasons.[2]

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[1] Justices CORRIGAN, YOUNG, and MARKMAN comprise "the remaining three" justices of the former "majority of four," which included former Chief Justice TAYLOR.

[2] The dissent attempts to make an argument that there is some sort of philosophical majority that wants to overrule *Karaczewski* in its entirety. However, one need look no further than the various opinions written in this case to see that there is no such majority for that proposition. When *Karaczewski* was decided in 2007, I concurred in the substance of the opinion, and I continue to see nothing wrong with its statutory analysis. On the other hand, Chief Justice KELLY is dissenting in part from the lead opinion in this case for the very reason that she thinks *Karaczewski* needs to be completely overruled. Her position is understandable, given that she dissented from the entire decision in 2007 when *Karaczewski* was decided. But there are currently not four votes for her position, so her position is not the majority's position. Rather, there are in essence six

It appears that the dissent is attempting to lump together the four justices who agree with parts of the lead opinion into having had some sort of previously stated fidelity to stare decisis that those justices have abandoned since former Chief Justice TAYLOR's overwhelming defeat in the 2008 election.

The dissent quotes various past statements, made by those justices signing portions of the lead opinion, regarding stare decisis and criticizing the former "majority of four" (former Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN). With respect to myself, the dissent quotes a statement I made in response to the improper and unfair dismantling of decades of longstanding insurance contract law by the former "majority of four" in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). In *Devillers*, I stated, "Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis *in this case*." *Id*. at 622 (WEAVER, J., dissenting) (emphasis added).

The dissent's use of my *Devillers* statement appears to be a weak attempt to manufacture some sort of story to try to get people to believe that a philosophical majority of justices exists and is out to overrule precedent created by the "majority of four." The dissent's mistaken assertions that I have somehow changed my view of stare decisis since former Chief Justice TAYLOR was defeated and that I am part of a philosophical majority are simply incorrect.

My *Devillers* statement itself shows that I was criticizing the disregard for stare decisis *in that specific*

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justices who have for whatever reason decided not to join with the Chief Justice's position to overrule all of *Karaczewski* in this case. The dissent simply ignores that fact for the convenience of making the mistaken conclusions in the dissenting opinion seem more palatable.

case. My *Devillers* statement is an example of my service to the rule of law and a partial expression of my view of the policy of stare decisis, which is that past precedent should generally be followed but that, in deciding whether wrongly decided precedent should be overruled, each case should be looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness.[3]

Over the past decade, the principal tool used by this Court to decide when a precedent should be overruled is the set of guidelines that was laid out in *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), an opinion written by former Justice TAYLOR that Justices

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[3] I agree with the sentiment recently expressed by Chief Justice Roberts of the United States Supreme Court in his concurrence to the decision in *Citizens United v Federal Election Comm*, 558 US ___, ___; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010), when he said that

> *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 [123 S Ct 2472; 156 L Ed 2d 508] (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 [60 S Ct 444; 84 L Ed 604] (1940) . . . . If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967).

Chief Justice Roberts further called stare decisis a "principle of policy" and said that it "is not an end in itself." *Id*. at ___; 130 S Ct at 920; 175 L Ed 2d at 807. He explained that "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id.* at ___; 130 S Ct at 921; 175 L Ed 2d at 807.

CORRIGAN, YOUNG, MARKMAN, and I signed, and that I have used numerous times. In the instant case, my lead opinion specifically, and properly, applies the *Robinson* guidelines. Thus, the dissent's assertion that I have changed my view on stare decisis makes no logical sense.

Furthermore, I note that my position in *Devillers* is in no way inconsistent with my position on stare decisis in this case, nor is it inconsistent with any position on stare decisis that I have taken in other cases, such as *Robinson*. *Devillers* involved the "majority of four" overruling precedent involving contract interpretation from a case that was nearly twenty (20) years old. In my *Devillers* dissent, I noted that I agreed with the majority's interpretation that the old precedent was incorrect, but given the passage of time since that specific precedent was decided, the Court should not disturb that longstanding precedent because the law had become so ingrained that to overrule it would harm the reliance interests of parties in insurance cases. My position in *Devillers* was entirely consistent with the reliance prong of the *Robinson* guidelines.[4]

My position in the instant case is also consistent with the reliance prong of the *Robinson* guidelines since *Karaczewski*, the case of which a portion is now being overruled, was only decided three (3) years ago. Furthermore, the portion that is being overruled is merely that decision's retroactive effect—applying the new decision to parties' past actions. My statement in *Devillers* is actually supportive of my position in the instant case because in both instances my position has been to apply the longstanding law that parties had relied on when their cases arose.

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[4] For an explanation of the various prongs of the *Robinson* guidelines, see the lead opinion, *ante* at 466.

The dissent cannot point to a statement where I professed some sort of position regarding stare decisis as an immutable doctrine, because I have not taken that position and therefore have made no such statements. For instance, I specifically chose not to sign Chief Justice KELLY's lead opinion in *Petersen v Magna Corp*, 484 Mich 300, 316-320; 773 NW2d 564 (2009), because it proposed to create a standardized test for stare decisis. There is no need for this Court to adopt any standardized test regarding stare decisis. In fact, it is an impossible task.

There are many factors to consider when deciding whether or not to overrule precedent, and the importance of such factors often changes on a case-by-case basis. The *Robinson* guidelines are relevant in cases such as the instant case, in which reliance interests are at risk. By no means do I consider the *Robinson* guidelines a "be-all, end-all test" that constitutes precedent of this Court to be used whenever this Court considers overruling precedent. I view *Robinson* as merely providing guidelines to assist this Court in its legal analysis when pertinent.

In the end, the consideration of stare decisis and whether to overrule wrongly decided precedent always includes service to the rule of law through an application and exercise of judicial restraint, common sense, and a sense of fairness—justice for all.

YOUNG, J. (*dissenting*). I dissent from the decision by the majority of justices to "overrule the retroactive effect of *Karaczewski*."[1] Having failed to identify any flaw in the analysis of *Karaczewski*, overruling the *application* of the case is simply a means of substan-

[1] *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

tively overruling *Karaczewski* without explicitly saying so. *Karaczewski* properly interpreted the plain language of MCL 418.845, and it was appropriately applied to the case at bar by the lower courts. Because the majority justices essentially render *Karaczewski* an advisory opinion, I dissent.

At the time of plaintiff's injury, MCL 418.845 provided:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act. [Emphasis added.]

Here, there is no question that plaintiff was not a resident of this state when he was injured. Therefore, pursuant to MCL 418.845 and *Karaczewski,* the magistrate correctly held that the Workers' Compensation Agency did not have jurisdiction.[2] This Court expressly stated in *Karaczewski* that its decision was to be applied to all pending cases. *Karaczewski,* 478 Mich at 44 n 15 ("[O]ur holding in this case shall apply to all claimants for whom there has not been a final judgment awarding benefits as of the date of this opinion."). Because this was a pending case when *Karaczewski* was decided, *Karaczewski* is applicable.

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[2] It is irrelevant that defendant did not pursue this jurisdictional issue until after *Karaczewski* was decided. All courts "must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists . . . ." *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). Thus, subject matter jurisdiction may be challenged at any time, even if raised for the first time on appeal. *Lehman v Lehman*, 312 Mich 102, 105-106; 19 NW2d 502 (1945); *In re Cody's Estate,* 293 Mich 697, 701; 292 NW 535 (1940); *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939).

As *Karaczewski* noted, since the very first workers' compensation jurisdictional statute was enacted in 1921, the law consistently provided the Michigan workers' compensation system jurisdiction over out-of-state injuries when both (1) the injured employee resided in this state at the time of injury *and* (2) the contract of hire was made in Michigan. However, in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), this Court declined to enforce the residency requirement because to do so would be "undesirable" and "unduly restrictive"[3] and because the requirement had been ignored by this Court since *Roberts v I X L Glass Corp*, 259 Mich 644; 244 NW 188 (1932).[4]

Karaczewski overruled *Boyd* on the basis of the rather unremarkable proposition that the use of the conjunction "and" in MCL 418.845 was unambiguous and that the statute must be applied as written. Nonetheless, in order to protect the reliance interests of injured plaintiffs who had already received an award of compensation benefits as part of a final judgment, *Karaczewski*'s holding was given limited retroactive effect, applying only to claimants who had not received a final judgment awarding benefits as of the date of the opinion.[5] While the Legislature

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[3] *Boyd*, 443 Mich at 524.

[4] However, as the dissenting justices in *Boyd* noted, the rationale of *Roberts* was based on the elective nature of workers' compensation in place at that time *Roberts* was decided. The dissenters noted that the analytical underpinnings of *Roberts* were eliminated when the Legislature made the workers' compensation scheme compulsory in 1943. Before *Boyd*, several Court of Appeals opinions had enforced the plain language of the statute on this basis. See *Wolf v Ethyl Corp*, 124 Mich App 368; 335 NW2d 42 (1983); *Bell v F J Boutell Driveaway Co*, 141 Mich App 802; 369 NW2d 231 (1985); *Hall v Chrysler Corp*, 172 Mich App 670; 432 NW2d 398 (1988).

[5] *Karaczewski*, 478 Mich at 44 n 15. While I agree with the lead opinion's statement that this Court's decisions are generally given *full* retroactive effect, *Karaczewski* was explicitly given *limited* retroactive effect.

subsequently amended the relevant statutory provision to expand the agency's jurisdiction over out-of-state injuries,[6] the Legislature chose not to give the amended statute retroactive application,[7] thus leaving claimants such as plaintiff subject to the holding in *Karaczewski*.[8]

The justices in the majority are unable to identify any analytical defect in the substantive holding in *Karaczewski*; indeed, Justice WEAVER explicitly concurred in *Karaczewski*'s substantive analysis. Instead, they elect to overrule the limited retroactive application of the opinion in favor of purely prospective application.[9] However, as *Wayne Co v Hathcock* explained, purely prospective opinions are effectively advisory opinions, and our constitutional authority to issue advisory opinions is limited to those circumstances set forth in Const 1963, art 3, § 8, which are clearly not applicable in the present case.[10]

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[6] 2008 PA 499, effective January 13, 2009.

[7] See *Brewer v A D Transp Express, Inc*, 486 Mich 50; 782 NW2d 475 (2010).

[8] The fact that the Legislature amended MCL 418.845 *after* this Court's decision in *Karaczewski* without indicating that it intended the amended statute to be applied retroactively makes this case significantly distinguishable from *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), in which this Court did apply its holding prospectively only, because in *Pohutski* the Legislature amended the pertinent statute *before* this Court's decision and, thus, had no reason to indicate that it intended the amended statute to apply retroactively rather than this Court's yet-to-be-decided decision in *Pohutski*. Even plaintiff's counsel acknowledged as much at oral argument when he stated, "I think that is a factual difference between *Pohutski* and this case and consequently you'd not be—certainly not required to follow or apply *Pohutski* to this case . . . ."

[9] Interestingly, Justice WEAVER would have preferred to deny the benefit of the *Karaczewski* ruling *even to the parties* appearing before the Court in *Karaczewski*. *Karaczewski*, 478 Mich at 45 (WEAVER, J., concurring in part and dissenting in part).

[10] *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004) ("[T]here is a serious question as to whether it is constitutionally

The decision in this case is another instance in which the Court's new philosophical majority seems to retreat from its previously stated fidelity to stare decisis.[11]

legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions. The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor—and, then, only 'on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.' "), quoting Const 1963, art 3, § 8.

[11] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) (" 'We have overruled our precedents when the intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes.' "), quoting *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990); *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) ("[A]bsent the rarest circumstances, we should remain faithful to established precedent."); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622; 702 NW2d 539 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case."); Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006 (quoting Justice HATHAWAY, then running for a position on the Court of Appeals, as saying that "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent").

Since the shift in the Court's philosophical majority in January 2009, the new majority has pointedly sought out precedents only recently decided[12] and has failed to give effect to other recent precedents of this Court.[13] Today, by overruling the retroactivity of *Karaczewski*,

[12] See, e.g., *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010) (overruling *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 [2006]); *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010) (overruling *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2010) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 [2001], was correctly decided); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (overruling *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 [2001]); *Anglers of the Au Sable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (directing the parties to consider whether *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 [2007], and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 [2004], were correctly decided); *Hoover v Mich Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 [2005], was correctly decided); *Colaianni v Stuart Frankel Dev Corp*, 485 Mich 1070 (2010) (granting leave to appeal to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 [2007], was correctly decided).

[13] See, e.g., *Hardacre v Saginaw Vascular Servs*, 483 Mich 918 (2009), in which the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), in which it failed to follow *Chrysler v Blue Arrow Transp Lines*, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest Sch Dist (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), in which it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244-245; 736 NW2d 561 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), in which it failed to follow *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Mich State Univ*, 485 Mich 917 (2009), in which it failed to follow *Rowland*; and *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009), in which it failed to follow *Thornton v Allstate*

the Court again refuses to apply a recent precedent of this Court. Because the justices in the majority use prospectivity as a means of substantively overruling *Karaczewski*, I dissent.

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

Ins Co, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997).

O'NEAL v ST JOHN HOSPITAL & MEDICAL CENTER

Docket Nos. 138180 and 138181. Argued January 12, 2010 (Calendar No. 3). Decided July 31, 2010.

Raymond O'Neal brought a medical-malpractice action in the Wayne Circuit Court against St. John Hospital & Medical Center, Ralph DiLisio, M.D., and Efstathios Tapazoglou, M.D., alleging that he had received an exchange blood transfusion too late and that he suffered a stroke as a consequence. Defendants moved for summary disposition, arguing that under MCL 600.2912a(2), plaintiff was required to prove that he suffered an injury that more probably than not was proximately caused by defendants' negligence and that plaintiff could not recover for the loss of an opportunity to achieve a better result unless the opportunity was greater than 50 percent. The testimony indicated that a patient with plaintiff's condition had a 10 to 20 percent chance of having a stroke and that a timely transfusion would have reduced that risk to less than 5 to 10 percent. Thus, defendants argued, the differential amounted to at best 20 percentage points and was insufficient to meet the burden of proof for proximate causation in *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002). Plaintiff argued that this evidence supported a finding that defendants' negligence more probably than not proximately caused his injuries. The court, Robert J. Colombo, Jr., J., denied defendants' motion. Defendants sought leave to appeal, which the Court of Appeals denied. In lieu of granting defendants leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 477 Mich 1087 (2007). The Court of Appeals, WILDER, P.J., and OWENS, J. (JANSEN, J., concurring), reversed in an unpublished opinion per curiam, issued November 4, 2008 (Docket Nos. 277317 and 277318), and remanded for entry of summary disposition in defendants' favor, concluding that the case presented a claim for the loss of an opportunity and that plaintiff had not met the burden of proof under MCL 600.2912a(2). The Supreme Court granted plaintiff's application for leave to appeal. 485 Mich 901 (2009).

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

1. *Fulton* is overruled to the extent that it has resulted in courts improperly treating traditional medical-malpractice claims as loss-of-opportunity claims.

2. This case presents a traditional medical-malpractice claim. Accordingly, the first sentence of MCL 600.2912a(2), which requires that a plaintiff show that the defendant's negligence more probably than not proximately caused the plaintiff's injury, applies to it. The second sentence of MCL 600.2912a(2), which provides that a plaintiff cannot recover for a loss of opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50 percent, applies only to lost-opportunity claims and does not apply to a traditional medical-malpractice claim such as the claim in this case.

3. Plaintiff established a question of fact on the issue of proximate causation because he presented sufficient evidence to support a finding that defendants' negligence more probably than not was the proximate cause of his injuries.

4. The judgment of the Court of Appeals must be reversed and the case remanded to that court for further proceedings.

Reversed and remanded to the Court of Appeals.

Justice HATHAWAY, joined by Justice WEAVER, further stated in the lead opinion that *Fulton* should also be overruled to the extent that it improperly transformed the burden of proof in a traditional medical-malpractice case from requiring proof of a proximate cause to proof of the proximate cause. Justice HATHAWAY also described the analyses permissible in determining whether a plaintiff has established proximate causation, including the statistical analyses allowed. In this case, the use of a standard percentage increase or standard percentage decrease calculation would be appropriate. *Fulton*'s analysis using a simple subtraction of percentage points is incorrect.

Justice CAVANAGH, joined by Chief Justice KELLY, further stated in his concurring opinion that a plaintiff may meet the cause-in-fact prong of the requirement to prove proximate causation by showing that the alleged negligence was responsible for a majority, or more than 50 percent, of the risk of the bad result occurring and described the analysis necessary to make that determination. Justice CAVANAGH rejected an analysis involving the change in percentage points when calculating an increased risk and disagreed with the lead opinion's use of a test involving only the percentage increase. Justice CAVANAGH would also hold that a plaintiff who cannot meet the burden for a traditional medical-malpractice claim may still pursue a loss-of-opportunity claim if

the plaintiff can meet the requirements for those claims under MCL 600.2912a(2) and *Falcon v Mem Hosp*, 436 Mich 443 (1990).

Chief Justice KELLY, concurring, wrote separately to address Justice YOUNG's discussion of comments she had made earlier concerning the change in the Court's membership.

Justice WEAVER, concurring, wrote separately to observe that by overruling *Fulton*, the Court was not overruling its own precedent and thus any discussion of stare decisis in this case was unnecessary. Because it was raised, however, Justice WEAVER noted that stare decisis is a principle of policy and not an end in itself. The consideration of stare decisis and whether to overrule wrongly decided precedent should always include service to the rule of law through the exercise of judicial restraint, common sense, and a sense of fairness.

Justice MARKMAN, joined by Justice CORRIGAN in parts IV(A)(2) and (B), concurring in the result only, agreed that the judgment of the Court of Appeals should be reversed and that the case should be remanded to the Court of Appeals to address defendants' remaining issue on appeal, but concluded that this case was a lost-opportunity case because it was possible that the bad outcome, plaintiff's stroke, would have occurred even if he had received proper treatment. He reiterated the appropriate analysis of lost-opportunity cases that he discussed in his concurrence in *Stone v Williamson*, 482 Mich 144 (2008), and concluded that plaintiff raised a genuine issue of material fact regarding whether he suffered a greater than 50 percent loss of an opportunity. Justice MARKMAN disagreed that whether a plaintiff's action is a lost-opportunity action or a traditional medical-malpractice claim should be determined by whether the plaintiff's lost opportunity is greater than 50 percent. He also disagreed that whether a plaintiff's action constitutes a lost-opportunity action or a traditional medical-malpractice action is a function of whether the plaintiff used the words "lost opportunity" in his or her pleading; disagreed with the alternative "standard percentage increase calculation" formula used by the lead opinion, which indicated that plaintiff suffered a 300 percent loss of an opportunity; and disagreed that whatever formula best serves the nonmoving party, invariably the plaintiff, is the appropriate formula. The decision by the majority transforms lost-opportunity cases into traditional medical-malpractice cases, resulting in larger potential recoveries for plaintiffs. Instead of limiting a plaintiff's recovery to the opportunity that he or she may have lost as a result of the defendant's negligence, the majority expands the recovery to include potentially all damages related to the plaintiff's medical condition,

despite the fact that the plaintiff may well have suffered the condition even if he or she had received perfect medical treatment.

Justice CORRIGAN, dissenting, joined Justice YOUNG's dissent in full and joined parts IV(A)(2) and (B) of Justice MARKMAN's opinion.

Justice YOUNG, joined by Justice CORRIGAN, dissenting, concluded that plaintiff's claim is a lost opportunity claim because there is no "but for" causation between the alleged malpractice and the injury plaintiff suffered, given that plaintiff's medical condition created a heightened chance of having a stroke with or without the alleged malpractice and that plaintiff is unable to show that the alleged malpractice increased his chance of suffering a stroke by 50 percentage points. Because this is a lost opportunity case, the second sentence of MCL 600.2912a(2) governs plaintiff's claim, but as noted in the lead opinion in *Stone*, MCL 600.2912a(2) is unenforceable as enacted. Furthermore, the decision in this case essentially applies the relaxed rules for determining causation applicable in lost opportunity cases to all medical-malpractice claims, including traditional ones, which heretofore required proof that any cause asserted as a proximate cause more probably than not produced the injury rather than increased the risk of injury. Justice YOUNG also stated that the opinions in this case reach the conclusion that plaintiff had established proximate causation by applying statistical analyses that are inconsistent with basic principles of statistical methodology. Justice YOUNG would vacate the order granting leave to appeal in this case because leave was improvidently granted.

McKeen & Associates, P.C. (by *Ramona C. Howard*), for Raymond O'Neal.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter* and *Cheryl A. Cardelli*) for St. John Hospital & Medical Center and Ralph DiLisio, M.D.

Rutledge, Manion, Rabaut, Terry & Thomas, P.C. (by *Paul J. Manion* and *Amy E. Schlotterer*), for Efstathios Tapazoglou, M.D.

Amici Curiae:

Sommers Schwartz, P.C. (by *Richard D. Toth*), for the Michigan Association for Justice.

Warner Norcross & Judd LLP (by *John J. Bursch*, *Matthew T. Nelson*, and *Julie Lam*) for the Michigan Health & Hospital Association.

Ottenwess & Associates, PLC (by *David M. Ottenwess*, *Stephanie P. Ottenwess*, and *Melissa E. Graves*), for Michigan Defense Trial Counsel.

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*), for the Michigan State Medical Society.

HATHAWAY, J. This case addresses the burden of proof necessary to establish proximate causation in a traditional medical malpractice action. At issue is whether the Court of Appeals properly reversed the trial court's denial of summary disposition. The trial court ruled that plaintiff had established a question of fact on the issue of proximate causation sufficient to withstand a motion for summary disposition. The Court of Appeals reversed. It treated plaintiff's claim as a loss-of-opportunity claim instead of a traditional medical malpractice claim and held that plaintiff did not raise a genuine issue of fact, as required by *Fulton v William Beaumont Hosp,* 253 Mich App 70; 655 NW2d 569 (2002), because plaintiff could not prove that receiving the alleged appropriate treatment would have decreased his risk of stroke by greater than 50 percentage points. We disagree with the Court of Appeals' analysis and conclusion.

We hold that the Court of Appeals erred by relying on *Fulton* and determining that this is a loss-of-opportunity case controlled by both the first and second sentences of MCL 600.2912a(2), and instead hold that this case presents a claim for traditional medical malpractice controlled only by the first sentence of

§ 2912a(2). Further, we conclude that plaintiff established a question of fact on the issue of proximate causation because plaintiff's experts opined that defendants' negligence more probably than not was the proximate cause of plaintiff's injuries. Finally, we hold that *Fulton* did not correctly set forth the burden of proof necessary to establish proximate causation for traditional medical malpractice cases as set forth in § 2912a(2). Therefore, we overrule *Fulton* to the extent that it has led courts to improperly designate what should be traditional medical malpractice claims as loss-of-opportunity claims and has improperly transformed the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause.

Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the Court of Appeals for consideration of the issue not decided on appeal in that court.

I. FACTS AND PROCEEDINGS

This case involves allegations of negligence in medical care. Plaintiff had an illness known as sickle cell anemia. Plaintiff developed acute chest syndrome (ACS), which is a known complication of sickle cell anemia. Plaintiff claims that his ACS was misdiagnosed as pneumonia and as a consequence he did not receive the correct treatment. Plaintiff's experts opined that ACS requires treatment with an aggressive blood transfusion or an exchange transfusion, either of which needs to be given on a timely basis. While plaintiff ultimately received a transfusion, his experts opined that it was given too late and, as a consequence, plaintiff suffered a disabling stroke. Plaintiff alleged that defendants' failure to provide a timely transfusion violated the standard of care and that defendants'

negligence was a proximate cause of his disabling stroke. Plaintiff's complaint pled a traditional malpractice claim and did not plead a claim for lost opportunity.

In support of his position, plaintiff offered two expert hematologists who testified that defendants' violations of the standard of care more probably than not caused plaintiff's injuries. Plaintiff's third hematology expert explained his opinion in statistical terms and testified that a patient with ACS has a 10 to 20 percent chance of developing a stroke. He further testified that with a timely exchange transfusion, the risk of stroke is reduced to less than 5 to 10 percent.

Defendants brought a motion for summary disposition challenging the sufficiency of plaintiff's expert testimony on the issue of proximate causation. Even though plaintiff's complaint pled only traditional malpractice, defendants' motion made no distinction between the proof required for proximate causation in a traditional malpractice claim and the burden required for a claim based on loss of opportunity. Instead, defendants argued that plaintiff's case was controlled by both the first and second sentences of MCL 600.2912a(2), which require that the plaintiff prove "that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants" and that "the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

Defendants argued that a reduction in the risk of stroke from 10 to 20 percent to less than 5 to 10 percent amounted to at best a 20 *percentage point differential*,[1]

[1] The Court of Appeals reasoned: "This number is the difference between the highest chance plaintiff had of developing a stroke without proper treatment (i.e., 20 percent) and the lowest chance of developing a

which would be insufficient to meet the burden of proof on proximate causation. Defendants relied on *Fulton* to support their position that plaintiff must comply with this *percentage point differential* theory. Plaintiff countered that defendants' statistical portrayal of these numbers was mathematically inaccurate because his experts' testimony supported a finding that his injuries were more probably than not proximately caused by defendants' negligence. The trial court agreed with plaintiff. The trial court denied defendants' motion, ruling that plaintiff had presented sufficient testimony to establish a question of fact on proximate causation.

The Court of Appeals based its decision entirely on *Fulton* and reversed the trial court in an unpublished opinion per curiam, holding that this case presented a claim for a loss of opportunity and that plaintiff had not met his burden of proof under MCL 600.2912a(2).[2] The Court of Appeals reasoned that plaintiff was bound by the *Fulton* analysis and that a percentage point differential applied to this case.[3] The Court opined:

> In asserting that defendants' negligence resulted in a stroke, plaintiff essentially argues that had defendants ordered a transfusion sooner, plaintiff would have avoided a stroke. Thus, to say defendants' failure to apply proper treatment caused the stroke is to say that this failure deprived plaintiff a greater opportunity to avoid the stroke. Consequently, plaintiff's claim amounts to one of lost opportunity to achieve a better result, and § 2912a(2) is applicable.
>
> In *Fulton*, this Court set forth the formula by which to calculate whether the opportunity to achieve a better result

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stroke with proper treatment (i.e., less than five percent, or in the light most favorable to plaintiff, zero percent)." *O'Neal v St John Hosp & Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2008 (Docket Nos. 277317 and 277318), p 5 n 7.

[2] *Id*. at 4.

[3] *Id*. at 4-5.

was greater than 50 percent — specifically, the Court must "subtract[] the plaintiff's opportunity to survive after the defendant's alleged malpractice from the initial opportunity to survive without the malpractice." *Ensink* [*v Mecosta Co Gen Hosp*, 262 Mich App 518, 531; 687 NW2d 143 (2004)].[4]

We granted leave to review this matter, asking the parties to brief:

(1) whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case; (2) if not, whether the plaintiff presented sufficient evidence to create a genuine issue of fact with regard to whether the defendants' conduct proximately caused his injury or (3) if so, whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2).[5]

II. STANDARD OF REVIEW

This case involves review of a trial court's decision on a motion for summary disposition, which this Court reviews de novo.[6] The issue also involves questions of statutory interpretation. Statutory interpretation is a question of law, which this Court also reviews de novo.[7]

III. ANALYSIS

At issue is whether the Court of Appeals properly reversed the trial court's denial of summary disposition on the issue of proximate causation. In order to answer this question we must review MCL 600.2912a.

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[4] *Id*. at 4.

[5] *O'Neal v St John Hosp & Med Ctr*, 485 Mich 901 (2009).

[6] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

[7] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

MCL 600.2912a provides:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

This statute, which governs the burden of proof in medical malpractice cases, was originally added to the Revised Judicature Act in 1977. It has been amended on several occasions, with the most recent amendment in 1993 adding subsection (2), which is at issue in this case. Subsection (2) contains two sentences. It is undisputed that the first sentence, which repeats the burden of proof as articulated in subsections (1)(a) and (b), merely reiterates the longstanding rule requiring a plaintiff to prove "that he or she suffered an injury that

more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2).

The second sentence of § 2912a(2) addresses a subcategory of injuries in medical malpractice litigation governed by the loss-of-opportunity doctrine. The Legislature did not define the phrase "loss of an opportunity to survive or an opportunity to achieve a better result." However, while not defined in the statute, the doctrine was initially recognized and defined in Michigan in *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990).[8]

It is generally accepted that the 1993 amendment to § 2912a was adopted in a direct reaction to *Falcon*, meaning that it repudiated *Falcon*'s reduced proximate causation theory.[9] Thus, it is generally accepted that in adopting this amendment, the Legislature intended to limit medical malpractice claims to the pre-*Falcon* state of the law: if it was more probable than not that the plaintiff would have died even with the best of treatment, a claim for medical malpractice is precluded.[10]

We next turn to the correct interpretation of both sentences of § 2912a(2) and their applicability to the

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[8] *Falcon* held that in a wrongful death case a plaintiff could bring a claim for a decedent's loss of opportunity to survive even if he or she did not meet the traditional proximate causation standard. *Falcon* reasoned that when the decedent suffered a substantial reduction in the loss of opportunity to survive—in that case 37.5 percent—even though the plaintiff could not maintain a traditional malpractice claim for the death itself because the plaintiff could not establish causation, she could bring a claim for loss of opportunity to survive. *Falcon* also stated that the doctrine applied to wrongful death claims and left the question of whether the doctrine applied to lesser injuries to another day. *Falcon* 436 Mich at 460-462, 469-470 (opinion by LEVIN, J.).

[9] *Stone v Williamson*, 482 Mich 144, 169; 753 NW2d 106 (2008).

[10] Nothing in our opinion today alters or changes that premise.

case before us. In examining the first line of § 2912a(2), we are guided by the principle that *nothing* in § 2912a(2) has changed the burden of proof for traditional medical malpractice claims. The language of the first line of subsection (2) is clear: "*in an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.*" This language reiterates the language of the previous subsections and merely restates the well-accepted, well-established historical rule for proximate causation.[11] As the meaning of this sentence is well-established, no further statutory construction is necessary.

The proper interpretation of proximate causation in a negligence action is well-settled in Michigan. In order to be a proximate cause, the negligent conduct must have been a cause of the plaintiff's injury and the plaintiff's injury must have been a natural and probable result of the negligent conduct. These two prongs are respectively described as "cause-in-fact" and "legal causation." See *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994); *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966); *Glinski v Szylling*, 358 Mich 182; 99 NW2d 637 (1959). While legal causation relates to the foreseeability of the consequences of the defendant's conduct, the cause-in-fact prong "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner*, 455 Mich at 163. It is equally well-settled that proximate causation in a malpractice claim is treated no differently than in an ordinary negligence claim, and it is well-established that there can be more than one

[11] *Kirby v Larson*, 400 Mich 585, 600-607; 256 NW2d 400 (1977) (opinion by WILLIAMS, J.).

proximate cause contributing to an injury. *Brisboy v Fibreboard Corp*, 429 Mich 540; 418 NW2d 650 (1988); *Barringer v Arnold*, 358 Mich 594; 101 NW2d 365 (1960); *Gleason v Hanafin*, 308 Mich 31; 13 NW2d 196 (1944). Finally, it is well-established that the proper standard for proximate causation in a negligence action is that the negligence must be "a proximate cause" not "the proximate cause." *Kirby v Larson*, 400 Mich 585; 256 NW2d 400 (1977). Thus, the burden of proof for proximate causation in traditional medical malpractice cases is analyzed according to its historical common-law definitions and the analysis is the same as in any other ordinary negligence claim. Nothing in this opinion changes or alters these well-settled principles.[12]

We next consider whether the Court of Appeals erred by relying on *Fulton* and applying the second sentence of § 2912a(2) to the present case. The second sentence of § 2912a(2) provides: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Since the statute was amended in 1993, litigants and the courts have debated the meaning of this second sentence.[13] While the debate over the meaning of the

[12] This is true despite the contrary statements in Justice YOUNG's dissent. The comments of the dissent amount to nothing more than another intemperate outburst of inappropriate accusations and illogical assertions. While the dissent decries confusion, the only apparent confusion in this matter lies in the dissent itself, which lacks sound analytical reasoning and even a basic understanding of the law of proximate causation. The dissent, if followed to its logical conclusion, would allow recourse for the negligent actions of medical providers only in those instances in which one provider's conduct is at issue and only when no pre-existing medical condition exists. Such an interpretation is not supported by any case law or the statute itself.

[13] The opinions in *Stone* illustrate this point. The debate has centered on such questions as whether the Legislature intended this sentence to

second sentence demonstrates that significant questions surround loss-of-opportunity cases, it is clear from the plain language of the statute that the second sentence is intended to apply to loss-of-opportunity cases. Today we address whether the second sentence of § 2912a(2) also applies to traditional malpractice cases and we unequivocally hold that it does not. Because the Court of Appeals in this case relied on *Fulton*, which erroneously applied the second sentence to a traditional malpractice case, we review *Fulton* and determine what, if any, continuing validity it has.

Fulton involved a claim for the failure to timely diagnose cervical cancer. The plaintiff, the personal representative of the decedent's estate, alleged that if decedent's cancer had been diagnosed during her pregnancy, she would have had treatment options available that could have saved her life. The theory was that the decedent was not diagnosed until her cancer was untreatable and, as a consequence, she died. The plaintiff's expert's testimony on proximate causation was described by the Court of Appeals as follows:

> Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not show that their negligence was the cause of Fulton's death. In response, plaintiff submitted an affidavit from Dr. Taylor, opining that if Fulton's cancer had been diagnosed while she was pregnant and if she had been treated after her child was delivered, she would have had an eighty-five percent chance to survive. Dr. Taylor opined that when Fulton was actually diagnosed with cancer, her opportunity to survive had decreased to sixty to sixty-five percent.

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restore the law to its pre-*Falcon* state, meaning that loss-of-opportunity claims are not recognized at all, or whether the Legislature's choice of language reflected intent to recognize such claims but limit their availability. Questions have also arisen about whether the last sentence of § 2912a(2) applies to *all* medical malpractice cases, including traditional ones, or only those that are presented as loss-of-opportunity claims.

> Therefore, according to Dr. Taylor, Fulton's opportunity to survive the cancer decreased by twenty to twenty-five percent because of defendants' malpractice. In reply, defendants argued that Dr. Taylor's affidavit was improper because it contradicted his deposition testimony and that, in any event, this affidavit was not enough to create a question of fact under MCL 600.2912a(2).[14]

Fulton opined that because the decedent went from an 85 percent pre-malpractice chance of survival to a 60-65 percent post-malpractice chance of survival, she "suffered a loss of a twenty to twenty-five percent chance of survival."[15] Fulton determined that a *percentage point differential subtraction* analysis was required by the statute. As demonstrated by the *Fulton* analysis, the conclusion is reached by a simplistic subtraction formula. *Fulton* subtracted the statistical likelihood of a better outcome without treatment from the statistical likelihood of a better outcome with treatment to determine if the resulting number is greater than 50.

Fulton's simplistic subtraction formula is not an accurate way to determine whether a defendant's malpractice is a proximate cause of the injury. *Fulton*'s analysis was erroneous because it misconstrued proximate causation as it applies to a traditional malpractice case. Under the *Fulton* subtraction formula it is mathematically impossible for there to be more than one proximate cause. Thus, in creating and applying this simplistic formula, *Fulton* fundamentally altered a plaintiff's burden of proof. *Fulton* transformed the burden of proof in traditional malpractice cases from *a* proximate cause to *the* proximate cause because it allows for only one proximate cause in any case. This proposition is in error because it has no basis in statute

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[14] *Fulton*, 253 Mich App at 74-75.

[15] *Id.* at 82.

or common law and it is inconsistent with the clear and unambiguous language of the first sentence of § 2912a(2). Moreover, as the Court of Appeals' decision in this case illustrates, *Fulton*'s analysis is being applied to all malpractice cases, even when they are pled only as traditional malpractice cases.

The Court of Appeals, analysis in the present case perpetuates the *Fulton* doctrine and the confusion surrounding proximate causation in medical malpractice claims. Much of the confusion stems from the inherent nature of medical malpractice: the plaintiff is generally seeking treatment for a preexisting medical condition that is causing a problem of some sort on its own, whereas in an ordinary negligence claim the plaintiff is generally an otherwise uninjured person who is claiming that the entire injury was caused by the incident.

In the present case, plaintiff was prepared to offer three expert witnesses to testify on his behalf on the issue of proximate causation at the time of trial. Two of plaintiff's experts unequivocally opined, in a discovery deposition, that had the necessary treatment been given, it was more probable than not that plaintiff would not have had a stroke.

Plaintiff's first expert, Dr. Richard Stein, opined:

> *Q*. I just have one question. Doctor, based on the extrapolation of the peds data that you've described for us, within a reasonable degree of medical certainty, and by that I mean with a greater than 50 percent likelihood, if Dr. Tapazoglou had met the standard of care as you defined it today, would the stroke have been avoided?
>
> *A*. To a reasonable degree of medical certainty, my opinion is yes, and I have already stated the basis for that opinion.

After opining that an exchange transfusion was necessary to reduce plaintiff's hemoglobin S concentration to less than 30 percent, Dr. John Luce, plaintiff's second expert, opined:

> *Q*. With respect to Mr. O'Neal, if the hemoglobin S had been reduced to less than 30 percent, do you have an opinion as to whether or not he would have had the stroke anyhow?
>
> *A*. I think it is probable that he would not have.
>
> *Q*. When you say "probable," are you prepared to say more probably than not had Mr. O'Neal had his hemoglobin S reduced to less than 30 percent he would not have had a stroke?
>
> *A*. Correct.

The testimony of the third expert, Dr. Griffin Rodgers, was more specific in expressing the statistics. The trial court summarized his testimony:

> Dr. Griffin Rodgers, a hematologist, testified that a patient in sickle cell crisis of acute chest syndrome has in the order of 10 or 20 percent chance of developing a stroke. With a timely exchange transfusion, it reduces the risk of stroke to less than 5 or 10 percent. Dr. Griffin's testimony demonstrates that Plaintiff had more than a 50 percent chance to avoid a stroke.

As this case demonstrates, the way causation is analyzed is important, especially when reviewing statistical data. In this instance, do these facts represent at best a 20 percent chance to avoid an injury, as the Court of Appeals concluded, or do they establish proximate causation, as found by the trial court? To answer this question we must determine whether we use a *percentage point differential subtraction analysis* (as used by the Court of Appeals in applying the *Fulton* formula) or whether we follow the approach taken by the trial court. In doing so we must follow the analysis that is

most consistent with our historical rules governing proximate causation and the plain language of § 2912a(2), which requires that a plaintiff prove *that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants*, in the context of this case. While the use of mathematical statistics is not required by the statute, and we do not impose such a requirement, we conclude that the analysis used by plaintiff's experts and the trial court represents the correct approach *in this instance* because it accurately represents the historical view of proximate causation as expressed in the first sentence of § 2912a(2) *based on its application to these facts*.

In this case, it is undisputed that with or without treatment plaintiff was more probably than not going to avoid the stroke. In other words, even without treatment it was more probable that plaintiff would *not* have a stroke. However, plaintiff did have a stroke. If the *Fulton* 50 percentage point differential subtraction analysis is used, plaintiff cannot proceed with a traditional claim because the failure to provide treatment was not the cause of the injury expressed in percentage point differential terms. As previously indicated, however, the problem is that a 50 percentage point differential subtraction analysis necessarily means that there can only be *one cause of an injury*. This analysis is not consistent with the historical test for proximate causation, which has always been that the malpractice be *a* proximate cause rather than *the* proximate cause.

Applying a 50 percentage point differential subtraction analysis requires that we change the traditional analysis of causation in medical malpractice cases to the *one* most immediate, efficient, and direct cause of the injury. This, however, is the standard for determining

the proximate cause rather than *a* proximate cause. This approach is simply not in keeping with our historical view of causation.[16]

The *Fulton* approach is incorrect because it requires a reliance on probabilities and possibilities of things that have not yet occurred, rather than reliance on what has actually occurred. Plaintiff in this case *did* have a stroke and was injured; his claim is for an existing injury, not just the possibility of one. Plaintiff's injury is no longer a statistical probability, it is a reality. The focus, once he was injured, is on the connection between defendants' conduct and the injury. The relevant inquiry for proximate causation is whether the negligent conduct was a cause of plaintiff's injury and whether plaintiff's injury was a natural and probable result of the negligent conduct. If so, defendants' conduct was *a* proximate cause, even though there may have been other causes. The analysis for proximate causation is the same whether we are discussing medical malpractice or ordinary negligence. Defendants' conduct in this case meets this standard when the defendants' actual conduct, rather than plaintiff's statistical probability of achieving a better outcome, is the focus of the inquiry.

In this instance, plaintiff suffered an injury that was more probably than not proximately caused by the negligence of defendants. As the trial court properly found, defendants' negligent conduct increased plain-

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[16] Common-law rules apply to medical malpractice actions unless specifically abrogated by statute. See MCL 600.2912(1) which provides:

> A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. *The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession*. [Emphasis added.]

tiff's risk of stroke from less than 5 to 10 percent to 10 to 20 percent. When viewed in the light most favorable to plaintiff, the change is from less than 5 percent to 20 percent. As the trial court analyzed, this represents a change that is greater than 50 percent in this instance. The trial court's approach is in keeping with the historical analysis of proximate causation because it involves a comparative analysis, not a simplistic subtraction formula. Determining what is "more probable than not" is inherently a comparative analysis. The proper method of determining whether the defendant's conduct more probably than not proximately caused the injury involves a comparative analysis, which is dependent upon the facts and circumstances and expert opinion in a given case.[17]

We conclude that *Fulton*'s simple subtraction analysis is wrong and unsupportable. While § 2912a(2) does not mandate the use of statistics or require any particular mathematical formula, the historical analysis of proximate cause must be followed to wit: the analysis or formulation used cannot require that the cause must be *the* proximate cause rather than *a* proximate cause.

No single formula can be dispositive for all cases. In this case if we were to use a standard percentage decrease calculation (meaning that defendants were responsible for 15 percentage points out of the 20 total percentage points of plaintiff's risk of the bad result, so that there is a $^{15}/_{20}$ chance or 75 percent chance) defendants' malpractice was a proximate cause of the injury.[18] Similarly, if the evidence is viewed as a stan-

[17] Comparative analyses could include standard percentage increases, standard percentage decreases, or other scientifically accepted statistical analyses offered by the experts.

[18] Moreover, either of the mathematical formulas used as an example (standard statistical decrease or increase) may not be appropriate in all

dard percentage increase calculation (meaning that defendants were responsible for 15 percentage points of increase over the 5 percentage points to begin with, thus causing a 300% [15/5] increase in plaintiff's risk of harm) defendants' malpractice was a proximate cause of the injury.[19]

It is also important to emphasize that not all traditional medical malpractice cases can or will be expressed in statistical or percentage terms, nor is a plaintiff required to express proximate causation in percentage terms. The plain language of the statute requires that proximate causation in traditional malpractice cases be expressed by showing that the defendant's conduct was *more probably than not* a cause of the injury, not by statistical or percentage terms.[20]

Given that *Fulton* used an incorrect mathematical formula and is being used to transform the burden of proof in traditional malpractice cases, we must next decide if it has any continuing validity. We find that it has none in the context of traditional medical malpractice cases. In *Stone*, all *seven* justices of this Court recognized that

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cases because either could limit causation to one proximate cause in those cases involving the conduct of more than one defendant.

[19] I recognize that Justice CAVANAGH and I differ on whether an increased risk of harm is a valid statistical method for determining proximate causation in a traditional malpractice case. However, both Justice CAVANAGH and I agree that claims evaluated in that manner may be brought; we only disagree about whether those claims proceed as claims for traditional malpractice or claims for loss of opportunity.

[20] We also recognize that different mathematical formulations can have varying results and that the results must be viewed in the light most favorable to the nonmoving party. For example, while percentage increases and percentage decreases would both be valid methods to determine proximate causation, they can yield different results. In those instances, if either calculation demonstrates that the plaintiff suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants, the plaintiff's case may proceed.

Fulton's analysis was incorrect or should be found to no longer be good law, though their reasons for doing so varied.[21] While I was not a member of this Court when *Stone* was decided, I also conclude that *Fulton* did not correctly set forth the burden of proof necessary to establish proximate causation as set forth in § 2912a(2). As all justices of this Court have concluded that *Fulton*'s analysis of § 2912a(2) is wrong, it is illogical to fail to overrule *Fulton*, because by failing to do so, this Court fosters unnecessary confusion for litigants and the lower courts. Accordingly, we overrule *Fulton* to the extent that it has led courts to improperly designate what should be traditional medical malpractice claims as loss-of-opportunity claims and has improperly transformed the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause.

We emphasize that we hold that the second sentence of § 2912a(2) applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice; we do not address the scope, extent, or nature of loss-of-opportunity claims as that issue is not before us. Significant questions surround such claims.[22] However, we decline to decide issues that are not necessary to the resolution of the case before us.

IV. CONCLUSION

For all the foregoing reasons, we conclude that the Court of Appeals erred in the present case by reversing

[21] *Stone*, 482 Mich at 164 (opinion by TAYLOR, C.J.).

[22] Questions exist about the full scope and extent of loss-of-opportunity claims and the extent of damages recoverable in those actions, which we do not decide today. For example, a partial discussion of the scope of loss-of-opportunity claims was at issue in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001). While Justice CAVANAGH and I do not fully agree in this case, I do agree with Justice CAVANAGH's partial dissent in *Wickens* that a living person may pursue a claim for loss of opportunity under the circumstances presented in that case.

the trial court's denial of summary disposition. The case before us presents a traditional malpractice claim. It does not present a claim for loss of opportunity. In traditional malpractice cases, the plaintiff is required to prove that the defendant's negligence more probably than not caused the plaintiff's injury. In this case, the testimony of plaintiff's expert witnesses supports plaintiff's position on proximate causation. While that testimony is not dispositive, it is sufficient to raise a question of fact to defeat a motion for summary disposition, allowing the issue to be adjudicated on the merits by the trier of fact. Finally, we overrule *Fulton* to the extent that it has led courts to improperly designate what should be traditional medical malpractice claims as loss-of-opportunity claims and has improperly transformed the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause.

Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the Court of Appeals for consideration of the issue not decided on appeal in that court.

WEAVER, J., concurred with HATHAWAY, J.

CAVANAGH, J. (*concurring*). I concur in the result. I agree with the majority that the Court of Appeals' judgment in this case should be reversed because the Court erred by treating this case as a loss-of-opportunity case instead of a traditional medical malpractice case and, as a result, erred by requiring plaintiff to meet the requirements in the second sentence of MCL 600.2912a(2). I further agree that *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), should be overruled to the extent that courts have relied on it to improperly transform what could be traditional medical malpractice claims into loss-of-

opportunity claims.[1] I write separately to express my views on the issues presented.

This case raises the issue of what the proper burden of proof for proximate causation is in medical malpractice cases in which the plaintiff had a preexisting risk of the bad result that occurred, even absent the defendant's alleged negligence. I agree with the lead opinion that the second sentence of MCL 600.2912a(2) is inapplicable to this case because it only applies to loss-of-opportunity claims and this case does not involve a loss-of-opportunity claim. Instead, the key issue in this case is the proper interpretation of the first sentence of MCL 600.2912a(2).

The first sentence of MCL 600.2912a(2) clearly provides that a plaintiff in any medical malpractice case, including a traditional medical malpractice case, bears the burden of showing that it is more probable than not that the plaintiff's injury was proximately caused by the defendant's negligence. Under traditional malpractice law in Michigan, proximate cause includes two prongs: (1) cause in fact and (2) legal, or "proximate," cause.[2] See, e.g., *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). While legal causation relates to the foreseeability of the consequences of the defendant's conduct, the cause-in-fact prong "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* at 163. The cause-in-fact prong is sometimes also stated as

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[1] Contrary to Justice YOUNG's assertion, I overrule *Fulton* only to the extent that it is implicated in this case. Regardless, I am sincerely baffled about what relevance Chief Justice KELLY's views on a former composition of *this* Court have to do with whether we should overrule a *Court of Appeals* case.

[2] Because the statute incorporates words and phrases from the common law, it is appropriate to consider common-law meanings of these phrases. See *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989).

requiring that "it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (quotation marks and citations omitted). Thus, even in cases in which there is statistical evidence that the plaintiff had a risk of the bad result occurring absent negligence,[3] a plaintiff may still meet the cause-in-fact prong of the proximate causation analysis if the plaintiff can show that it is more probable than not that the defendant's alleged negligence was a cause in fact of the bad result occurring. I would hold that this threshold is met if the plaintiff can show that the alleged negligence was responsible for a majority, or "more than fifty percent," of the risk of the bad result occurring. See MCL 600.2912a(2) and *Falcon v Mem Hosp*, 436 Mich 443, 450; 462 NW2d 44 (1990).[4]

Under this approach, a court should consider the total risk of the bad result that the plaintiff faced, including the risk caused by the alleged negligence. Then, the court should consider how much of that risk was created by the negligence. If the negligence was responsible for more than half of the total risk of the bad result and the plaintiff suffered that bad result, then the cause-in-fact prong of the proximate cause analysis is met because it is more probable than not that the defendant's negligence was a cause in fact of the bad result.[5] This approach is consis-

[3] I agree with the lead opinion, however, that not all traditional medical malpractice cases need to be expressed in statistical or percentage terms in order to meet the "more probable than not" standard.

[4] If a plaintiff cannot meet the burden for a traditional medical malpractice claim, I would hold that the plaintiff may still pursue a loss-of-opportunity claim if the plaintiff can meet the requirements for those claims provided in MCL 600.2912a(2) and *Falcon*, as explained in my opinion in *Stone v Williamson*, 482 Mich 144, 170-179; 753 NW2d 106 (2008).

[5] To give a nonmedical example, if I am rolling a die, there is ordinarily a 1 out of 6 chance that I will roll a number one. But if a defendant

tent with the statutory language "more probable than not" and with the historical approach to proximate causation.[6]

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negligently changes two additional sides of the die to number ones, then the die will have three number ones. Now my chances of rolling a number one are 3 out of 6 (or 1/2). If I actually roll a number one, there is a 2/3 (approximately 67 percent) chance that I rolled a number one that was created by the defendant's negligence. Therefore, there is a more than 50 percent chance that I rolled a number one because of the defendant's negligence, i.e., it is more probable than not that the defendant's negligence was a cause in fact of the result. Notably, this analysis will differ somewhat if the plaintiff's increased risk of the bad result is alleged to have been caused by multiple negligent actors, depending on the timing and the interaction of the various causes.

[6] Justice YOUNG haphazardly concludes that "the majority" is extending the exception to the cause-in-fact prong created in *Falcon* to all medical malpractice claims. I agree that *Falcon* created what was essentially an exception to this rule, but I fail to see, and Justice YOUNG utterly fails to explain, how my approach in this case is an extension of that rule to all traditional medical malpractice cases. Justice YOUNG himself explains that "[i]n cases in which the plaintiff alleges that the defendant's negligence more probably than not caused the injury, the claim is one of simple medical malpractice [as opposed to loss-of-opportunity]." (Quotation marks and citation omitted.)

Setting aside the numerous pages of Justice YOUNG's opinion that consist only of irrelevant, hyperbolic, or unsubstantiated commentary, he appears to raise only two substantive concerns with my approach, and neither provides support for his conclusion that it does not satisfy the cause-in-fact prong. First, he irrelevantly notes that, as I concede in footnote 7, this approach is inconsistent with an example I used in *Stone*. Second, he alleges that I should not have compared the *low* end of the possible range of plaintiff's risk of the bad result absent negligence to the *high* end of the range of plaintiff's risk with negligence. I think that my approach is perfectly consistent with our charge to view the evidence in the light most favorable to the plaintiff, given that even Justice YOUNG explains that the experts testified that plaintiff's risk was somewhere *between* the ranges the experts provided. But regardless, this criticism only challenges which numbers to use and not the merits of the approach itself, and it would be possible, as Justice YOUNG prefers, to instead compare the low ends of the ranges, or the high ends, only to each other. For example, if the alleged negligence increased a plaintiff's risk of the bad result from 5 to 10 percent to 30 to 40 percent, then, regardless of which numbers are compared, the negligence would have been responsible for a majority of the plaintiff's risk of the bad result, and, given

In adopting this approach, I reject the view that a plaintiff must show that the defendant's negligence increased the plaintiff's risk by more than 50 *percentage points*, e.g., from 25 percent to 76 percent, or from 10 percent to 61 percent.[7] As noted by the lead opinion, this approach is inconsistent with the historical approach to proximate causation. It is also inconsistent with the first sentence in MCL 600.2912a(2) because it would preclude traditional medical malpractice claims in many cases in which the defendant's negligence was more probably than not a cause in fact of the bad result, such as in a case in which the negligence increased the risk of a bad result from 5 percent to 45 percent.[8] I also reject the lead opinion's "percent-increase" test because it is similarly inconsistent with a more-probable-than-not standard. The fact that a negligent act caused a 50 percent increase in the risk of a bad result does not demonstrate that it is more probable than not that the negligence was a cause in fact of the bad result.[9]

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that the bad result occurred, it would be more probable than not that the negligence was a cause in fact of the bad result occurring. Justice YOUNG fails to address why this logic is incorrect or levy a criticism that actually supports his conclusion that my approach eviscerates the cause-in-fact requirement.

[7] To the extent that I endorsed the percentage point approach by way of an example in my opinion in *Stone*, I repudiate that position. See *Stone*, 482 Mich at 177 (opinion by CAVANAGH, J.), stating that a plaintiff whose chance of survival decreased from 80 to 40 percent could not bring a traditional malpractice claim because it would not amount to a 50 percent change.

[8] In this example, the defendant was responsible for 40 percentage points of the plaintiff's risk, out of a total of 45 percentage points, meaning that there is a 40 out of 45 chance, or $^{40}/_{45}$ (approximately 89 percent) chance, that the defendant's negligence was a cause in fact of the bad outcome. In contrast, under the percentage-point approach, the plaintiff's burden would not have been met because the increase in risk was 40 percentage *points*.

[9] For example, if a defendant's negligence caused an increase in a plaintiff's risk of a bad result from 10 percent to 15 percent, this would

In this case, plaintiff presented sufficient facts to establish the cause-in-fact prong of the proximate cause analysis in a traditional medical malpractice claim. Viewing the facts in the light most favorable to plaintiff, plaintiff's expert testified that defendants' alleged negligence increased plaintiff's risk of the bad result, the stroke, from 5 percent to 20 percent. Defendants were thus responsible for 15 percentage points out of the total 20 percentage points of plaintiff's risk of the bad result, meaning that there is a $^{15}/_{20}$ chance, or 75 percent chance, that defendants' alleged negligence was a cause in fact of the bad result.[10] Thus, plaintiff has presented evidence sufficient to support his allegation that it is "more probable than not" that defendants' negligence was a cause in fact of the stroke occurring.

For the foregoing reasons, I concur with the lead opinion that the judgment of the Court of Appeals

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be a 50 percent increase in risk. But it is not more probable than not that the defendant's negligence was a cause in fact because the defendant would only have been responsible for five out of the total 15 percentage points of the plaintiff's risk of the bad result, meaning that there is only a 5/15 chance, or an approximately 33 percent chance, that the negligence was a cause in fact of the bad result. As I explain in footnote 4, however, the plaintiff could still pursue a loss-of-opportunity claim.

[10] Although this formulation is mathematically identical to Justice MARKMAN's approach, there are very important differences in how we view its utility. I favor adopting it because it is consistent with the more-probable-than-not standard in the *first* sentence of MCL 600.2912a(2) as applied to traditional medical malpractice claims in which the plaintiff had a risk of the bad result even absent negligence. In contrast, Justice MARKMAN believes it is required by the *second* sentence of MCL 600.2912a(2) and, unlike myself, believes that all medical malpractice claims in which there was a risk of the bad result occurring even absent negligence should be treated as loss-of-opportunity claims, regardless of whether the plaintiff can meet the burden of proof for a traditional medical malpractice claim. As explained in my concurring opinion in *Stone*, I continue to think that Justice MARKMAN's interpretation is inconsistent with the statute's text and Michigan law, including *Falcon*. *Stone*, 482 Mich at 179-184 (opinion by CAVANAGH, J.).

should be reversed. I would remand the case to the Court of Appeals for further proceedings.

KELLY, C.J., concurred with CAVANAGH, J.

KELLY, C.J. (*concurring*). I fully join Justice CAVANAGH's concurring opinion. I write separately because in his dissent (which Justice CORRIGAN joins), Justice YOUNG continues to quote and misleadingly characterize a statement I made nearly two years ago off the bench. *Post* at 532. For my response, I refer the reader to my concurring opinion in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 318-320; 791 NW2d 897 (2010) (KELLY, C.J., concurring).

WEAVER, J., (*concurring*). I concur fully with and sign Justice HATHAWAY's opinion. I write separately to note that by overruling the Court of Appeals' decision in *Fulton*, we are not overruling precedent from this Court. Justice YOUNG's dissent, however, attempts to mislead the public into thinking that this Court *is* overruling such precedent by introducing a discussion of stare decisis into this case.

Justice YOUNG's dissent lists 12 cases that have been overruled by this Court in the past 18 months. While Justice YOUNG may feel aggrieved by this Court overruling those 12 cases, amongst those cases were some of the most egregious examples of judicial activism that did great harm to the people of Michigan. Those decisions were made by the "majority of four," including Justice YOUNG, under the guise of ideologies such as "textualism" and "judicial traditionalism."

As I stated in my concurrence in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 311-313; 791 NW2d 897 (2010), I agree with the sentiment recently expressed by Chief Justice Roberts of the United States

Supreme Court in his concurrence to the decision in *Citizens United v Fed Election Comm*, 558 US ___, ___; 130 S Ct 876, 920; 175 L Ed 2d 753, 806 (2010), when he said that

> *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 [123 S Ct 2472; 156 L Ed 2d 508] (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 [60 S Ct 444; 84 L Ed 604] (1940) . . . . If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 [16 S Ct 1138; 41 L Ed 256] (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 [74 S Ct 686; 98 L Ed 873] (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 [43 S Ct 394; 67 L Ed 785] (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [57 S Ct 578; 81 L Ed 703] (1937); *Olmstead* v. *United States*, 277 U. S. 438 [48 S Ct 564; 72 L Ed 944] (1928), overruled by *Katz* v. *United States*, 389 U. S. 347 [88 S Ct 507; 19 L Ed 2d 576] (1967).

Chief Justice Roberts further called stare decisis a "principle of policy" and said that it "is not an end in itself." *Id*. at ___; 130 S Ct at 920; 175 L Ed 2d at 807. He explained that "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id* at ___; 130 S Ct at 921; 175 L Ed 2d at 807. It appears that Justice YOUNG does not agree with Chief Justice Roberts.

The consideration of stare decisis and whether to overrule wrongly decided precedent always includes service to the rule of law through an application and

exercise of judicial restraint, common sense, and a sense of fairness—justice for all.[1]

MARKMAN, J. (*concurring in the result only*). Unlike the majority, I conclude that this is a lost-opportunity case because it is possible that the bad outcome here, i.e., suffering a stroke, would have occurred even if plaintiff had received proper treatment. However, I concur in the result reached by the majority because plaintiff has raised a genuine issue of material fact regarding whether he suffered a greater than 50 percent loss of an opportunity under MCL 600.2912a. Therefore, I agree with the majority that the judgment of the Court of Appeals should be reversed and this case should be remanded to the Court of Appeals for it to consider defendants' remaining issue on appeal, i.e., the admissibility of the expert testimony proffered by plaintiff. However, I strongly disagree with the analysis of the majority and believe that it will lead to confusion and unnecessary litigation.

I. STATUTE AND CASELAW

MCL 600.2912a(2) provides:

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[1] Justice YOUNG's apparent contempt for the common law and common sense can be seen in his 2004 article in the Texas Review of Law and Politics, where Justice YOUNG stated:

> Consequently, I want to focus my remarks here on the embarrassment that the common law presents—or ought to present—to a conscientious judicial traditionalist. . . .
>
> To give a graphic illustration of my feelings on the subject, I tend to think of the common law as a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party. Grandpa's presence is undoubtedly a cause of mortification to the host. But since only the most ill-bred of guests would be coarse enough to comment on Grandpa's presence and condition, all concerned simply try ignore him. [Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 301-302 (2004).]

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.[1]

In *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), the Court of Appeals held that a lost-opportunity plaintiff must prove that his loss was greater than 50 percentage points. That is, the difference between the plaintiff's premalpractice chance to achieve a better result and the plaintiff's postmalpractice chance to achieve a better result must be greater than 50 percentage points.[2]

In *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), although all seven justices concluded that *Fulton* was wrongly decided, this Court could not overrule *Fulton* because, while four justices concluded that *Fulton* was a lost-opportunity case, six justices concluded that *Stone* was not a lost-opportunity case. See *id*. at 164 n 14 (opinion by TAYLOR, C.J.) ("[B]ecause a majority of justices hold that this is not a lost-opportunity case, the issue of the correctness of *Fulton* cannot be reached, and *Fulton*'s approach remains undisturbed as the method of analyzing lost-opportunity cases.").[3] In

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[1] For a discussion of the common law that existed before the enactment of this statutory provision, see my opinion concurring in the result in *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008) (opinion by MARKMAN, J.).

[2] As I did in *Stone*, I use the term "premalpractice chance" to refer to the plaintiff's chance to survive or achieve a better result with proper treatment, and the term "postmalpractice chance" to refer to the plaintiff's chance to survive or achieve a better result without proper treatment.

[3] Because a majority of justices now believes that neither *Fulton* nor the instant case are lost-opportunity cases, *Fulton* is now apparently

Stone, Chief Justice TAYLOR and Justices CORRIGAN and YOUNG concluded that the loss-of-an-opportunity provision is "unenforceable." *Id*. at 147 (opinion by TAYLOR, C.J.). They concluded that if the plaintiff's premalpractice opportunity to achieve a better result was greater than 50 percent, the plaintiff could bring a traditional medical-malpractice action. However, if the plaintiff's premalpractice opportunity to achieve a better result was 50 percent or less, the plaintiff could not bring a traditional medical-malpractice action or a lost-opportunity action because lost-opportunity actions are no longer allowed under the language of the statute.

Justices CAVANAGH, KELLY, and WEAVER concluded in *Stone* that if the percentage point difference between the plaintiff's premalpractice opportunity to achieve a better result and his postmalpractice opportunity to achieve a better result was greater than 50 percentage points, the plaintiff could bring a traditional medical-malpractice action. However, if the percentage point difference was 50 points or less, the plaintiff could only bring a lost-opportunity action and would have to prove that his premalpractice opportunity to achieve a better result was greater than 50 percent.

Finally, in *Stone*, I concluded that a lost-opportunity case is "one in which it is at least possible that the bad outcome would have occurred even if the patient had received proper treatment." *Id*. at 186 (opinion by

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overruled at least with regard to the determination concerning whether a case is a traditional medical-malpractice action or a lost-opportunity action. However, because a majority of the justices conclude that the instant case is not a lost-opportunity case, *Fulton*'s method of analyzing lost-opportunity cases is unaffected by the decision in this case.

MARKMAN, J.).[4] I further concluded that in order for a lost-opportunity plaintiff to prevail, he must prove that his lost opportunity was greater than 50 percent. And,

> [i]n order to determine whether the "lost opportunity" was greater than 50 percent, the postmalpractice chance of obtaining a better result must be subtracted from the premalpractice chance, the postmalpractice chance must then be subtracted from 100, the former number must be divided by the latter number, and then this quotient must be multiplied by 100 to obtain a percentage. [*Id.*]

"If this percentage is greater than 50, the plaintiff may be able to prevail; if this percentage is 50 or less, then the plaintiff cannot prevail." *Id.*

II. PROBLEMS WITH *FULTON*

As I observed in *Stone*, the first problem with *Fulton* is that it requires a loss of more than 50 *percentage points*, while MCL 600.2912a(2) requires a loss of more than 50 *percent*.

> The Court of Appeals in *Fulton* . . . concluded that because the plaintiff's premalpractice chance of survival was 85 percent and her postmalpractice chance of survival was 60 percent to 65 percent, her "lost opportunity" was 20 percent to 25 percent and, thus, because the plaintiff's "lost opportunity" was not greater than 50 percent, she could not recover under MCL 600.2912a(2). However, *Fulton* did not offer any explanation as to why it merely subtracted the postmalpractice chance from the premalpractice chance to determine the "lost opportunity." This might have been the correct method of determining the "lost opportunity" if MCL 600.2912a(2) required that such a loss be "greater than 50 percentage points." However,

[4] "By contrast, if there is no question that the proper treatment would have resulted in a good outcome, then the patient who has suffered a bad outcome has a traditional medical-malpractice action." *Stone*, 482 Mich at 186 (opinion by MARKMAN, J.).

> MCL 600.2912a(2) requires that the "lost opportunity" be "greater than 50%." There is a significant distinction between 50 percentage points and 50 percent. As Dr. Roy Waddell, a board-certified orthopedic surgeon in Grand Rapids, has explained: "A decrease in survival rate from 50 percent to 10 percent is a 40-*percentage-point* decrease, but it is an 80 *percent* decrease." Waddell, *A doctor's view of "opportunity to survive": Fulton's assumptions and math are wrong*, 86 Mich B J 32, 33 (March 2007) (emphasis in original). Similarly, a reduction in wages from $5 an hour to $1 an hour is not a 4 percent reduction in wages; rather, it is an 80 percent reduction in wages. [*Id.* at 196 (emphasis in the original).]

As I also observed in my opinion in *Stone*, Justice CAVANAGH made this same mistake in his opinion in *Stone*:

> Like the Court of Appeals in *Fulton*, Justice CAVANAGH offers no explanation as to why he repeatedly calculates the "lost opportunity" in terms of the percentage points lost rather than the actual percentage lost when MCL 600.2912a(2) clearly states that the "lost opportunity" must be "greater than 50%," not greater than 50 percentage points. These statistical concepts are utterly distinct. [*Id.* at 196 n 11.]

I am pleased that Justice CAVANAGH and the other justices who signed his opinion in *Stone* (Chief Justice KELLY and Justice WEAVER) now apparently recognize this analytical error, and that they now "repudiate" that position. Thus, a majority of the justices of this Court now agree that MCL 600.2912a(2) requires us to determine whether the lost opportunity is "greater than 50%," not whether the lost opportunity is greater than 50 percentage points.

The other problem with *Fulton*, which Justice CAVANAGH and his colleagues in the majority also now apparently recognize, is that "it does not differentiate

between those patients who would have survived regardless of whether they received proper or improper treatment and those patients who needed the proper treatment in order to survive." *Id.* at 197.[5] As I observed in *Stone*:

> Such a differentiation is necessary because only those in the latter group have truly suffered a "lost opportunity" as a result of the improper treatment. That is, if a patient would have survived regardless of whether he received proper or improper treatment, the improper treatment cannot be said to have caused him to lose an opportunity to survive. On the other hand, if the patient would have survived only if he had received the proper treatment, the improper treatment *can* be said to have caused him to lose an opportunity to survive. MCL 600.2912a(2) requires us to determine whether the patient more likely than not fell into the latter category rather than the former category,

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[5] Although the majority describes their formula in considerably different terms than I did in *Stone*, the same result is produced under either formula. That is, regardless of whether the formula is described as I do

$$\frac{\text{(Premalpractice chance of better result) - (Postmalpractice chance of better result)}}{\text{100 - (Postmalpractice chance of better result)}}$$

or, as the majority now does

$$\frac{\text{(Postmalpractice chance of worse result) - (Premalpractice chance of worse result)}}{\text{(Postmalpractice chance of worse result)}}$$

the same figure is obtained. Given Justice CAVANAGH's forceful criticisms of my formula in *Stone*, it is encouraging that we are now in agreement on this critical point. See, e.g., *Stone*, 482 Mich at 183-184 (opinion by CAVANAGH, J.) ("the Waddell formula [which I adopted in *Stone* and to which I continue to adhere] is blatantly inconsistent with the language of MCL 600.2912a(2)"; "[i]t is inconceivable that Justice MARKMAN can read the [statute] and conclude that it should be translated into this formula"; "[t]he approach taken by Justice MARKMAN and Dr. Waddell requires [the statute] to be rewritten"; "the Waddell approach leads to such anomalous results that it cannot possibly reflect the intention of the Legislature"). While Justice CAVANAGH is correct that he employs the formula to determine whether plaintiff's cause of action is a traditional medical-malpractice action or a lost-opportunity action, and I use it to determine whether plaintiff has satisfied the greater-than-50-percent requirement, we agree nonetheless that the number produced by the formula represents the opportunity that the plaintiff lost as a result of the defendant's negligence.

because the statute only allows a plaintiff to recover for a "loss of an opportunity" that was "greater than 50%" and that was "caused by the negligence of the defendant . . . ." Dr. Waddell's calculation does just that:

$$\frac{\text{(Premalpractice chance) - (Postmalpractice chance)}}{\text{100 - (Postmalpractice chance)}}$$

The quotient resulting from this numerator and denominator is then multiplied by 100 to obtain a percentage. This number must be "greater than 50%" in order to satisfy the requirement of the second sentence of MCL 600.2912a(2). For instance, if the patient's premalpractice chance to achieve a better result was 80 percent and, as a result of the defendant's malpractice, the patient's postmalpractice chance is reduced to 20 percent, the patient has suffered a 75 percent loss of an opportunity to survive.[6]

What the Waddell formula essentially does is test the sufficiency of the expert testimony, which is typically presented in the form of two statistics: the likelihood that a patient would have had a good outcome with proper treatment (the "[premalpractice chance]") and the likelihood that a patient would have had a good outcome with negligent treatment (the "[postmalpractice chance]"). The Waddell formula allows a court analyzing this data to determine whether the plaintiff, when the patient has experienced a bad outcome, has created a question of material fact concerning whether proper treatment more likely than not would have made a difference. The formula does this by identifying the universe of patients who would have had a bad outcome (the denominator) and the subset of those patients who could have been favorably treated (the numerator).

It is easiest to start with the formula's denominator. This denominator consists of the universe of all patients who would have had a bad outcome, for whatever reason. This group includes two subsets of patients: those who would have had a bad outcome because they received negligent treatment, and those who would have had a bad outcome despite receiving proper treatment. The formula

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[6] $\frac{80\text{-}20}{100\text{-}20} \times 100 = 75\%$

identifies this group by subtracting from 100 the percentage of patients who would have had a good outcome even without proper treatment; in other words, it subtracts the "[postmalpractice chance]" from 100. In this way, a court can take the expert's statistics and identify those patients who were not treated properly and who experienced a bad outcome. A patient who is the subject of a medical-malpractice action is a member of this group. But we cannot determine whether the patient is a member of this group because he or she was denied the proper treatment or because he or she would have suffered a bad outcome even with proper treatment.

One more calculation must then be made in order to answer the dispositive question posed by the statute: whether it is more likely than not that the patient would have benefited from proper treatment or, put another way, whether the "opportunity to survive or . . . to achieve a better result" was "greater than 50%." MCL 600.2912a(2). A court has to determine what percentage of those patients with a bad outcome (those patients in the denominator) would have benefited from treatment. This brings us to the Waddell formula's numerator. The numerator consists of those patients who would have had a bad outcome only if they had been negligently treated. It is calculated by subtracting the "[postmalpractice chance]" from the "[premalpractice chance]," thus identifying those patients who required treatment to avoid a bad outcome.

Once the numerator and denominator have been calculated, comparison of these two numbers by their quotient allows a court to reasonably determine whether improper treatment more likely than not made a difference in the patient's outcome. If the number of patients who would have had a bad outcome only if they had been negligently treated (the numerator) comprises more than half of the number of patients who would have had a bad outcome overall (the denominator), then the plaintiff has established that proper treatment more likely than not would have made a difference. In other words, when this has been shown, the plaintiff has created a question of material fact concerning whether the "opportunity"—the benefit that

would have been realized by a group of patients from the treatment that was not given to this specific patient—was greater than 50 percent. Such a plaintiff has presented adequate expert testimony to establish a "lost opportunity" cause of action within the meaning of the statute.

As Dr. Waddell has explained:

> "[T]he intent of the law is to disallow damages unless it can be shown that *proper treatment creates a better than even* ("greater than 50%") *chance of survival of the patients who would have died without treatment.* In other words, if appropriate treatment *cannot* save at least half of the patients who otherwise would have died, then you do not have sufficient evidence to show that the negligence made the difference in the adverse outcome (death). Conversely, if good treatment *can* save more than half of the patients who otherwise would have died, then you have adequate evidence that the poor treatment or negligence was likely to blame for the bad outcome. This is exactly what this definition of opportunity measures." [Waddell, 86 Mich B J at 33 (emphasis in original).]
>
> MCL 600.2912a(2) only allows a plaintiff to recover for a "loss of an opportunity" that was "greater than 50%" and that was "caused by the negligence of the defendant . . . ." Use of Dr. Waddell's formula, which generates the actual percentage lost rather than the number of percentage points lost, and excludes those who would have achieved a good result regardless of the malpractice, best ensures, in my judgment, that these statutory requirements are satisfied. That is, this calculation would impose liability, in accordance with MCL 600.2912a(2), in those instances in which the medical care received more likely than not affected whether the patient survived. [*Id.* at 197-202.]

III. APPLICATION

In the instant case, plaintiff alleged that defendants failed to timely and properly treat his acute chest syndrome, a serious complication of sickle-cell

disease, and that, as a result, he suffered a stroke. More specifically, plaintiff alleged that defendants should have performed an exchange blood transfusion in which the patient's abnormal blood is taken out and replaced with normal blood, rather than a simple blood transfusion in which normal blood is simply added to the patient's abnormal blood.[7] Plaintiff's expert witness testified that there was a 10 to 20 percent chance of stroke without proper treatment, but that with proper treatment there would have been only a 5 to 10 percent chance of stroke. In other words, with proper treatment plaintiff had a 90 to 95 or more percent chance of not suffering a stroke, and without proper treatment he had an 80 to 90 percent chance of not suffering a stroke. That is, plaintiff's premalpractice chance to achieve a better result was, at best, 95 percent, and his postmalpractice chance was, at worst, 80 percent. Pursuant to the Waddell calculation, plaintiff lost a 75 percent opportunity to achieve a better result:

$$\frac{95\text{-}80}{100\text{-}80} \times 100 = 75\%$$

Therefore, plaintiff has raised a genuine issue of material fact regarding whether he suffered a greater than 50 percent loss of an opportunity under MCL 600.2912a(2). For these reasons, I agree with the majority that the judgment of the Court of Appeals should be reversed and this case should be remanded to the Court of Appeals for it to consider defendants' remaining issue on appeal, i.e., the admissibility of the expert witness testimony proffered by plaintiff.

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[7] An exchange blood transfusion was not performed until *after* plaintiff suffered a stroke. As a result of the stroke, plaintiff suffers from partial paralysis of his left leg and complete loss of function of his left hand and arm.

IV. MAJORITY'S ANALYSIS

Although I agree with the majority that the Court of Appeals should be reversed, I strongly disagree with its analysis.

A. LOST OPPORTUNITY VS. TRADITIONAL MEDICAL MALPRACTICE

1. GREATER-THAN-50-PERCENT REQUIREMENT

On the one hand, the majority concludes that whether the plaintiff's lost opportunity is greater than 50 percent determines whether the plaintiff's action is a lost-opportunity action or a traditional medical-malpractice action. I find this conclusion to be completely illogical. Either the defendant's negligence has caused the plaintiff to suffer the injury, or it has caused the plaintiff to suffer a loss of an opportunity to achieve a better result— the better result being not to suffer the injury. How substantial the plaintiff's lost opportunity is determines whether he satisfies the "greater than 50%" requirement of MCL 600.2912a(2), not whether the plaintiff's action constitutes a lost-opportunity action in the first place. As I stated in *Stone*:

> In order to satisfy traditional medical-malpractice action requirements, there must be no question that the proper treatment would have resulted in a good outcome (at least with regard to the specific injury suffered by the patient), because if there is any chance that a patient who received proper treatment might nevertheless have suffered the specific bad outcome ultimately suffered by the patient, it cannot be proved that the improper treatment caused the bad outcome. If there is any chance that the proper treatment could have resulted in the bad outcome, the chances of a good outcome with proper treatment and the chances of a good outcome with improper treatment must be compared. That is, under those circumstances, although the plaintiff cannot prove that the defendant's

> malpractice caused the bad outcome because the bad outcome might have occurred even with proper treatment, the plaintiff may be able to prove that the defendant's malpractice increased the patient's chances of obtaining a bad outcome and, thus, caused him or her to suffer a "lost opportunity" to achieve a better result. This is the only coherent concept of a "lost opportunity" cause of action under MCL 600.2912a(2). [*Stone*, 482 Mich at 271 (opinion by MARKMAN, J.).]

Because it is possible that the bad outcome in this case, i.e., suffering a stroke, might have occurred *even if* plaintiff had received proper treatment, the instant case constitutes a lost-opportunity action.

2. PLAINTIFF'S PLEADINGS

On the other hand, the lead opinion concludes that "the second sentence of § 2912a(2) applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice . . . ." That is, the lead opinion concludes that whether the plaintiff's action constitutes a lost-opportunity action or a traditional medical-malpractice action is a function of whether the plaintiff has used the magic words "lost opportunity" in his pleading. If he did not, the action is a traditional medical-malpractice action and the plaintiff need not concern himself with satisfying the greater-than-50-percent requirement of MCL 600.2912a(2). However, if the plaintiff *did* use the words "lost opportunity" in his pleading, the action *is* a lost-opportunity action and the plaintiff must satisfy the greater-than-50-percent requirement of MCL 600.2912a(2). Besides being utterly inconsistent with the majority's own conclusion that a lost opportunity greater than 50 percent determines whether the plaintiff's action constitutes a lost-opportunity action or a traditional

medical-malpractice action, it is also inconsistent with the well-established principle that Michigan courts are "not bound by a party's choice of label for its action [because this would] put form over substance . . . ." *St Paul Fire & Marine Ins Co v Littky*, 60 Mich App 375, 378-379; 230 NW2d 440 (1975). Instead, as we explained in *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999), "the gravamen of plaintiff's action is determined by considering the *entire* claim." (Emphasis added.)

Thus, just as whether a plaintiff labels an action as an ordinary negligence action does not control whether that action is, in fact, an ordinary negligence action or a medical-malpractice action, see *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004), whether a plaintiff labels an action as a traditional medical-malpractice action or a lost-opportunity action cannot control whether the plaintiff's action is, in fact, a traditional medical-malpractice action or a lost-opportunity action. This established principle ensures that the governing *law,* and not the label the parties attach to that law, controls the outcome of an action. As the United States Supreme Court has observed, any other approach would allow a party to avoid the requirements of a legislative mandate simply by artful pleading. See *Allis-Chalmers Corp v Lueck*, 471 US 202, 211; 105 S Ct 1904; 85 L Ed 2d 206 (1985). Yet this is exactly what the lead opinion would allow a plaintiff to do in relation to the requirements of MCL 600.2912a(2). Apparently, according to the justices joining the lead opinion, all a plaintiff need do to avoid the "greater than 50%" requirement in MCL 600.2912a(2) is to omit the words "lost opportunity" in his complaint. Thus, no artfulness is even required to nullify this particular statute under their theory.

Indeed, in light of the lead opinion, the discussions in the various opinions in this case concerning appropriate formulas for determining loss of opportunity seem pointless. For what plaintiff, and what competent plaintiff's attorney, would ever plead a lost-opportunity claim if it could be so easily avoided? Simply put, under the lead opinion's rule, would the lost-opportunity doctrine enacted by the Legislature even continue to exist as a viable legal doctrine in this state? Would a court have any power to apply the actual law, or would it be required to participate in a charade of the plaintiff's (and the lead opinion's) making? As an example, could a public official plaintiff avoid having to prove actual malice in a defamation case by simply leaving the words "public official" out of his pleading? Could a plaintiff suing a public entity entitled to governmental immunity avoid such immunity by simply omitting that the defendant is a public entity from his pleading? Could an independent contractor transmute himself into an employee by simply asserting such in his pleading?

B. WHICHEVER FORMULA BEST SERVES THE PLAINTIFF

The lead opinion offers no explanation, and I can think of none, to support its alternative "standard percentage increase calculation" formula, other than the fact the justices signing the lead opinion believe that it somehow indicates that plaintiff has suffered a *300 percent* loss of an opportunity! However, none of this really seems to matter to the justices signing the lead opinion because in the end they conclude that MCL 600.2912a(2) does not require "any particular mathematical formula," and that if "either calculation," or, indeed, some other yet-to-be-discovered calculation, demonstrates a greater than 50 percent lost opportunity, the plaintiff's case may proceed, because "the

results must be viewed in the light most favorable to the nonmoving party." This is simply nonsensical. Although it is true that *evidence* is to be viewed in a light most favorable to the nonmoving party, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), which, as in this case, will almost invariably be the plaintiff, this is the first I have heard of a judicially created rule that we are to construe an unambiguous *law* in a light most favorable to one side or the other. Needless to say, and for reasons that are apparent, the lead opinion does not bother to cite any authority in support of such a rule. Is there some logical reason for this rule other than an apparent desire by the lead justices to place a finger on the scales of justice on behalf of the plaintiff class? Is this rule limited to lost-opportunity cases or is it equally applicable to all medical-malpractice actions? Why is such a rule appropriate in a lost-opportunity case, but not in other realms of the civil law? When is such a default interpretation of the law warranted, and when is it not? If the law does not require "any particular formula," why does the lead opinion devote such attention to identifying the two formulas that it does identify? Why not just devise a third formula under which the plaintiff will *always* prevail? Could it possibly be that the lead justices may be confusing their own personal political philosophies with the dictates of the actual law that they pledged to uphold?[8]

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[8] The lead opinion indicates that the justices signing that opinion now support "Justice CAVANAGH's partial dissent in *Wickens* [*v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001)] that a living person may pursue a claim for loss of opportunity under the circumstances presented in that case." What this gratuitous observation has to do with the instant case, I have not a clue. Do the justices signing the lead opinion also support Justice CAVANAGH's dissent in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), or any one of his other random dissents? Given that three justices previously supported Justices CAVANAGH's partial dissent in *Wickens* (Chief Justice KELLY and Justices CAVANAGH and WEAVER), by

V. CONCLUSION

As I summarized in *Stone*:

> A "lost opportunity" action is one in which it is possible that the bad outcome would have occurred even if the patient had received proper treatment. On the other hand, if there is no question that the proper treatment would have resulted in a good outcome and the patient has suffered a bad outcome, the plaintiff possesses a traditional medical-malpractice action. In order for a traditional medical-malpractice plaintiff to prevail, the plaintiff must prove that the bad outcome was more probably than not caused by the defendant's malpractice. In order for a "lost opportunity" plaintiff to prevail, the plaintiff must prove that the "lost opportunity" to achieve a better result was more probably than not caused by the defendant's malpractice and that the "lost opportunity" was greater than 50 percent. In order to determine whether the "lost opportunity" was greater than 50 percent, the postmalpractice chance of obtaining a better result must be subtracted from the premalpractice chance; the postmalpractice chance must then be subtracted from 100; the former number must be divided by the latter number; and then this quotient must be multiplied by 100 to obtain a percentage. The calculation can be summarized as follows:
>
> $$\frac{\text{(Premalpractice chance) - (Postmalpractice chance)}}{\text{100 - (Postmalpractice chance)}}$$
>
> If this percentage is greater than 50, the plaintiff may be able to prevail; if this percentage is 50 or less, then the plaintiff cannot prevail. [*Stone*, 482 Mich at 218-219 (opinion by MARKMAN, J.).][9]

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indicating that she now supports it Justice HATHAWAY seems to be signaling that there is now majority support in favor of his position in that case. Unfortunately, this type of behavior seems to have become the new majority's modus operandi—unnecessarily sowing uncertainty, doubt, and confusion into the law by gratuitously questioning prior cases decided by the former majority. For more discussion on this, see my dissent in *McCormick v Carrier*, 487 Mich 180, 266-274; 795 NW2d 517 (2010).

[9] However, the present status of the law seems to be, pursuant to the lead opinion and Justice CAVANAGH's concurring opinion, that if the

As discussed earlier, because it is possible that the bad outcome in this case, i.e., suffering a stroke, would have occurred even if plaintiff had received proper treatment, the instant case is, in fact, a lost-opportunity action, and because plaintiff has raised a genuine issue of material fact regarding whether he suffered a greater than 50 percent loss of an opportunity under MCL 600.2912a, I agree with the majority that the judgment of the Court of Appeals should be reversed and this case should be remanded to the Court of Appeals for it to consider defendants' remaining issue on appeal, i.e., the admissibility of the expert witness testimony proffered by plaintiff.

However, I emphatically disagree with the majority's incoherent analysis and the implications of such analysis. The majority effectively transforms a lost-opportunity action into a traditional medical-malpractice action, for no other apparent reason than to afford plaintiffs larger potential recoveries. Instead of limiting a plaintiff's recovery to the *opportunity* that he or she may have lost as a result of the defendant's negligence, the majority now expands the plaintiff's recovery to include potentially all damages related to his medical condition, even though the plaintiff may well have suffered the condition even had he received *perfect* medical treatment. Thus, having already undermined the Legislature's attempt at medical-malpractice reform, see, e.g., *Bush v Shabahang*, 484 Mich 156; 772

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plaintiff's lost opportunity is greater than 50 percent (the calculation of which is anyone's guess in view of the different tests of these two opinions), the plaintiff can bring a traditional medical-malpractice action, but, if the plaintiff's lost opportunity is not greater than 50 percent, then the plaintiff can only bring a lost-opportunity action. And, pursuant to *Fulton*, a lost-opportunity plaintiff must prove that the difference between his premalpractice chance of achieving a better result and his postmalpractice chance of achieving a better result is greater than 50 *percentage points*. Neither of these conclusions is, to say the least, consistent with my own reading of the statute.

NW2d 272 (2009); *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009); and ADM File No. 2009-13, 485 Mich cclxxv (order entered February 16, 2010, amending MCR 2.112 and 2.118), the majority now embarks upon transforming medical-malpractice law in exactly the opposite direction of that sought by the Legislature. At the same time, the differing formulas, and non-formulas, adopted by the majority, as well as the internal inconsistencies in its analysis, will only produce more confusion in an already confused area of the law, and more litigation in an already heavily litigated area of the law. The clearest principle of law that can be gleaned from the lead opinion is also the least *principled* of its asserted principles—the adoption of whichever formula best serves the plaintiff. Not much more than this "principle" really needs to be understood concerning the essence of the lead opinion's analysis.

CORRIGAN, J., concurred with MARKMAN, J., with respect to parts IV(A)(2) and (B).

CORRIGAN, J. (*dissenting*). I fully join Justice YOUNG's dissenting opinion. I also join part IV(A)(2) and part IV(B) of Justice MARKMAN's opinion concurring in the result only.

YOUNG, J. (*dissenting*). Our new Chief Justice established the "agenda" for the newly reconstituted Court in her recent comments captured by the press:

> **We the new majority [Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY] will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench.**[1]

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[1] *She Said*, Detroit Free Press, December 10, 2008, p 2A. Chief Justice KELLY objects that I "continue[] to quote and misleadingly characterize a

There are many cases this term that can be said to exemplify the new majority's commitment to "undo . . . the damage" of the prior majority, but this case certainly qualifies as a first among equals. Here, not only do my colleagues in the "new majority" destroy the doctrinal integrity of medical malpractice law, they do so in highly fractured opinions that will require a Venn diagram for the bench and bar to construct the points at which four of them agree on any governing principle of law. The new majority has thus made it more difficult to determine what it has done today. Perhaps this is intended.

Chaos and confusion in the law only promote *more* litigation. The decisions the new majority has issued today in this case will thus benefit *only* those who profit from litigating medical malpractice cases. The rest of us desire to know what legal rules control our rights and obligations, and we desire and deserve to know them *before* we act. The citizens of this state are entitled to that kind of clarity in the decisions from the state's senior court, not the disorder this Court has sown today. Today's decision returns this Court to an era in which the bench and bar must decipher this Court's split opinions in order to figure out what principles of law they collectively articulate.[2] It is no small challenge to respond in dissent to the various opinions that shred our medical malpractice laws.

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statement [she] made nearly two years ago off the bench." *Ante* at 513. As my dissenting opinion in *Univ of Mich Regents v Titan Ins* Co, 487 Mich 289, 322-325, 327-330; 791 NW2d 897 (2010) (YOUNG, J., dissenting), explains at length, my characterization of her statement is not misleading. Chief Justice KELLY's remarks both set an agenda for undoing the precedents of the previous 10 years and are especially mean-spirited in light of the political attacks against former Chief Justice TAYLOR during the 2008 campaign.

[2] See, e.g., *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), for a model case in the same chaotic vein as today's split decisions. It exemplifies the era to which this Court returns in this case.

Despite the Legislature's codification of the traditional obligation to prove that alleged malpractice "more probably than not" caused a plaintiff's injury,[3] 20 years ago, in *Falcon v Mem Hosp*, this Court waded into the realm of policy-making and judicially created the lost opportunity doctrine as an exception to the traditional and statutorily codified causation standard of proof.[4] Even after the Legislature subsequently recognized the lost opportunity doctrine,[5] it also expressly retained the traditional requirement that "[i]n an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants."[6]

Until today, this Court has always made clear that when a *traditional* medical malpractice claim was at issue, the more-probable-than-not standard of causation applied and required the plaintiff to " 'exclude other reasonable hypotheses with a fair amount of certainty.' "[7] However, as the Court did in *Falcon*, today the majority makes a radical transformation of medical malpractice law and again jettisons traditional causation doctrine by equating *causation* of the injury with *risk* of the injury. But, unlike in *Falcon*, the new majority here does not recognize merely an *exception* to the traditional malpractice requirement of "but for" causation, *it essentially eliminates the traditional rule entirely by importing that exception into all malpractice cases*. In declaring this case to be a "traditional" medi-

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[3] 1977 PA 272.

[4] *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990).

[5] See MCL 600.2912a, as amended by 1993 PA 78.

[6] MCL 600.2912a(2).

[7] *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994) (citation omitted).

cal malpractice claim, the new majority applies the relaxed causation rules that previously had applied *only* to lost opportunity claims. After today, therefore, *all* malpractice claims will be treated under relaxed causation principles previously applied only to lost opportunity claims. This is a tectonic shift in our law, for which there is no basis but the preference of the justices in the new majority to foster more legal chaos that will promote litigation in this area of the law. This shift is significant because a traditional medical malpractice injury creates liability for *the entire injury*, while a lost opportunity claim creates liability only for that portion of the increased risk of injury attributable to a defendant.[8] Make no mistake: Although Justice CAVANAGH feigns that he is unaware of the significant change in the law being made in this case, the reduced burden of persuasion and the broader scope of damages permitted is the reason the new majority now applies lost opportunity causation principles to *all* medical malpractice claims.[9]

Rather than attempting to give meaning to the words of the statute at issue in this case, the new majority performs a spectacularly hubristic feat in treating a statutory medical malpractice claim as though it were a mere matter of common law and thus subject to its revisionary powers. What is more, these justices have decided to use those extraconstitutional powers to circumvent the Legislature's explicit decision to retain traditional causation rules. The new majority has cho-

[8] See *Falcon*, 436 Mich at 471 (opinion by LEVIN, J.) ("In this case, 37.5 percent times the damages recoverable for wrongful death would be an appropriate measure of damages.").

[9] See n 52 of this opinion for further elaboration on the significance of Justice CAVANAGH's repudiation of the position he took just two years ago in *Stone v Williamson*, 482 Mich 144, 175-177; 753 NW2d 106 (2008) (opinion by CAVANAGH, J.).

sen "free form" to change the law to match its policy preference that no legal doctrines shall exist to eliminate *any* claim of medical malpractice—even those doctrines codified by our Legislature to accomplish this very goal.

For someone who campaigned on the theme that more of this Court's precedent should be preserved,[10] we are surprised at how eagerly Justice HATHAWAY has striven in this case to overturn precedent—even to the extent of offering her own new views that precedent is not a serious barrier to any change desired by the new majority.[11]

The dicta in Justice HATHAWAY's opinion bears out her newfound position on stare decisis because her opinion purports to opine on "the full scope and extent of loss-of-opportunity claims,"[12] even while denying that such a claim is involved in *this* case. In doing so, Justice HATHAWAY engages in a completely gratuitous assault on this Court's decision in *Wickens v Oakwood Healthcare Sys*.[13] *Wickens* involved a claim for the lost opportunity *to survive*, and it was brought by a living plaintiff—someone who had not yet *lost* her opportunity to survive. *No* justice even contends that plaintiff in this case has asserted a claim for the lost opportunity

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[10] Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006 (quoting Justice HATHAWAY, then running for a position on the Court of Appeals, as saying that "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent").

[11] See, e.g., *Univ of Mich Regents*, 487 Mich at 314-317 (HATHAWAY, J., concurring).

[12] *Ante* at 506 n 22.

[13] *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001).

to survive, and therefore it is completely unnecessary for Justice HATHAWAY to opine on whether the majority or dissent correctly interpreted the question whether a living plaintiff could recover for the loss of an opportunity to survive.

Ordinarily, this fact would hinder any justice from engaging in a discussion on the scope of a claim for the lost opportunity to survive that is not implicated in the case before the Court. Justice HATHAWAY, though, is not constrained to consider only the legal issues *she* claims are involved here because, consistent with the new majority's "agenda,"[14] she has a desire to overrule in one fell swoop as many cases decided by the "Republican-dominated court" as she can. Unfazed by the inconvenient fact that *Wickens* is irrelevant to any question posed by this case, Justice HATHAWAY's opinion observes that it "agree[s] with Justice CAVANAGH's partial dissent in *Wickens* . . . ."[15] Such dicta do not yet operate to overturn this Court's decision in *Wickens*. Nevertheless, given that Justice HATHAWAY is now the fourth sitting justice on this Court to support the partial dissenting opinion in *Wickens*, it is safe to conclude that the majority opinion in *Wickens* has, more probably than not, lost a substantial part of its opportunity to survive.[16]

Finally, the new majority overrules the Court of Appeals' decision in *Fulton v William Beaumont Hosp*

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[14] See the text accompanying n 1 of this opinion.

[15] *Ante* at 506 n 22.

[16] One could read this dicta in Justice HATHAWAY's opinion as a signal that the new majority will overrule *Wickens*. However, the majority has *already* so signaled in its order granting leave to appeal in *Edry v Adelman*, 485 Mich 901 (2009). *Edry* was decided on narrow evidentiary grounds, *Edry v Adelman*, 486 Mich 634; 736 NW2d 567 (2010), but, as Justice HATHAWAY's decision in this case exemplifies, its decision was decidedly not a reaffirmation of the continued vitality of *Wickens*.

to the extent it is inconsistent with their opinions.[17] However, again, the new majority overreaches; *Fulton* applies *only* to lost opportunity cases, *not* to traditional medical malpractice cases, and the new majority's decision to convert claims previously considered lost opportunity claims into traditional medical malpractice claims serves to eliminate the application of *Fulton*. The new majority's deliberate decision to repudiate *Fulton* in this expansive manner provides further support for my claim that it now applies lost opportunity principles to *all* medical malpractice claims.

For these reasons and more, I vigorously dissent. I believe that the new majority has intentionally mischaracterized this as a "traditional" medical malpractice claim because plaintiff's expert testimony unquestionably established that the alleged malpractice was *not* the "but for" cause of plaintiff's injury. Were the new majority's characterization of this case as a traditional medical malpractice claim accurate, I would affirm for failure of proofs. However, because I believe this to be a lost opportunity case, I would vacate as improvidently entered our September 30, 2009, order granting leave to appeal. I continue to adhere to the position stated in the lead opinion in *Stone v Williamson* that the second sentence of MCL 600.2912a(2) codifying the lost opportunity remedy is unenforceable as enacted.[18] Because the Legislature has not clarified the intention of its 1993 amendment of § 2912a(2), vacating the grant order is the most appropriate course of action.

I. FACTS AND PROCEDURAL HISTORY

Because none of the opinions that collectively create

[17] *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002).

[18] *Stone*, 482 Mich at 144 (opinion by TAYLOR, C.J.).

a majority elaborates on the facts necessary to decide this case, I present the following complete recitation of the pertinent facts and procedural history of this case.

Plaintiff, Raymond O'Neal, suffers from sickle cell anemia, a genetic condition that produces an increased amount of abnormally shaped red blood cells in his bloodstream.[19] In January 2003, plaintiff's progressively worsening chest pain developed into acute chest syndrome (ACS), a known complication of sickle cell anemia.[20] To treat ACS, a patient must undergo blood transfusions to reduce the amount of abnormal red blood cells. The difference between and effectiveness of two types of blood transfusions—standard transfusions and exchange transfusions—is at issue in this case. Standard transfusions add healthy red blood cells to the patient's existing blood supply and thereby reduce the patient's percentage of abnormal red blood cells. Exchange transfusions are more complicated, but they also more aggressively treat the blood abnormality because they physically remove existing abnormal red blood cells and replace them with healthy red blood cells.

On January 23 through 24, 2003, plaintiff received a standard transfusion of three units of blood cells. He received two additional units of blood cells in another standard transfusion on January 28, 2003. Plaintiff suffered a stroke on the right side of his brain on February 1, 2003. Plaintiff received a third transfusion—an exchange transfusion—on February 2 through 3, 2003. Plaintiff's condition stabilized after this final transfusion, but he alleged permanent injury

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[19] Beers & Berkow, eds, *The Merck Manual of Diagnosis and Therapy* (17th ed) (Whitehouse Station, NJ: Merck & Co, Inc, 1999), pp 877-878.

[20] *Id.* at 879.

as a result of the stroke, including partial paralysis of his left leg and loss of function of his left hand and arm.

Plaintiff filed the instant medical malpractice complaint, alleging that defendants failed to comply with the appropriate standard of care, which required them to "arrange for exchange transfusions" to treat plaintiff's ACS on or before January 28, 2003. He also alleged that "[p]erformance of [an] exchange transfusion prior to the . . . stroke would have prevented the stroke from occurring."

Plaintiff retained and deposed three expert witnesses to testify on his behalf on the issue of causation. Dr. John Luce, a pulmonary care specialist, testified that reducing plaintiff's abnormal hemoglobin concentration to under 30 percent would have made it "probable that he would not have" suffered the stroke, although he acknowledged that plaintiff still could have suffered the stroke even with such a reduced abnormal hemoglobin concentration. Because no data existed on the frequency of strokes in adult sickle cell patients, Dr. Richard Stein, a hematologist, extrapolated from existing data on the effects of aggressive transfusion therapy on children with sickle cell disease. He testified that "more likely than not" plaintiff would have avoided a stroke if he had received aggressive transfusion therapy, what plaintiff alleged is the appropriate standard of care. Dr. Griffin Rodgers, also a hematologist, provided the most detailed testimony regarding the causal relationships between the stroke, plaintiff's underlying medical condition, and defendants' alleged malpractice. He explained that sickle cell patients generally have a baseline risk of stroke that is significantly higher than the average population. Moreover, plaintiff's ACS further increased his baseline risk of stroke to between 10 and 20 percent. Dr. Rodgers testified that, with aggres-

sive transfusion therapy, plaintiff's risk of stroke would have "been cut in half," that is, to between 5 and 10 percent. Stated otherwise, plaintiff's opportunity to avoid a stroke would have been between 90 and 95 percent with aggressive transfusion therapy, but it was reduced to between 80 and 90 percent without aggressive transfusion therapy. Thus, under either treatment regime, plaintiff's experts testified that it was more likely than not that plaintiff would *avoid* a stroke.

Defendants moved for summary disposition, arguing that Dr. Rodgers's testimony regarding plaintiff's lost opportunity to avoid a stroke failed to satisfy the requirement of MCL 600.2912a(2)[21] and *Fulton*[22] that the opportunity to achieve a better result must decrease by more than 50 percentage points. The trial court denied defendants' motion, noting that defendants "[didn't] have a clue about what [*Fulton*] says."

After the Court of Appeals denied defendants' interlocutory application for leave to appeal, in lieu of granting leave to appeal, we remanded this case to the Court of Appeals for consideration as on leave granted.[23] On remand, the Court of Appeals reversed the trial court's denial of summary disposition in an unpublished opinion per curiam.[24] The majority opinion held that plaintiff's claim was a lost opportunity claim, that *Fulton* required the loss of opportunity to be greater than 50 percentage points, and that the loss of oppor-

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[21] MCL 600.2912a(2) provides, in pertinent part: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

[22] *Fulton*, 253 Mich App at 83-84.

[23] *O'Neal v St John Hosp & Med Ctr*, 477 Mich 1087 (2007).

[24] *O'Neal v St John Hosp & Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2008 (Docket Nos. 277317 and 277318).

tunity here was, at most, 15 percentage points. The concurring opinion concluded that plaintiff also failed to present sufficient evidence of proximate causation because his "preexisting medical condition" precluded him from satisfying "his burden of establishing the existence of a genuine factual dispute concerning whether defendants' alleged professional negligence 'more probably tha[n] not' proximately caused his stroke."[25]

We granted leave to appeal and directed the parties to brief:

> (1) whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case; (2) if not, whether the plaintiff presented sufficient evidence to create a genuine issue of fact with regard to whether the defendants' conduct proximately caused his injury; or (3) if so, whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2).[26]

II. LEGAL BACKGROUND

The lead opinion in *Stone* aptly summarized the pertinent legal background relevant to this case, including the distinction between traditional malpractice claims and lost opportunity claims that the majority now eviscerates:

> In the first Michigan case to refer to the legal theory of "the value of lost chance," the Court of Appeals explained: "This theory is potentially available in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries." *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456

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[25] *Id.* at 2 (JANSEN, J., concurring).

[26] *O'Neal v St John Hosp & Med Ctr*, 485 Mich 901 (2009).

(1986). The Court in *Vitale* noted that allowing such claims would expand existing common law, and it declined to do so, stating that such a decision "is best left to either the Supreme Court or the Legislature." *Id.* at 504. . . .

In accord with this analysis, this Court has stated: "The lost opportunity doctrine allows a plaintiff to recover when the defendant's negligence *possibly*, i.e., [by] a probability of fifty percent or less, caused the plaintiff's injury." *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (emphasis added). The *Weymers* Court aptly described the lost-opportunity doctrine as "the antithesis of proximate cause." *Id.* In cases in which the plaintiff alleges that the defendant's negligence more probably than not caused the injury, the claim is one of simple medical malpractice. *Id.* at 647-648.

In *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990), this Court first recognized a claim for lost opportunity to survive. *Falcon* was a wrongful-death case in which this Court allowed a claim to go forward even though the plaintiff's granddaughter would have had only a 37.5 percent chance of surviving a medical accident had she received proper care. Because proper medical procedures had not been followed, the granddaughter's chance of surviving the accident went to essentially zero. The lead opinion in *Falcon* admitted that the plaintiff could not show that the malpractice had more likely than not caused her granddaughter's death, but could show that it had caused her granddaughter to lose a "substantial opportunity of avoiding physical harm." *Id.* at 470 (LEVIN, J.). The lead opinion disavowed the traditional rule that requires a plaintiff to show that, but for the defendant's negligence, the patient would not have suffered the physical harm, saying that the "more probable than not standard, as well as other standards of causation, are analytic devices—tools to be used in making causation judgments." *Id.* at 451. Instead, despite the fact that the plaintiff could not show that the doctor's malpractice had more probably than not caused her granddaughter's death, the plaintiff had a claim because the malpractice did cause her granddaughter harm. The 37.5 percent chance for a better outcome was

"hardly the kind of opportunity that any of us would willingly allow our health care providers to ignore." *Id.* at 460. This harm occurred *before* the granddaughter's death, at the moment "[w]hen, by reason of the failure to implement [certain] procedures," she was denied any opportunity of living. *Id.* at 469, 471 n 44. The lead opinion characterized its holding as requiring the plaintiff to show, more probably than not, that the malpractice reduced the opportunity of avoiding harm: "failure to protect [the granddaughter's] opportunity of living." *Id.* at 469. Loss of her 37.5 percent opportunity of living, the lead opinion stated, "constitutes a loss of a substantial opportunity of avoiding physical harm." *Id.* at 470.

The lead opinion in *Falcon* thus concluded that the loss-of-opportunity claim accrued not when the patient died, but at the moment she went from having a 37.5 [percent] chance of survival to having no chance of survival. Under this theory, a plaintiff would have a cause of action independent of that for the physical injury and could recover for the malpractice that caused the plaintiff to go from a class of patients having a "good chance" to one having a "bad chance." Without this analysis, the plaintiff in *Falcon* would not have had a viable claim because it could not have been shown that the defendant more probably than not caused the physical injury. Until *Falcon*, medical-malpractice plaintiffs alleging that the defendant's act or omission hastened or worsened the injury (such as by failing to diagnose a condition) had to prove that the defendant's malpractice more probably than not was the proximate cause of the injury. See, e.g., *Morgan v Taylor*, 434 Mich 180; 451 NW2d 852 (1990); *Naccarato v Grob*, 384 Mich 248, 252; 180 NW2d 788 (1970); *Skeffington v Bradley*, 366 Mich 552; 115 NW2d 303 (1962).

When the Court decided *Falcon*, MCL 600.2912a read:

"In an action alleging malpractice the plaintiff shall have the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

"(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable

professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

"(b) The defendant, if a specialist, failed to provide the recognized standard of care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury."

Three years after *Falcon*, the Legislature enacted 1993 PA 78, amending MCL 600.2912a to add the second subsection. In its entirety, the statute as amended reads:

"*(1) Subject to subsection (2)*, in an action alleging malpractice, the plaintiff *has* the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

"(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice *or care* in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

"(b) The defendant, if a specialist, failed to provide the recognized standard of *practice or* care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

"*(2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.*" [New language emphasized.]

> As can be seen, the Legislature retained the already-existing language, making it subsection 1 of the statute. Both subsection 1(a) and subsection 1(b) require the plaintiff to show that, "as a proximate result of the defendant failing to provide [the appropriate standard of practice or care], the plaintiff suffered an injury." Further, the Legislature added subsection 2. Specifically, the first sentence of this new subsection codifies and reiterates the common-law requirement that a plaintiff show that the defendant's malpractice more probably than not caused the plaintiff's injury. The second sentence of subsection 2 adds that, in medical-malpractice cases, a "plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." However, one must keep in mind that the relevant caselaw when subsection 2 was enacted held that the lost-opportunity doctrine applies "*in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries* . . . ." *Vitale*, [150 Mich App] at 502 (emphasis added). That is, the first sentence of subsection 2 requires plaintiffs in every medical-malpractice case to show the defendant's malpractice proximately caused the injury while, at the same time, the second sentence refers to cases in which such proof not only is unnecessary, but is impossible.[27]

Thus, in contrast with traditional malpractice claims, the very nature of the lost opportunity doctrine allows a plaintiff to recover *in the absence of proximate causation between the alleged malpractice and the physical injury suffered*. The lead opinion in *Stone* determined that "the two sentences of subsection 2 create a paradox, allowing claims in the second sentence while precluding them by the first sentence."[28] In this case, Justice HATHAWAY's opinion and Justice CAVANAGH's concurring opinion altogether avoid the implications of this paradox by essentially applying the lost opportunity analysis

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[27] *Stone*, 482 Mich at 152-157 (opinion by TAYLOR, C.J.).

[28] *Id.* at 157.

(which never required "but for" causation) to a traditional medical malpractice claim that, until today, *always required* "but for" causation. In doing so, the new majority radically alters proximate causation doctrine by casting aside the traditional component of "but for" causation and by replacing causation of the injury with consideration only of the *increased* risk of the injury. This is a revolutionary change in our law and represents a change that not even the *Falcon* Court dared to make.

A necessary component of proximate causation is "but for" causation, or causation in fact.[29] As this Court has previously held:

> As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries.
>
> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect."[30]

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[29] *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997), citing *Skinner*, 445 Mich at 162-163.

[30] *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004), quoting *Skinner*, 445 Mich at 174.

As Justice CAVANAGH has himself previously concluded, plaintiffs must present evidence of proximate causation that " 'must exclude other reasonable hypotheses with a fair amount of certainty.' "[31] By allowing plaintiff's claim to proceed as a traditional medical malpractice claim, the new majority today eviscerates the distinction between the weaker causation allowed in lost opportunity claims and the "but for" causation that has *always* been required in traditional medical malpractice claims.

III. APPLICATION

A. PLAINTIFF ASSERTED A LOST OPPORTUNITY CLAIM BECAUSE THERE IS NO "BUT FOR" CAUSATION BETWEEN THE ALLEGED MALPRACTICE AND THE PHYSICAL INJURY SUFFERED

As stated, the crux of a lost opportunity claim is that a plaintiff cannot show that, more probably than not, the alleged malpractice proximately caused his injuries. This is because a plaintiff need only show that the alleged malpractice merely reduced his opportunity to achieve a better result. Accordingly, whether a claim is a traditional malpractice claim or a claim for the loss of an opportunity to achieve a better result depends on whether the alleged malpractice *proximately caused* the alleged injury.

Contrary to the new majority's position, this case presents a prototypical lost opportunity claim because *no proximate causation exists between the alleged malpractice and plaintiff's physical injury*. Plaintiff's experts testified that plaintiff's underlying medical condition—sickle cell anemia complicated by ACS—*increased his risk of stroke* above that of a healthy person and even above that of a sickle cell patient who

[31] *Skinner*, 445 Mich at 166 (CAVANAGH, C.J.) (citation omitted).

has not developed ACS. Plaintiff's underlying medical condition created a heightened chance of suffering a stroke, *with or without the alleged malpractice.* As Dr. Rogers, who provided the most detail of plaintiff's causation experts, testified, plaintiff would have had a 5 to 10 percent chance of suffering a stroke *even if he had been treated according to the plaintiff's proposed standard of care*.

The evidence here, therefore, does not " 'exclude other reasonable hypotheses [of the cause of injury] with a fair amount of certainty,' "[32] as is required to prove "but for" causation in a traditional medical malpractice action. Plaintiff's expert testified that, in the absence of the alleged medical malpractice, plaintiff had between a 90 percent and 95 percent chance of avoiding a stroke. The alleged medical malpractice reduced plaintiff's chance of avoiding a stroke to between 80 percent and 90 percent. Even looking at the evidence in the light most favorable to the plaintiff, there is no basis for a fact-finder to conclude that defendants' actions more probably than not *caused* plaintiff's injury. But this is unimportant because the new majority now only requires causation for the *increased risk of injury*.

Simply stated, the plaintiff has not asserted—and neither Justice HATHAWAY's opinion nor Justice CAVANAGH's concurring opinion assert—that the alleged medical malpractice increased his chance of suffering a stroke by the more than 50 percentage points required to prove proximate causation.[33] **This fact irrefutably establishes**

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

[33] See *Falcon*, 436 Mich at 450 (opinion by LEVIN, J.) (characterizing the traditional approach to "but for" causation as "measured as more than fifty percent" and concluding that a 37.5 percentage point reduction in the opportunity for surviving could not prove "but for" causation). **Thus**

that the plaintiff asserts a lost opportunity claim, not a traditional medical malpractice claim.

B. THE CONCLUSION THAT PLAINTIFF HAS ASSERTED A TRADITIONAL MEDICAL MALPRACTICE CLAIM AND HAS SATISFIED THE REQUIREMENTS OF "BUT FOR" CAUSATION IS A DANGEROUS DEPARTURE FROM TRADITIONAL CAUSATION REQUIREMENTS

As stated, in determining that plaintiff's claim is a traditional medical malpractice claim, the new majority today applies relaxed causation rules that previously had applied *only* to lost opportunity claims—claims involving an increased *risk of injury* that did not rise to the level of proximate causation. These relaxed rules are inconsistent with the position that three of the justices of the new majority have taken previously on what evidence is required for a plaintiff to prove a traditional medical malpractice claim.[34] Such claims have *always* required "but for" causation. After today's shift, therefore, *all* malpractice claims will be established using principles that could only have applied to lost opportunity claims. Few can miss how significant a departure this is from all of this Court's medical malpractice jurisprudence that preceded this case.

1. THREE JUSTICES TODAY REPUDIATE THE TRADITIONAL CAUSATION PRINCIPLES THAT THEY *REAFFIRMED* JUST TWO YEARS AGO

The new majority appears to be of the view that the less said about its radical rewriting of this statute the

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no one, not even those in the *Falcon* decision who created an *exception*, has ever required less than a "more than 50 percentage point" change in order to establish a *traditional* medical malpractice claim. Just two years ago, Justices CAVANAGH, WEAVER, and KELLY *reaffirmed* this position. See *Stone*, 482 Mich at 175-177 (opinion by CAVANAGH, J.).

[34] See *id*.

better. It is apparently not required to maintain a consistent position or explain a fundamental change in position when a judge is "doing" policy rather than interpreting the law. Certainly, such disclosures are probably not desired by jurists whose positions are undergoing radical "revision." I commend the reader to compare the positions taken today by Chief Justice KELLY and Justices CAVANAGH and WEAVER with those taken just two years ago in *Stone*.[35] These three justices now *repudiate* the traditional proximate cause requirements that they previously recognized and applied at that time.

In *Stone*, Justice CAVANAGH, writing for himself and Justices KELLY and WEAVER, held that a traditional medical malpractice action required "but for" causation. He specifically posed a hypothetical example in which a plaintiff's opportunity to achieve a better result was reduced by 40 percentage points, from 80 percent to 40 percent. Thus, this hypothetical plaintiff's risk of suffering a bad result increased from 20 percent to 60 percent as a result of the alleged medical malpractice. According to Justice CAVANAGH just two years ago, this hypothetical plaintiff "could not meet the more-probably-than-not standard of causation . . . ."[36] Today these same three justices declare that a much smaller reduction in the opportunity to achieve a better result—from 90 to 95 percent to 80 to 90 percent—now satisfies the causation standard of a *traditional* malpractice case. This is not a product of the rule of law. This is a naked display of judicial whimsy and aggressive policy-making.

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[35] See *id*. Justice CAVANAGH at least has the forthrightness to indicate that he today repudiates this position. *Ante* at 511 n 7.

[36] *Stone*, 482 Mich at 177 (opinion by CAVANAGH, J.).

2. JUSTICE HATHAWAY'S OPINION MISREADS CASELAW TO REDEFINE PROXIMATE CAUSE AND TO DO AWAY WITH THE TRADITIONAL REQUIREMENT THAT A PLAINTIFF PROVE A "BUT FOR" CAUSE UNDER THE MORE-PROBABLE-THAN-NOT STANDARD

Justice HATHAWAY's opinion places much emphasis on the fact that our caselaw indicates that "a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries,"[37] in recognition that any given injury may have more than one proximate cause. It then uses this fact of logic and causation to create a false distinction that radically refashions proximate causation and negates the traditional requirement—as previously articulated even by Justice CAVANAGH—that proof of "but for" causation must "*exclude* other reasonable hypotheses with a fair amount of certainty."[38]

The proposition that any injury may have more than one proximate cause is an unremarkable one for anyone who understands the principles of "but for" causation. An injury that involves a *series* of individual occurrences before it is manifested will have multiple "but for" causes. **However, in such a case, *each* of these causes *must be proved to have produced the injury under the more-probable-than-not standard*, not merely proved to have *increased the risk of injury*, as this case does.**

One of this Court's cases on traditional causation, *Brackins v Olympia, Inc*, illustrates this point.[39] The plaintiff, a roller skating instructor, fell while roller skating at the defendant's rink. He alleged that another skater had clipped his right skate and that, "as a result his skates became locked with his right foot and skate

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[37] *Craig*, 471 Mich at 87.

[38] *Skinner*, 445 Mich at 166 (emphasis added; quotation marks and citation omitted).

[39] *Brackins v Olympia, Inc*, 316 Mich 275; 25 NW2d 197 (1946).

behind his left skate."[40] Furthermore, the plaintiff claimed that he could not have prevented the fall "because his left skate struck a ridge or inequality in the floor of the rink . . . ."[41] The defendant rink owner sought summary disposition because it claimed that the proximate cause of the plaintiff's injury was the other skater clipping the plaintiff's skate, not the flaw in the rink surface. To be sure, the other skater's action *was* a "but for" cause of the plaintiff's injury, as the injury would not have occurred without it. However, this Court concluded that the skating rink surface was *also* a proximate cause of the plaintiff's injury:

> Defendant is not absolved from liability for its negligence because of the act of the other skater . . . . The proofs support the conclusion . . . that plaintiff fell because of the roughness of, or the inequality in, the floor of the skating rink. Defendant's negligence, if not the sole proximate cause of the accident, was, in any event, *a* proximate cause.[42]

Each of the "but for" causes in *Brackins* could be proved with near certainty. Accordingly, the *Brackins* Court concluded that *both* "but for" causes more probably than not *directly* caused the plaintiff's injury, and therefore it affirmed the jury's award of damages to the plaintiff against the defendant. ***Nevertheless, in recognizing that an injury may have more than one "but for" cause, this Court has always, until now, required the traditional burden of proving that each particular "but for" cause more probably than not produced the injury.***[43]

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[40] *Id.* at 277.

[41] *Id.*

[42] *Id.* at 283 (emphasis added).

[43] Justice HATHAWAY claims that this position "would allow recourse for the negligent actions of medical providers only in those instances in which one provider's conduct is at issue and only when no pre-existing medical

The dual "but for" causes in *Brackins* are very different from the situation in the instant case. Here, all that plaintiff can show is that defendants' alleged malpractice exacerbated plaintiff's *preexisting* sickle cell anemia to the extent of increasing his *risk* of suffering a stroke by between 5 and 10 percentage points. Plaintiff has simply not proved that the alleged malpractice *caused* his stroke, nor has he "exclude[d]" the "other reasonable hypothes[i]s"—his preexisting sickle cell anemia—"with a fair amount of certainty."[44] Thus, plaintiff's preexisting sickle cell anemia could well have operated to injure him *even in the absence of defendants' alleged malpractice*.

3. JUSTICE HATHAWAY'S AND JUSTICE CAVANAGH'S OPINIONS TAKE INAPPROPRIATE LIBERTIES WITH PLAINTIFF'S EXPERT STATISTICAL EVIDENCE BY FAILING TO COMPARE LIKE WITH LIKE

Even in applying their radical new approach to proximate causation, the justices in the new majority

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condition exists." *Ante* at 497 n 12. This is patently false. First, as stated, there *can* be multiple "but for" causes for a particular injury, including the negligent conduct of *multiple* medical providers. All of these hypothetical negligent acts, however, must *themselves* be "but for" causes, like the chain reaction of events that caused the roller skating injury in *Brackins*. Second, a medical provider's negligence *may*, more probably than not, be a "but for" cause of an injury *even when the plaintiff has a preexisting condition*. This was the very situation that this Court encountered in *Stone*. The plaintiff in *Stone* alleged that a timely diagnosis of an aortic aneurysm would have given him a 95 percent chance of attaining a good result. Instead, his aneurysm ruptured, requiring emergency surgery and ultimately amputation of his legs. According to the plaintiff's experts, "misdiagnosed patients whose aneurysms rupture have only a 10 percent chance to achieve a good result." *Stone*, 482 Mich at 148 (opinion by TAYLOR, C.J.). Thus, even though the plaintiff had a preexisting medical condition, the defendants' misconduct increased the plaintiff's probability of suffering a bad result from 5 percent to 90 percent. This increase of 85 percentage points provided a sufficient factual basis to defeat the defendants' motions for judgment notwithstanding the verdict.

[44] *Skinner*, 445 Mich at 166 (quotation marks and citation omitted).

only reach their desired result by manipulating the expert's statistical evidence in ways inconsistent with the experts' own use of the statistical evidence and, similarly, in ways inconsistent with the uncontroversial and essential principle of statistical methodology of comparing "like with like." The new majority's inappropriate use of the statistical evidence presented in this case provides further proof that it is engaging in result-driven jurisprudence. Only this motivation could support such a mathematically illiterate presentation.

Justice HATHAWAY's opinion declares, under the guise of requiring "results [to] be viewed in the light most favorable to the nonmoving party,"[45] that *any* mishmash of figures that yields a result of greater than 50 percent will establish proximate causation between the alleged malpractice and the plaintiff's injury sufficient to defeat summary disposition. Thus, while Justice HATHAWAY's opinion expressly declines to adopt any *particular* mathematical formula for determining whether proximate cause exists in a given case, it essentially adopts *every* formula that an attorney or judge can manufacture. This is not a serious analysis—"statistical" or otherwise. Justice HATHAWAY's opinion is simply an invitation for the artful manipulation of probability figures and calls to mind the adage Mark Twain once attributed to Benjamin Disraeli, that there are "three kinds of lies: lies, damned lies, and statistics."[46]

Two of the formulas that Justice HATHAWAY's opinion identifies by name bear closer analysis. Her opinion indicates that the evidence in this case can be "viewed

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[45] *Ante* at 505 n 20.

[46] Twain, *My Autobiography: "Chapters" from the North American Review* (Mineola, NY: Dover Publications, Inc, 1999), p 208.

as a standard percentage increase calculation . . . ."[47] The flaw in using this "standard percentage increase calculation" in a traditional medical malpractice case is obvious. **Such a calculation would turn the facts of *Falcon*—a case in which *no* justice believed that the plaintiff could prove "but for" causation using a more-probable-than-not standard[48]—into a traditional medical malpractice case.**

In *Falcon*, the plaintiff's decedent, Nena Falcon, suffered an amniotic fluid embolism, "an unpreventable complication" of childbirth.[49] A woman who suffers this complication has a 62.5 percent probability of dying, even if it is treated immediately. Because of alleged malpractice, however, Nena Falcon's amniotic fluid embolism was not treated immediately. This alleged malpractice increased her chance of death to 100 percent.[50] Under the "standard percentage increase calculation" used by Justice HATHAWAY to support her radical departure from requiring traditional proximate causation in this case, the defendant's alleged malpractice in *Falcon* was responsible for increasing Nena Falcon's chance of dying by 37.5 percentage points over the preexisting 62.5 percentage point chance of dying. This represents a 60 percent increase in her chance of dying (37.5/62.5), and satisfies Justice HATHAWAY's conclusion that *any*

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[47] *Ante* at 504-505.

[48] *Falcon*, 436 Mich at 460 (opinion by LEVIN, J.) ("[I]t cannot be said, more probably than not, that [defendant] caused [plaintiff's] death."); *id.* at 472-473 (BOYLE, J., concurring) ("I concur in the recognition of 'lost opportunity to survive' as injury for which tort law should allow recovery in proportion to the extent of the lost chance of survival . . . provided that the negligence of the defendant more probably than not caused the loss of opportunity."); *id.* at 473 (RILEY, C.J., dissenting) ("[I]t is uncontested that the plaintiff cannot show that defendant's negligence caused the decedent's death . . . .").

[49] *Falcon*, 436 Mich at 454 (opinion by LEVIN, J.).

[50] *Id.* at 454 n 16.

formula that reaches the magic number of more than 50 percent is satisfactory. Justice HATHAWAY's opinion has, therefore, taken a judicially created aberration of proximate causation, *Falcon*, and applied it so that she can satisfy the proximate cause component of a traditional medical malpractice claim. Fortunately, Justice HATHAWAY's opinion is the only opinion that adopts this approach, so this "standard percentage increase calculation" does not, therefore, have support from a majority of this Court.

However, a second approach used by Justice HATHAWAY that I wish to discuss *does* appear to have the support from a majority of this Court—what Justice HATHAWAY calls the "standard percentage decrease calculation."[51] This approach takes the pre- and postmalpractice probabilities of suffering the injury and calculates what proportion of the postmalpractice probability of injury is attributable to the malpractice. The percentage approach is found nowhere in this Court's proximate cause jurisprudence, yet both Justice HATHAWAY's opinion and Justice CAVANAGH's concurring opinion apply it to conclude that plaintiff has made the requisite showing of probable cause to defeat defendants' motions for summary disposition.

As stated, three of the justices who support this approach do so in opposition to their previously stated positions.[52] Moreover, Justice HATHAWAY's opinion and

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[51] *Ante* at 504.

[52] Under the hypothetical example Justice CAVANAGH posed in *Stone*, a plaintiff whose risk of suffering a bad result increases from 20 percent to 60 percent is unable to prove causation under the more-probable-than-not standard. This is because the plaintiff's risk has not increased by the more than 50 percentage points traditionally required to prove "but for" causation. Justice CAVANAGH applies a very different approach today, and, under that approach, his hypothetical *Stone* plaintiff *would* be able to prove causation. Whatever innocence Justice CAVANAGH now feigns

Justice CAVANAGH's concurring opinion apply the new standard in an especially troubling fashion. It is a

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in treating both that hypothetical case and the instant case as traditional medical malpractice cases, he is unequivocally converting what used to be a lost opportunity case into a traditional medical malpractice case.

A plaintiff who has a preexisting medical condition is *only* able to prove "but for" causation when the alleged malpractice increases the plaintiff's risk of suffering a "bad result" by more than 50 percentage points. Otherwise, there is no way to exclude, as Justice CAVANAGH (and this Court) has previously required, all "other reasonable hypotheses with a fair amount of certainty." *Skinner*, 445 Mich at 166 (quotation marks and citation omitted). The approach adopted by the opinions of Justices HATHAWAY and CAVANAGH negates this basic requirement of proximate cause and would allow a plaintiff to recover for a bad result even in situations in which other, nonmalpractice "causes" for the result predominated in creating it.

The new majority's approach would allow a plaintiff to recover *in full* from a doctor who, for example, failed to diagnose cancer at its earliest stages, but still diagnosed it at a stage where it was much more probable than not that a patient would survive. To put figures on this situation, suppose a plaintiff's risk of dying from cancer is 1 percent if it is caught at its earliest stages. A doctor who fails to catch the cancer at that stage, but who catches it and treats it at a stage where the risk of dying from cancer is 3 percent, then, is liable, under the new majority's new approach, for the *entire* injury, should one occur, because the failure to diagnose contributed to 2/3 of the risk of injury. This is true, according to the new majority, even though the doctor only decreased the patient's chance of surviving by 2 percentage points, from 99 percent to 97 percent.

By shifting many lost opportunity claims into traditional medical malpractice claims, the new majority creates additional liability of a defendant for the *entire* injury, not just for the *increased risk* of injury, as lost opportunity claims provide. See *Falcon*, 436 Mich at 471 (opinion by LEVIN, J.) ("In this case, 37.5 percent times the damages recoverable for wrongful death would be an appropriate measure of damages."). This shift in determining a defendant's liability is *essential* to understanding what the new majority is trying to accomplish in this case. Now plaintiffs need only prove that a doctor's negligence contributed to the risk of injury, not that his negligence actually *caused* the injury. And no amount of pretended ignorance about the significance of these changes by members of the new majority alters their fundamental and radical impact on this area of the law.

truism in statistical methodology that one marshaling statistical evidence to support causation must apply the principle of *ceteris paribus* by "comparing like with like."[53] The new majority violates this basic principle of statistical analysis to reach its desired result. The expert testimony indicated that plaintiff's chance of suffering a stroke would have been reduced from the range of 10 to 20 percent to the range of 5 to 10 percent if plaintiff had been treated according to the asserted standard of care. In clarifying these statistical ranges, the expert concluded that plaintiff's likelihood of suffering a stroke would have been "cut in half" under the standard of care urged by plaintiff. In other words, the upper end of the range of plaintiff's likelihood of suffering a stroke was "cut in half," from 20 percent to 10 percent, and the lower end of that range was *also* "cut in half," from 10 percent to 5 percent. Rather than comparing like with like—the lower end of each range *or* the upper end of each range—a majority of this Court fallaciously compares the lower end of one range (5 percent) with the upper end of the other (20 percent). They do so in order to conclude that the alleged malpractice caused 75 percent of plaintiff's chance of suffering a stroke ($^{15}/_{20}$).[54] This failure to "compare like with like" is a patent error of statistical analysis, but it

[53] See Lewis-Beck, Bryman, & Liao, eds, 1 *The SAGE Encyclopedia of Social Science Research Methods* (Thousand Oaks, Cal: SAGE Publications, Inc, 2004), p 117 ("*Ceteris paribus* . . . refers to the process of comparing like with like when asserting a causal relationship or the effect of one variable on another.").

[54] The new majority calculates that defendants' alleged malpractice caused an increase in plaintiff's risk of suffering a stroke by 15 percentage points (5 percent risk without malpractice subtracted from 20 percent risk with malpractice). They then divide that figure by plaintiff's 20 percent risk of a stroke with malpractice to conclude that the alleged malpractice caused 75 percent of plaintiff's chance of suffering a stroke. See *ante* at 504, 512.

gets the majority where it needs to go to support its conclusion that plaintiff has established "but for" cause.

Finally, Justice HATHAWAY's opinion concludes that "plaintiff established a question of fact on the issue of proximate causation because plaintiff's experts opined that defendants' negligence more probably than not was the proximate cause of plaintiff's injuries."[55] This statement might have had more relevance if it had been supported by the experts' *actual* statistical evidence of plaintiff's chances of suffering the stroke. However, as discussed above, plaintiff's experts were unable to show proximate causation between the alleged malpractice and plaintiff's stroke. All they were able to show was a *connection* between the alleged malpractice and plaintiff's *increased likelihood of suffering a stroke*, from between 5 to 10 percent to between 10 to 20 percent. Justice HATHAWAY's analysis, such as it is, allows an expert to say certain "magic words" about proximate causation, while presenting statistical evidence to the contrary.

As stated, this case is a prototypical lost opportunity case because plaintiff cannot establish that, more probably than not, defendants proximately caused his stroke because he was predisposed to suffer one, his risk being in the range of 5 to 10 percent, even with medical care that satisfied plaintiff's proposed standard of care. Accordingly, I vigorously dissent from the conclusion of a majority of this Court that plaintiff asserted a traditional medical malpractice claim and would instead conclude that plaintiff asserted a lost opportunity claim.

C. MCL 600.2912a(2) IS (STILL) UNENFORCEABLE AS ENACTED

Because the new majority concludes that plaintiff's claim is a traditional medical malpractice claim, it does

[55] *Ante* at 490.

not need to reach the question whether plaintiff's claim meets the requirements of the second sentence of MCL 600.2912a(2), which applies only to lost opportunity claims. The decision of the new majority to treat this case as a traditional medical malpractice claim, of course, obviates the need for interpreting the second sentence of MCL 600.2912a(2) because the new majority essentially treats *all* medical malpractice claims under the weakened *Falcon* causation standard heretofore applicable *only* to lost opportunity claims. Therefore, the decision of the new majority to overrule the Court of Appeals' decision in *Fulton*, to the extent *Fulton* drew a line between lost opportunity cases and traditional medical malpractice cases, also does away with *Fulton*'s application of the sentence in § 2912a(2) that applies to lost opportunity cases. *Fulton* only applies to lost opportunity cases. By concluding that the instant case sounds in traditional medical malpractice, the new majority essentially writes the decision in *Fulton* out of existence. Thus, its expansive decision in this case is characteristic of the new majority that overreaches in its decisions in order to achieve its own preferred policy outcomes.[56]

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[56] Although the "new majority" has only been in existence 18 months, it has an impressive record of overturning cases consistent with the Chief Justice's promise to "undo . . . the damage that the Republican-dominated court has done." *She Said*, Detroit Free Press, December 10, 2008, p 2A.

By my count, the new majority has now overturned this term 12 cases in addition to the one that it overturns today:

1. In *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010), the new majority overruled *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

2. In *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), the new majority overruled *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the new majority overruled the following cases:

The Legislature added subsection (2) to MCL 600.2912a shortly after the *Falcon* Court created the

3. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001);

4. *Crawford v Dep't of Civil Serv*, 466 Mich 250; 645 NW2d 6 (2002);

5. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004);

6. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 124-127; 693 NW2d 374 (2005);

7. *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006);

8. *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007);

9. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 302-303; 737 NW2d 447 (2007); and

10. *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008).

11. In *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010), the new majority expressly overruled the limited retroactive effect of *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

12. In *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), the new majority overruled *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006).

Given this list of "lately departed" decisions of the "Republican-dominated Court," killing one Court of Appeals case such as *Fulton*—even if entirely irrelevant to the question the new majority purports to address here—is hardly surprising for the new majority which, before its members *became* the majority, were individually and collectively notably more "hawkish" on preserving precedent. See *Pollard v Suburban Mobility Auth for Regional Transp*, 486 Mich 963, 963-965 (2010) (YOUNG, J., dissenting statement). As in three other cases decided this term, Justice WEAVER repeats her tired and unsuccessful attempt to defend her changing position on stare decisis. *Ante* at 513-515. See also *Univ of Mich Regents*, 487 Mich at 310-314 (WEAVER, J., concurring); *Lansing Sch Ed Ass'n*, 487 Mich at 381-384 (WEAVER, J., concurring); *McCormick*, 487 Mich at 223-226 (WEAVER, J., concurring). Her position does not become any more convincing with repetition. My dissenting opinion in *Univ of Mich Regents*, 487 Mich at 325-327 & n 11 (YOUNG, J., dissenting), explains in full why Justice WEAVER's position is merely an attempt to justify stark judicial policy-making.

new claim for loss of an opportunity to survive. The new subsection provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.[57]

As the lead opinion in *Stone* aptly observed, there are multiple problems in determining whether the requirements of MCL 600.2912a(2) apply in any particular case. As stated above, the two sentences are internally inconsistent and, therefore, create a paradox:

> [T]he first sentence of this new subsection codifies and reiterates the common-law requirement that a plaintiff show that the defendant's malpractice more probably than not caused the plaintiff's injury. The second sentence of subsection 2 adds that, in medical-malpractice cases, a "plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." However, one must keep in mind that the relevant caselaw when subsection 2 was enacted held that the lost-opportunity doctrine applies "*in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries* . . . ." *Vitale*, [150 Mich App] at 502 (emphasis added). That is, the first sentence of subsection 2 requires plaintiffs in every medical-malpractice case to show the defendant's malpractice proximately caused the injury while, at the same time, the second sentence refers to cases in which such proof not only is unnecessary, but is impossible.[58]

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[57] MCL 600.2912a(2).

[58] *Stone*, 482 Mich at 156-157 (opinion by TAYLOR, C.J.).

Even ignoring the internal inconsistency, the second sentence of subsection (2) is incomprehensible as written. Subsequent to the amendment, the split Court of Appeals panel in *Fulton* offered two contradictory interpretations of the second sentence, neither of which was consistent with the text of that sentence as enacted. The *Fulton* majority determined that "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent."[59] As the lead opinion in *Stone* indicated, this interpretation "improperly adds to the statute the words 'loss of,' effectively replacing the word 'opportunity' where it is used the second time with the phrase 'loss of opportunity.' "[60] Thus, the *Fulton* majority essentially rewrote the second sentence of § 2912a(2) to include the following bracketed words: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the [loss of] opportunity was greater than 50%."

The dissenting judge in *Fulton* did not fare any better. His interpretation of MCL 600.2912a(2) required a plaintiff " 'to show that, had the defendant not been negligent, there was a greater than fifty percent chance of survival or a better result.' "[61] This interpretation essentially rewrote the second sentence of § 2912a(2) to include the following bracketed word: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or

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[59] *Fulton*, 253 Mich App at 83.

[60] *Stone*, 482 Mich at 159 n 9 (opinion by TAYLOR, C.J.).

[61] *Fulton*, 253 Mich App at 91 (SMOLENSKI, J., dissenting), quoting *Wickens v Oakwood Healthcare Sys*, 242 Mich App 385, 392; 619 NW2d 7 (2000). The published Court of Appeals decision in *Wickens* was not controlling in *Fulton* because this Court had already reversed in part and vacated in part that published decision. *Wickens*, 465 Mich at 62.

an opportunity to achieve a better result unless the [initial] opportunity was greater than 50%."

Thus, both the majority and the dissent in *Fulton* inserted additional words into the statute. Their reasons for doing so were identical: each believed the additional language was necessary to enforce the perceived legislative intent to respond to the *Falcon* Court's creation of the lost opportunity claim. However, these multiple interpretations show that, even if they were correct that the amendment was a legislative response to *Falcon*, the scope of such response was far from clear.

In the end, the lead opinion in *Stone* concluded:

> It is confounding to attempt to ascertain just what the Legislature was trying to do with this amendment. . . .
>
> As written, the second sentence of MCL 600.2912a(2) can be made understandable only by adding words or by redefining "injury" in a way significantly contrary to the mass of caselaw at the time the sentence was added. . . . None of these multiple, contradictory interpretations can be shown to be the "correct" construction of legislative intent. Choosing between them can only be a guess. . . . Accordingly, I conclude that the second sentence of subsection 2 cannot be judicially enforced because doing so *requires* the Court to impose its own prerogative on an act of the Legislature.[62]

Since this Court's split opinions in *Stone*, the Legislature has not clarified the confusion surrounding the appropriate interpretation of MCL 600.2912a(2). Therefore, my position remains that the provision is unenforceable as enacted.

The decision by the new majority that this case represents a traditional medical malpractice case further muddles this important area of the law. Moreover,

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[62] *Stone*, 482 Mich at 160-161 (opinion by TAYLOR, C.J.).

three justices of the new majority have changed their published positions over the past several years on the nature of the evidence required to prove proximate cause.

If the numerous fractured decisions and inconsistent opinions of the members of this Court fail to demonstrate that this statute is impossible to interpret reasonably, then it is hard to envision a better illustration that MCL 600.2912a(2) is inherently internally inconsistent and cannot be parsed.

IV. CONCLUSION

Confusion and uncertainty in the law prevent citizens from arranging their affairs in a predictable fashion. This Court initially created uncertainty in adopting the lost opportunity claim in *Falcon* because it was so profoundly at odds with traditional principles of causation. It is no wonder that the Legislature had difficulty reconciling "*Falcon* causation" with the traditional causation that the Legislature clearly desired to maintain in medical malpractice claims. Today, the new majority has created even more uncertainty in interpreting the legislative response to *Falcon*. While the result in this case undoubtedly serves the interests of lawyers who litigate medical malpractice cases, it poorly serves the people of this state to have the law become even more incomprehensibly muddled. This is not an accidental act, but one intentionally designed to thwart the legislative directive that the plaintiff prove the traditional requirement of proximate cause in *every* "action alleging medical malpractice . . . ."[63] Judges, as neutral arbiters whose function is merely to interpret the laws

[63] MCL 600.2912a(2).

enacted through the democratic process, should not be agents of "societal change" they desire, and they certainly should not contribute to confusion and chaos in the law. The new majority's resolution of this case fails on both counts.

Plaintiff's claim is a prototypical lost opportunity claim. As such, the second sentence of MCL 600.2912a(2) expressly controls plaintiff's claim. However, I continue to maintain that § 2912a(2) is unenforceable as enacted, and I reiterate former Chief Justice TAYLOR's call for the Legislature "to reexamine its goal and the policies it wishes to promote and strive to better articulate its intent in that regard."[64] Today, that call is more urgent than it was just two years ago.

Today is a sad day for predictability in Michigan law. The disorder sown by the new majority in their several opinions speaks poorly of the quality of decision-making in this Court. Doctrinal destruction aside, the obvious manipulation of the statistical evidence by the justices of the new majority to achieve their goal of creating a cause of action when the proofs have failed is itself worthy of condemnation.

For all of the reasons stated, I vigorously dissent from overreaching by the new majority and, instead, would vacate as improvidently entered this Court's September 30, 2009, order granting leave to appeal.

CORRIGAN, J., concurred with YOUNG, J.

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[64] *Stone*, 482 Mich at 165 (opinion by TAYLOR, C.J.).

PEOPLE v HOUTHOOFD

Docket Nos. 138959 and 138969. Argued March 9, 2010 (Calendar No. 2). Decided July 31, 2010.

Todd K. Houthoofd was convicted in the Saginaw Circuit Court, Lynda L. Heathscott, J., after a jury trial on three separate charges that had been consolidated for trial: obtaining property by false pretenses, MCL 750.218; solicitation to commit murder, MCL 750.157b; and intimidating a witness, MCL 750.122. The false-pretenses charge arose from a 1998 incident in which defendant had used false identification to rent equipment from a store in Saginaw County, then failed to return the equipment. The solicitation charge was based on a claim that, while defendant was in the Arenac County jail on unrelated charges in 2001, he had offered a fellow inmate money to kill the owner of the equipment rental store. The witness-intimidation charge stemmed from an allegation that, after defendant's 2004 false-pretenses trial in Saginaw County ended with a hung jury, defendant had threatened a police detective, who had testified for the prosecution, in a phone conversation shortly before the scheduled retrial. Evidence indicated that defendant was in Bay County at the time while the detective was in Ogemaw County. After the three charges were consolidated for retrial, defendant filed an application for emergency leave to appeal in the Court of Appeals challenging the consolidation, but this application was denied. A jury convicted defendant of all three charges. Defendant appealed all three convictions, arguing, among other things, that Saginaw County was not the proper venue for trial on the charges of witness intimidation or solicitation. The Court of Appeals, BECKERING, P.J., and BORRELLO and DAVIS, JJ., affirmed defendant's convictions for obtaining property by false pretenses and witness intimidation, but reversed his solicitation conviction on the ground that venue was improper in Saginaw County. Unpublished opinion of the Court of Appeals, issued February 3, 2009 (Docket No. 269505). Defendant and the prosecution both filed applications for leave to appeal, which the Supreme Court granted. 485 Mich 858 (2009).

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

Venue was not proper in Saginaw County for defendant's trial with respect to either the charge of solicitation to commit murder or the charge of witness intimidation because neither crime was committed in Saginaw County. However, defendant's convictions are valid because improper venue alone is not a basis for voiding a judgment and, in this case, it constituted harmless error.

1. Generally, a defendant should be tried in the county where the crime was committed unless the Legislature has provided otherwise. MCL 762.8 provides that when a felony consists or is the culmination of two or more acts, venue is proper in any county where one of the acts was committed. In *People v Flaherty*, 165 Mich App 113 (1987), and *People v Fisher*, 220 Mich App 133 (1996), the Court of Appeals interpreted this provision broadly to mean that venue is proper in the place where an act done in perpetration of a felony has its effects. *People v Webbs*, 263 Mich App 531 (2004), properly concluded that this interpretation does not comport with the plain language of the statute. Accordingly, *Flaherty* and *Fisher* are overruled.

2. MCL 762.8 does not apply to this case because neither felony at issue consists or is the culmination of two or more acts. Witness intimidation requires an act of discouraging or attempting to discourage an individual from testifying at a present or future proceeding. Defendant committed this crime when he threatened to harm the detective in a telephone call that originated in Bay County and terminated in Ogemaw County. Solicitation to commit murder requires an offer or promise to give something in exchange for murder. Defendant committed this crime in Arenac County. Accordingly, venue was improper in Saginaw County for both crimes.

3. MCL 769.26 provides that no judgment or verdict shall be set aside or reversed unless it affirmatively appears that the error complained of resulted in a miscarriage of justice. To justify reversing a conviction on the basis of a preserved nonconstitutional error, the defendant has the burden of establishing that the error more probably than not resulted in a miscarriage of justice. With regard to venue, Michigan's constitution requires only that a defendant's constitutional right to a fair and speedy trial before an impartial jury be preserved; it does not require that a jury trial be in the county where the crime occurred. The fact that the Legislature has enacted a statute that allows changes of venue under certain circumstances reinforces the conclusion that venue in the location where the crime was committed is not constitutionally required. In this case, defendant received a fair trial before an impartial jury, and it cannot be argued that there was a miscar-

riage of justice simply because the trial was in Saginaw County. Furthermore, defendant's convictions should not be vacated because the Legislature has provided, in MCL 600.1645, that no order, judgment, or decree is void or voidable solely on the ground of improper venue. Cases holding that convictions must be reversed where venue was not proved beyond a reasonable doubt have been abrogated by this provision and by MCL 769.26.

Justice CORRIGAN, concurring, would further have concluded that, under MCL 600.1645, venue challenges in criminal cases must be resolved through interlocutory appeals, and would consider adopting a court rule or recommending legislative action to codify this point.

Court of Appeals judgment reversed in part; conviction for solicitation to commit murder reinstated; case remanded to the Court of Appeals for further proceedings.

Chief Justice KELLY, dissenting, agreed that MCL 762.8 is inapplicable to defendant's convictions for witness intimidation and solicitation on these facts, that Saginaw County was an improper venue for both these charges, and that *Fisher* and *Flaherty* should be overruled, but dissented from the remainder of the majority opinion. She would affirm the Court of Appeals' judgment vacating defendant's solicitation conviction on a different basis and would vacate defendant's witness-intimidation conviction as required by *People v Hall*, 375 Mich 187 (1965).

Justice CAVANAGH, dissenting, agreed that venue was not proper in Saginaw County for the witness-intimidation and solicitation charges and that *Flaherty* and *Fisher* should be overruled, but disagreed with the remainder of the majority opinion, specifically its extension of the harmless-error analysis to claims of improper venue, its application of MCL 600.1645, and its conclusion that the caselaw requiring the prosecution to prove venue beyond a reasonable doubt has been abrogated by statute.

1. VENUE — CRIMINAL LAW — STATUTORY VENUE — ACTS DONE IN PERPETRATION OF A FELONY.

In a case involving a felony that consists or is the culmination of two or more acts, venue is not proper in a county on the basis that an act that did not occur in that county had effects there (MCL 762.8).

2. VENUE — CRIMINAL LAW — HARMLESS ERROR.

Claims of improper venue are subject to harmless-error analysis and cannot provide the sole basis for reversing a criminal conviction (MCL 600.1645).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *J. Thomas Horiszny* and *Patrick O. Duggan*, Assistant Prosecuting Attorneys, for the people.

Law Offices of Michael Skinner (by *Michael Skinner*) for defendant.

HATHAWAY, J. In this opinion, we address only whether venue was proper in Saginaw County for defendant's trial on charges of solicitation to commit murder and witness intimidation. We conclude that venue was not proper for either charge because neither crime was committed in Saginaw County. However, because improper venue is not a constitutional structural error, this matter is subject to a harmless error analysis under MCL 769.26. In this case, defendant was not deprived of his due process right to a fair trial before an impartial jury and there has been no miscarriage of justice. Moreover, MCL 600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue. Thus, we reverse the Court of Appeals in part and reinstate defendant's conviction for solicitation to commit murder. In addition, we remand to the Court of Appeals for consideration of whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the guidelines when imposing defendant's sentences for the solicitation and witness intimidation convictions. With respect to all other issues raised in the applications for leave, we deny leave to appeal.[1]

[1] In our order granting leave to appeal, we raised an additional issue for the parties to discuss that the trial court and Court of Appeals did not address. We asked the parties to discuss the significance, if any, of defendant's supposed waiver of objection to the joinder of his cases. *People v Houthoofd*, 485 Mich 858 (2009). The prosecution concedes that defendant did not waive this issue.

I. FACTS AND PROCEEDINGS

The facts and proceedings in this case were accurately summarized by the Court of Appeals:

> This case stems from three consolidated, lower court cases involving: obtaining a tractor, tiller, and trailer by false pretenses (LC No. 02-021097-FH); intimidating witness [Michigan State Police] Detective Sergeant Michael VanHorn (LC No. 04-024765-FH); and soliciting Michael Dotson to murder Edward Wurtzel, Jr. (LC No. 05-025865-FH). The cases were consolidated by the trial court and tried together in January and February of 2006.
>
> In April of 1998, a man identifying himself as Colin Francis called a rental equipment store in Saginaw County. The man indicated that he was interested in renting a tractor and tiller. Wurtzel, a co-owner of the store, spoke to the man over the phone and made arrangements for the rental. Wurtzel testified that a few days later, a man appeared at the store to pick up the tractor and tiller. In order to complete the rental agreement, the man produced a driver's license bearing the name "Colin Francis." The tractor, tiller, and trailer used to haul the equipment were not returned to Wurtzel's store. Wurtzel then discovered that Francis was not the man who had rented the equipment. Francis testified that at the time of the rental, he worked with defendant at a General Motors (GM) plant in Bay City, Michigan and had recently lost his driver's license.

The Court of Appeals also did not address defendant's argument that the prosecution violated the rule of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to provide defendant with the name and report of an undercover officer involved in the investigation of the cases. *Brady* held that a defendant is entitled to the disclosure of exculpatory evidence and no intentional suppression of information by the people or police investigators if the undisclosed material would have caused a different result at trial. The trial court evaluated defendant's argument and ruled that the information that defendant claimed was not provided to him did not meet the *Brady* criteria. We agree with the trial court and do not address this issue further.

Detective VanHorn testified that he discovered evidence related to the tractor case in November of 2001. At the time, the detective was investigating a shooting at the home of Jody Meagher. Someone had fired a round of buckshot directly at Meagher and her husband through their window. Meagher informed the investigators, and later testified, that she was a co-worker of defendant's at GM in Bay City, that defendant had been placed on two periods of disciplinary suspension, and that her department was responsible for imposing the suspensions. The shooting occurred during defendant's second suspension. Meagher also indicated that there was a separate, ongoing investigation of defendant involving acts of violence against another GM employee. Defendant had previously worked at a GM plant in Toledo, Ohio. In 1994, GM supervisor Robert Griffith terminated defendant's employment. Shortly thereafter, Griffith was assaulted at his home. Defendant's employment with GM was subsequently reinstated. In 1997, after defendant began working in Bay City, a pipe bomb exploded at Griffith's home.

On the night of the shooting at Meagher's home, defendant was arrested for trespassing on GM property. Upon searching defendant's truck for evidence related to the shooting, Detective VanHorn found two driver's licenses belonging to men other than defendant. The licenses bore the names "Colin Francis" and "Dale White." The detective then learned of the "cold" tractor case. While investigating the Griffith case, the Meagher case, and the tractor case, the detective obtained a search warrant for defendant's home and property in Arenac County. Upon executing the warrant, investigators found Wurtzel's tractor and tiller, two pipe bombs, and reading materials entitled, "How to Outfox the Foxes, 297 Secrets the Law and Lawyers Don't Want You to Know," "The Poisoner's Handbook," and "How to Be Your Own Private Detective." The Arenac County prosecutor subsequently charged defendant with receiving and concealing stolen property based on his possession of Wurtzel's equipment and two counts of possessing illegal explosives. Defendant was incarcerated in the Arenac County jail.

In December of 2001, Detective Sergeant Wilbur Yancer of the Saginaw County Sheriff's Department became aware of the developments in the tractor case and arranged for an "in-custody lineup" at the Arenac County jail. At the December 6 lineup, Wurtzel picked defendant out as the man who took his equipment. Later that day, Wurtzel identified defendant's truck. On December 10, the Saginaw County prosecutor charged defendant with obtaining Wurtzel's property by false pretenses. The Arenac County prosecutor subsequently dropped the charges against defendant in favor of Saginaw County proceeding with its false pretenses case. Defendant remained in the Arenac County jail until January of 2002.

During his time in the Arenac County jail, defendant met Dotson, a fellow prisoner. Dotson testified that two or three days after the December 6 lineup, defendant offered him money to shoot out the windows of a Bay City house and to kill Wurtzel at his rental equipment store in Saginaw County. Over the course of several conversations, defendant gave Dotson the details of his plan and a copy of a police report listing Wurtzel's name and business address. Dotson initially agreed to the plan, although he testified that he never intended to carry it out, and told defendant that a man named Chucky could assist with the Bay City shooting.

At some point in December of 2001, or early 2002, Dotson told his girlfriend Sandra Faulman and one of Faulman's relatives about defendant's "murder-for-hire" scheme. In March of 2002, Faulman's relative conveyed the information to Trooper James Moore. Thereafter, Trooper Moore and Detective VanHorn met with Dotson at the Arenac County jail, and Dotson agreed to cooperate with their investigation. Upon searching Faulman's home, the officers recovered the police report listing Wurtzel's name and business address. They then arranged for Detective Sergeant William Eberhardt, posing as Chucky, to make contact with defendant. Investigators also arranged for Dotson to talk to defendant over the phone. During Dotson's recorded phone conversation with defendant, they discussed "the shit in Bay City," money that defendant

owed Dotson, Chucky, and Wurtzel picking defendant out of a lineup in the tractor case. When Dotson asked if they were going to do anything about Wurtzel, defendant said, "Nah, nah, no, I, I got a real good case. . . . [M]y lawyer will pick [Wurtzel's] fucking wings off." Defendant then stated that he thought the phone might be bugged.

Defendant was first tried for obtaining Wurtzel's property by false pretenses in February and March of 2004 in Saginaw County. During the trial, Detective VanHorn, Francis, and Wurtzel, among several others, testified for the prosecution. Defendant testified that he purchased the tractor and tiller in 1999 from Denny VanHaaren at Delta College where Denny was a bricklayer. Defendant presented a receipt from the transaction, and it was undisputed that Wurtzel's trailer was recovered at Delta College. Defendant further testified that he found Francis[']s and White's driver's licenses in the tractor after purchasing it from Denny. The trial ended in a hung jury, and the case was scheduled for retrial on June 29, 2004. Detective VanHorn later testified that during the trial, he saw defendant in the hall and defendant said, "Fuck off VanHorn, fuck off."

On June 21, 2004, just eight days before the scheduled retrial, Detective VanHorn received a page from a phone number he did not recognize. The detective testified that he called the number and initiated a conversation, saying, "Somebody paged me from this number." The recipient of the call responded, "Yeah." When the detective then identified himself, the recipient said, "Never mind all that. I want to let you know I saw you in court last week, and I want to let you know that I know where you live, motherfucker." According to the detective, he recognized the recipient's voice almost immediately and believed that it was defendant. The detective also believed that defendant "was letting [him] know that there was no doubt that he was going to kill [him], attempt to kill [him], or harm [his] family," and that "it was just a matter of time."

A phone company representative testified that the cell phone used to call Detective VanHorn's pager on June 21 belonged to Brandean Rinness, but Rinness testified that she lost the phone in early June. According to the phone

records, the call originated in Bay County and terminated in Ogemaw County. The same cell phone was used to call the GM call center, defendant's girlfriend Roberta Haertel, a restaurant located on the same street that Haertel lived on, and another person associated with Haertel.

On June 24, 2004, the Saginaw County prosecutor charged defendant with intimidating a witness and obstructing justice, based on the statements made to Detective VanHorn over the phone. Defendant then moved to adjourn the retrial of the tractor case. The prosecution stipulated to the adjournment, indicating that it intended to use the facts of the intimidation case and the solicitation case as evidence of consciousness of guilt in the retrial of the tractor case.

In July of 2004, Detective VanHorn received a call on his cell phone. During the call, he heard a male voice that he did not recognize saying over and over, "I know where you live motherfucker." The call originated from a pay phone in Bay County and occurred while defendant was in Saginaw County jail. Detective VanHorn testified that the caller could have been James Franklin, a man he had previously testified against. Defendant's first trial attorney, Matthew Reyes, testified that he had represented Franklin in a number of cases and believed that Franklin could have made the call to Detective VanHorn. At a motion hearing in July of 2005, Reyes testified that he had planned, as a part of his trial strategy in this case, to create a reasonable doubt in the jurors' minds as to the identity of the person who first threatened Detective VanHorn by introducing Franklin as a possible perpetrator.

* * *

. . . The court then ruled that the [tractor and intimidation] cases would be tried separately. The next day, the court granted Reyes' motion to withdraw and the cases were adjourned.

In November of 2004, the prosecution filed a motion for reconsideration and joinder, requesting that [evidence] be admitted in the tractor case and that the tractor and

intimidation cases be consolidated for trial. Defendant opposed the motion. In March of 2005, defendant was charged in Saginaw County with solicitation to commit murder. The trial court then ordered, in August of 2005, to consolidate the tractor case, the intimidation case, and the solicitation case for trial, primarily as a matter of judicial economy. The court further indicated that it would reconsider the admission of [evidence].

* * *

On December 28, 2005, defendant filed an application for emergency leave to appeal in this Court, along with motions for immediate consideration and stay of proceedings. Defendant argued that the trial court erred in consolidating the three lower court cases for trial and denying his motions to exclude the [evidence]. We granted defendant's motion for immediate consideration, but denied his application for leave to appeal and motion for stay. *People v Houthoofd*, unpublished order of the Court of Appeals, entered December 29, 2005 (Docket No. 267348).

The consolidated trial commenced on January 5, 2006, and concluded on February 13, 2006. After the prosecution rested, defendant moved for directed verdict in all three cases, and the trial court denied the motions. The jury convicted defendant of obtaining property by false pretenses, solicitation to commit murder, and witness intimidation involving a threat to kill, injure, or damage property or malicious use of a telephone.

Following trial, defendant moved for dismissal, new trial, and judgment notwithstanding the verdict. The trial court subsequently denied the motions. . . .

The trial court sentenced defendant to prison terms of five to ten years for the false pretenses conviction, and ten to 15 years for the intimidation conviction. The court exceeded the guidelines for the solicitation to commit murder conviction, sentencing defendant to 40 to 60 years imprisonment.

Defendant filed a claim of appeal in [the Court of Appeals] in April of 2006. In August of 2006, defendant

> filed an untimely motion to remand for an evidentiary hearing. Defendant argued that his trial counsel was ineffective for failing to move to dismiss for improper venue and failing to object to numerous instances of prosecutorial misconduct. He further argued that a previously unknown witness, Detective Eberhardt, could offer potentially exculpatory testimony. [The Court of Appeals] initially denied defendant's motion to remand, *People v Houthoofd*, unpublished order of the Court of Appeals, entered September 12, 2007 (Docket No. 269505), but later granted his motion for reconsideration and remanded "to the trial court so that defendant-appellant [could] file, within 14 days, a motion for new trial," *People v Houthoofd*, unpublished order of the Court of Appeals, entered October 16, 2007 (Docket No. 269505).
>
> On remand, defendant moved for dismissal and new trial. The trial court held hearings on defendant's motion in November of 2007 and January of 2008. On April 9, 2008, the trial court issued a lengthy written opinion and order denying defendant's motion for new trial. The court found that defendant's motion for dismissal exceeded the scope of the remand order.[2]

Defendant appealed as of right to the Court of Appeals alleging that venue was improper, the trial court committed evidentiary errors, and there was prosecutorial misconduct. In an unpublished per curiam opinion, the Court of Appeals vacated defendant's conviction for solicitation to commit murder on the basis of improper venue. The Court affirmed defendant's remaining convictions and sentences.

Defendant and the prosecution, in separate applications, have applied for leave to appeal in this Court. We granted leave to appeal on both applications and asked the parties to include among the issues to be briefed:

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[2] *People v Houthoofd*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 269505), pp 1-6.

> whether venue was properly laid in Saginaw County with respect to the defendant's solicitation to commit murder and witness intimidation charges, whether the defendant is entitled to retrial on the false pretenses and witness intimidation charges in the event that his conviction for solicitation to commit murder is not reinstated, and the relevance, if any, of the defendant's statement to the trial court, over his counsel's objection, that he wanted the cases tried together.[3]

In this opinion, we address only whether venue was proper in Saginaw County for trial on the charges of solicitation to commit murder and witness intimidation.

II. STANDARD OF REVIEW

A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo.[4] This case also presents issues of statutory interpretation, which are reviewed de novo.[5]

III. ANALYSIS

The general venue rule is that defendants should be tried in the county where the crime was committed.[6] "[E]xcept as the legislature for the furtherance of justice has otherwise provided reasonably and within the requirements of due process, the trial should be by a jury of the county or city where the offense was committed."[7]

Defendant argues that Saginaw County was not the proper venue for prosecution of the charges of witness

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[3] *People v Houthoofd*, 485 Mich 858 (2009).

[4] *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996).

[5] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[6] *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997).

[7] *People v Lee*, 334 Mich 217, 226; 54 NW2d 305 (1952).

intimidation and solicitation to commit murder because all the acts done in perpetration of those offenses occurred in other counties. The prosecution argues that venue was proper in Saginaw County for both charges. The parties and the Court of Appeals assume that MCL 762.8, rather than the general venue rule, is the applicable rule in this case. MCL 762.8 provides:

> Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed.

Applying MCL 762.8, the Court of Appeals concluded that venue was properly established in Saginaw County as to the intimidation charge, but not the solicitation charge.

Thus, we must examine MCL 762.8 to determine whether venue was proper in Saginaw County as the prosecution alleges. In interpreting statutes, we follow established rules of statutory construction. Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[8] Accordingly, the Court must interpret the language of a statute in a manner which is consistent with the legislative intent.[9] In determining the legislative intent, we must first look to the actual language of the statute.[10] As far as possible, effect should be given to every phrase, clause, and word in the statute.[11] Moreover, the statutory language must be read and understood in its

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[8] *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[9] *Potter*, 484 Mich at 411.

[10] *Id.* at 410.

[11] *Sun Valley*, 460 Mich at 237.

grammatical context.[12] When considering the correct interpretation, a statute must be read as a whole.[13] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[14] In defining particular words within a statute, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.[15]

In *People v Flaherty*[16] and *People v Fisher*,[17] the Court of Appeals interpreted MCL 762.8 broadly and ruled that when an act done in perpetration of a felony has effects elsewhere that are essential to the offense, venue is proper in the place where the act has its effects. In the present case, the Court of Appeals summarized the facts and holdings in *Flaherty* and *Fisher*:

> In *Flaherty*, the defendant was charged in St. Clair County with larceny by false pretenses. *Flaherty*, [165 Mich App] at 116, 119. The defendant owned an insurance agency located in Macomb County, and defrauded a general insurance agency located in St. Clair County by accepting payment for an insurance policy that was never issued. *Id*. at 117, 119. The larceny was accomplished through a series of mail and telephone communications across county lines. *Id*. at 119. The *Flaherty* Court found that some of the defendant's "communication 'acts' " had effects in St. Clair County. *Id*. Specifically, the defendant's acts of placing a cover note and invoice in the mail and sending it to St. Clair County induced the general agency to authorize an invoice and mail payment to the defendant. *Id*. Noting that

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[12] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[13] *Sun Valley*, 460 Mich at 237.

[14] *Herman*, 481 Mich at 366.

[15] *Id.*, quoting *Sun Valley*, 480 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[16] *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987).

[17] *People v Fisher*, 220 Mich App 133; 559 NW2d 318 (1996).

"detrimental reliance by the victim on the [defendant's] false representation" is an essential element of larceny by false pretenses, the *Flaherty* Court concluded that although the defendant was physically present in Macomb County, the "effective false representation occurred in St. Clair County." *Id*. Thus, venue was properly established in St. Clair County. *Id*.

In *Fisher*, the defendant was charged in Wayne County with inciting perjury and attempted obstruction of justice. *Fisher*, [220 Mich App] at 135. The defendant had previously been convicted in Wayne County of murdering his wife and, pending an appeal of that conviction, was imprisoned in Jackson County. *Id*. at 135-136. While in prison, the defendant asked a prison mate to swear to a false affidavit and claim that he, not the defendant, had committed the crime for which the defendant had been convicted. *Id*. The *Fisher* Court noted that the defendant's acts were intended to affect the proceedings pending in Wayne County and that the charge of attempted obstruction of justice required proof that defendant committed an act with the intent "to hinder the due course of justice in the case pending in Wayne County." *Id*. at 149, 152. See *People v Milstead*, 250 Mich App 391, 405; 648 NW2d 648 (2002) (stating that obstruction of justice is generally defined as "an interference with the orderly administration of justice," "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein," or an "effort . . . to thwart or impede the administration of justice"). After examining federal case law holding that in obstruction of justice cases, "venue is proper in the district where the proceeding affected is pending," other states' decisions regarding offenses such as tampering with a witness, and this Court's reasoning in *Flaherty*, the *Fisher* Court concluded that, while MCL 762.8 does not use the words "effects" or "results," an "act that has effects elsewhere that are essential to the offense is, in effect, committed in the place where the act has its effects," and therefore that venue was properly established in Wayne County as to the attempted obstruction of justice charge. *Fisher*, [220 Mich App] at 146-150, 152. The defendant

> conceded that if Wayne County was the proper venue for prosecution of the attempted obstruction of justice charge, it was also the proper venue for the inciting perjury charge because both charges arose out of the same transaction. *Id.* at 143-144 n 1.[18]

In *People v Webbs*,[19] the Court of Appeals narrowed the holdings of *Flaherty* and *Fisher* and stated that "the plain language of MCL 762.8 requires an act to be done in the perpetration of the felony without regard to where the effects of the crime are felt . . . ."[20] In *Webbs*, the defendant was charged in Grand Traverse County with larceny by false pretenses; however, all of the acts done in perpetration of the offense took place in Wayne County.[21] The defendant falsely identified himself as James Hardy and applied for and received a loan in Wayne County. Hardy, a resident of Grand Traverse County, claimed that the defendant's acts affected him in his home county where he had to deal with the effects of the identity theft. The *Webbs* court ruled that the statute mandates that the crime be prosecuted in the county where the acts to perpetrate the felony were committed. The Court reasoned that since none of the acts were committed in Grand Traverse County, venue was not proper in that county. *Webbs* criticized the "effects" analysis of *Flaherty* and *Fisher*, commenting that the holding that venue is proper where the effects of the acts committed are felt does not comport with the plain language of the statute.

We agree with the *Webbs* analysis of MCL 762.8, and overrule the "effects" analysis of *Flaherty* and *Fisher*. MCL 762.8 is unambiguous and clearly provides that

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[18] *Houthoofd*, unpub op at 7-8.

[19] *People v Webbs*, 263 Mich App 531; 689 NW2d 163 (2004).

[20] *Id.* at 534.

[21] *Id*. at 532.

when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the acts was committed. The statute does not contemplate venue for prosecution in places where the effects of the act are felt, and we decline to extend the application of MCL 762.8 beyond the scope provided for in the statute.

Although the Court of Appeals decided this case under MCL 762.8, neither felony at issue here "consists or is the culmination of two or more acts . . . ." The crime of solicitation to commit murder requires the act of offering to give, promising to give, or giving anything of value in exchange for murder. MCL 750.157b.[22] The crime of witness intimidation, as it applies to the facts of this case, requires the act of discouraging or attempting to discourage an individual from testifying at a present or future official proceeding.[23] Nonetheless, our

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[22] The solicitation to commit murder statute, MCL 750.157b, provides in relevant part:

> (1) For purposes of this section, "solicit" means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.
>
> (2) A person who solicits another person to commit murder, or who solicits another person to do or omit to do an act which if completed would constitute murder, is guilty of a felony punishable by imprisonment for life or any term of years.

[23] The witness intimidation statute, MCL 750.122, provides in relevant part:

> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.

holding concerning the MCL 762.8 caselaw applies equally here: it is the *act* that constitutes the felony—rather than its effects—that gives rise to venue.

Defendant committed the crime of witness intimidation when he threatened to harm Detective VanHorn or his family if VanHorn testified at defendant's trial. VanHorn testified that on June 21, 2004, as he was leaving his Michigan State Police post in Ogemaw County, he received a page from a number he did not recognize. He used his state-issued cell phone to return the call. The person who answered, whom VanHorn recognized as defendant, made a threatening statement. Phone records obtained to investigate the threatening phone call revealed that the call was made from a cell phone. A representative from the cell phone company testified that the particular call originated in Bay County and terminated in Ogemaw County. The representative also testified that none of the calls she had been asked about originated or terminated in Saginaw County. Thus, the trial testimony established that VanHorn was in Ogemaw County and defendant was in Bay County when defendant threatened VanHorn. Neither

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(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

* * *

(7) A person who violates this section is guilty of a crime as follows:

* * *

(c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both.

defendant nor VanHorn was in Saginaw County when defendant, "by threat or intimidation," "[d]iscourage[d] or attempt[ed] to discourage" VanHorn from testifying at defendant's trial. MCL 750.122(3)(a). Defendant did not commit the act necessary to complete the crime of witness intimidation, threatening the detective, in Saginaw County. As established by the phone records, the act could be said to have been committed in Bay County, where the call was placed, or Ogemaw County, where the call was received, but not in Saginaw County. Accordingly, venue was improper in Saginaw County.

As for the solicitation charge, the evidence establishes that defendant solicited a fellow jail inmate, Dotson, to murder Wurtzel, a witness in the false pretenses case against him. The offer and promise to give money in exchange for the murder occurred while both defendant and Dotson were in the Arenac County jail. Thus, the act required for the crime of solicitation to commit murder, the offer or promise to give something of value for murder, occurred in Arenac County, and venue for the charge of that crime was not proper in Saginaw County.

Because venue was not proper in Saginaw County for the charge of either witness intimidation or solicitation to commit murder, we next consider whether statutory venue error in criminal prosecutions is subject to a harmless error analysis under MCL 769.26. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In analyzing the application of MCL 769.26, this Court has held that, for preserved nonconstitutional errors, the defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard in order to justify reversing a conviction.[24] An error is outcome-determinative if it undermines the reliability of the verdict.[25] For preserved constitutional errors, if the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.[26] A structural error, however, is a fundamental constitutional error that defies a harmless error analysis.[27]

In this case, defendant preserved the venue error. In order to apply the harmless error analysis of MCL 769.26, we must first examine whether statutory venue error is a constitutional error in order to determine the applicable standard of review. In *People v Lee*[28] this Court recognized that "[i]n the absence of any limitation by constitutional provision, it seems to be generally recognized that the power of a State legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted."[29] The *Lee* Court was evaluating the constitutionality of MCL 762.8, and concluded that the statute was constitutional because the defendant's constitutional right to a speedy trial by an impartial jury was maintained. The Court noted that there was no

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

[25] *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

[26] *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

[27] *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008).

[28] *People v Lee*, 334 Mich 217; 54 NW2d 305 (1952).

[29] *Id*. at 225 (citation and quotation marks omitted).

explicit venue mandate in the Michigan Constitution of 1908. In contrast, Michigan's prior constitution, the Michigan Constitution of 1835, did contain such a provision in article 1, § 10, which stated that "[i]n all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage . . . ." The corresponding provision in the Constitution of 1850, art 6, § 28, omitted the words "of the vicinage" qualifying a jury to try a criminal case, and this omission carried over to the 1908 and 1963 Constitutions.[30] Thus, Michigan's constitution only requires that a defendant's constitutional right to a fair and speedy trial before an impartial jury be preserved, and does not require that the jury trial be in the county where the crime occurred; as a result, statutory venue error is not a constitutional error.[31]

The Legislature has taken advantage of this latitude regarding venue to enact statutes designed to preserve a defendant's right to a fair trial. For example, MCL 762.7 allows a change of venue in criminal prosecutions upon good cause shown by either party.[32] This statute

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[30] See Const 1908, art 2, § 19, and Const 1963, art 1, § 20.

[31] Traditionally, venue rules have served to ensure that proceedings are held in the most convenient forum. *Webbs*, 263 Mich App at 533. Convenience is evaluated in terms of interests of the parties and relevant witnesses. *Id*. However, in determining a convenient forum, the primary goal is to minimize the costs of litigation, not only by reducing the burdens on the parties, but also by considering the strains on the system as a whole. *Id*. Determining proper venue should only concern the selection of a fair and convenient location where the merits of a dispute can be adjudicated. *Id*. Thus, venue is a matter of procedure in courts, and will not be a basis for setting aside or reversing a verdict unless the venue error resulted in a miscarriage of justice.

[32] MCL 762.7 provides:

> Each court of record having jurisdiction of criminal cases upon good cause shown by either party may change the venue in any cause pending therein, and direct the issue to be tried in the circuit

has been utilized to change venue in cases where pretrial publicity in a locality is so rampant as to make a fair jury selection in the locality difficult. Although the prosecution in the present case did not establish venue under this statute, the existence of the statute reinforces our conclusion that venue in the location where the crime was committed is not constitutionally required.

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court of another county, and make all necessary rules and orders for the certifying and removing [of] such cause, and all matters relating thereto, to the court in which such issue shall be ordered to be tried, and the court to which such cause shall be so removed shall proceed to hear, try and determine the same, and execution may thereupon be had in the same manner as if the same had been prosecuted in the court having original jurisdiction of such cause, except that in all causes when the defendant shall be convicted and be sentenced to imprisonment in the county jail or to pay a fine, or to both such imprisonment and fine, the court awarding such sentence shall have authority to direct and shall direct that the defendant be imprisoned in the county jail of the county in which such prosecution commenced; and that such fine, when paid, shall be paid over to the county treasurer of the county in which such prosecution commenced, in the same manner as is now provided by law for paying over fines to county treasurers; and in every case where a change of venue is ordered, all expenses of such trial shall be a charge upon the county in which the prosecution originated; and when there shall be a disagreement of the jury on the trial of any criminal cause in the circuit court to which such cause was ordered for trial, the circuit judge before whom the same was tried, if he shall deem that the public good requires the same, may, upon cause shown by either party, order and direct the issue to be tried in the circuit court of another county in the state; and the court to which such cause shall be removed shall proceed to hear, try and determine the same in the same manner and with like effect as was pursued by the circuit court making such order: Provided, That in any and all suits, proceedings, causes or actions now pending in any of the circuit courts of this state, whether the court has general or special jurisdiction, a change of venue may be had in the manner provided and in accordance with section 10 of Act No. 157 of the Public Acts of 1851, as amended by Act No. 309 of the Public Acts of 1905 and the provisions of said act shall be continued in full force and effect for such purpose: Provided further, That in all suits, proceedings, causes or actions in which a change of venue has been granted, the court to which such suit, proceeding, cause or action has been transferred, shall retain jurisdiction.

This Court has held that the standard of review for preserved nonconstitutional error places the burden on the defendant to establish a miscarriage of justice under a "more probable than not" standard in order to warrant reversal.[33] This generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.[34] Defendant has not established prejudice for the witness intimidation or solicitation charges. With respect to the witness intimidation charge, defendant has proffered no argument that it is more probable than not that the outcome of the trial would have been different had he been prosecuted in another county, nor has he shown that he was deprived of a fair trial by an impartial jury. With respect to the solicitation charge, defendant argues that he was prejudiced because the prosecutors in Arenac County had declined to prosecute him on that charge. However, this is not the same as arguing that it is more probable than not that the outcome of the case would have differed had he been tried in Arenac County. MCL 769.26 requires a miscarriage of justice in order to warrant reversal. Defendant received a fair trial before an impartial jury, and it cannot be argued that there was a miscarriage of justice simply because the trial was in Saginaw County. Therefore, defendant has not met his burden of proof to establish that, more probably than not, there was a miscarriage of justice by trying him for witness intimidation and solicitation to commit murder in Saginaw County. Thus, we hold that lack of proper venue is subject to a harmless error analysis and that the venue error did not undermine the reliability of the verdicts. Accordingly, defendant did not suffer a miscar-

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[33] *Lukity*, 460 Mich 484 at 495-496; *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

[34] *Carines*, 460 Mich at 763.

riage of justice and his convictions for witness intimidation and solicitation to commit murder should not be vacated.

Moreover, defendant's convictions should not be vacated because the Legislature has provided, in MCL 600.1645, that "[n]o order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." This provision of the Revised Judicature Act (RJA) is applicable to criminal proceedings as recognized by the title of the act, which provides that the RJA is applicable to "pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts . . . ." This Court has also recognized that the RJA can be applicable to criminal proceedings and procedure.[35] Because criminal venue is inherently procedural in nature,[36] MCL 600.1645 applies.[37] Thus, defendant's convictions cannot be vacated solely on grounds of improper venue.[38]

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[35] *People v Milton*, 393 Mich 234; 224 NW2d 266 (1974).

[36] *Webbs*, 263 Mich App at 533.

[37] We disagree with the argument that MCL 600.8312(5) suggests that MCL 600.1645 does not apply to criminal cases. First, MCL 600.8312(5) is located in the section of the RJA addressing district courts, and the statute as a whole addresses venue for district court cases, not circuit court cases. Moreover, MCL 600.1645 does not purport in any way to determine what particular venue would attach to a case. Thus, MCL 600.8312(5) does not bar this Court, implicitly or otherwise, from citing MCL 600.1645 as an alternative basis for its decision to uphold defendant's circuit court convictions.

[38] MCL 769.26 and MCL 600.1645 both deal with the result of a procedural error in proceedings, the former with general procedural errors, and the latter with specific venue errors. Both mandate that a procedural error shall not result in a judgment or verdict being set aside or reversed. MCL 769.26 qualifies that a procedural error can only lead to a judgment or verdict being set aside or reversed if there is a miscarriage of justice. MCL 600.1645, on the other hand, does not contain a similar clause; rather, the statute does mandate that no judgment be void or voidable solely on the ground that there was improper venue. Venue is

Finally, we note that early Michigan caselaw required that a conviction be reversed and the case remanded for a new trial where venue was not proved beyond a reasonable doubt. See *People v Jackzo*, 206 Mich 183; 172 NW 557 (1919), *People v Warner*, 201 Mich 547; 167 NW 878 (1918), and *People v Ayers*, 182 Mich 241; 148 NW 383 (1914). However, these cases were decided before the Legislature's adoption of both MCL 769.26 (adopted in 1927) and MCL 600.1645 (adopted in 1961; effective in 1963). As previously noted, it is within the purview of the Legislature to adopt rules governing venue as long as constitutional mandates are met.[39] Michigan's Constitution does not have a specific venue requirement, and as long as other constitutional mandates are upheld, the legislative changes to Michigan venue law control. As a result, the early Michigan caselaw requiring that a conviction be reversed and the case remanded for a new trial because of improper venue has been abrogated by statute and is no longer applicable.

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strictly procedural in nature and does not pertain to a court's jurisdiction over a case. As the Committee Comment to chapter 16 of the RJA (Venue) states, the Legislature specifically adopted provisions to separate jurisdiction issues from venue issues, and indicated that venue is a matter of convenience that is governed by logic and sound policy considerations. Thus, improper venue alone does not necessarily result in a miscarriage of justice because matters of venue are matters of convenience. However, if an improper venue choice led to other more serious errors, such as deprivation of a defendant's right to due process or trial by a fair and impartial jury, the alleged errors would not "solely" be for improper venue, and MCL 600.1645 would not apply.

MCL 600.1645 is also consistent with MCL 767.45(1)(c), which provides in relevant part that "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." This provision governs a defendant's claim that the prosecution failed to prove venue at trial, rather than a claim that venue was improper.

[39] *Lee*, 334 Mich at 226.

The dissents cite *People v Raymond Hall*, 375 Mich 187; 134 NW2d 173 (1965) as an example of post-1927 caselaw that requires a conviction to be reversed because of improper venue. However, reliance on *Hall* for this proposition is flawed for two reasons. First, *Hall* concluded that the "proceedings before the magistrate were fatally defective" and that "[t]he motion to quash should have been granted" based solely on the holding in *Jackzo*.[40] *Hall* did not independently determine that a venue error must lead to reversal and did not mention MCL 769.26. As previously discussed, reliance on *Jackzo* to reverse a conviction on the basis of improper venue is flawed because this holding has been abrogated by statute and is no longer applicable. As a result, reliance on *Hall* for this proposition is also error. Second, since *Hall* was decided, this Court has held "that error at the preliminary examination stage should be examined under a harmless error analysis."[41] This principle applies to alleged venue errors and automatic reversal because of improper venue is unwarranted.

IV. CONCLUSION

In this opinion, we address only whether venue was proper in Saginaw County for defendant's solicitation to commit murder and witness intimidation charges. We conclude that venue was not proper for either charge because neither crime was committed in Saginaw County. However, because a venue error is not a constitutional structural error, this matter is subject to a harmless error analysis under MCL 769.26. In this case, defendant was not deprived of his due process right to a fair trial before an impartial jury and there has been no miscarriage of justice. Moreover, MCL

[40] *Hall*, 375 Mich at 192.

[41] *People v Lisa Hall*, 435 Mich 599, 602; 460 NW2d 520 (1990).

600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue. Thus, we reverse the Court of Appeals in part and reinstate defendant's conviction for solicitation to commit murder. We remand to the Court of Appeals for consideration of whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the sentencing guidelines when imposing defendant's solicitation and witness intimidation convictions. With respect to all other issues raised in the applications for leave, we deny leave to appeal.

WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with HATHAWAY, J.

CORRIGAN, J. (*concurring*). I join the majority opinion in full. I would further conclude that, under MCL 600.1645, venue challenges in criminal cases must be resolved through interlocutory appeals. A criminal defendant should not be permitted to seek to overturn a verdict on the sole basis that the trial was held in an improper venue. I urge my colleagues to consider adopting a court rule or recommending legislative action to clarify this currently uncertain aspect of criminal procedure.

MCL 600.1645 provides that "[n]o order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." In *Grebner v Clinton Charter Twp*,[1] the Court of Appeals rejected the defendants' argument that the trial court erred in denying their motion for change of venue. It concluded that the issue was moot in light of MCL 600.1645 and held that "[t]he proper manner in which to raise this issue is an

[1] 216 Mich App 736, 744-745; 550 NW2d 265 (1996).

interlocutory appeal from the order denying the motion for a change of venue."[2] In *Gross v Gen Motors Corp*, the Court of Appeals had stated previously:

> To require plaintiff to raise the issue following a trial in the Washtenaw Circuit Court would effectively deny plaintiff the opportunity to have a resolution on the merits of whether the original change of venue was proper. Effective appellate review of a venue ruling can be granted only from an appeal from an interlocutory order because MCL 600.1645 precludes appellate relief based solely upon improper venue. [*Gross v Gen Motors Corp*, 199 Mich App 620, 625; 502 NW2d 365 (1993), rev'd on other grounds 448 Mich 147 (1995) (citation omitted).][3]

I would apply this sound caselaw clarifying the procedure in civil cases to criminal cases generally and to this case. A criminal defendant who objects to the prosecution's choice of venue should be required to challenge venue through an interlocutory appeal. As the majority opinion explains, a venue error is neither jurisdictional nor constitutional. Accordingly, no verdict in any case should be overturned solely on the ground that the trial was held in an improper venue.[4]

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[2] *Id*. at 744, citing *Gross v Gen Motors Corp*, 199 Mich App 620, 625; 502 NW2d 365 (1993), rev'd on other grounds 448 Mich 147 (1995).

[3] Defendant sought an interlocutory appeal in the Court of Appeals in this case but did not raise the venue issue. He argued that the trial court erred in consolidating the three lower court cases for trial and denying his motions to exclude various items of evidence referred to as the "kitchen sink material." The Court of Appeals granted defendant's motion for immediate consideration, but denied his application for leave to appeal and motion for stay. *People v Houthoofd*, unpublished order of the Court of Appeals, entered December 29, 2005 (Docket No. 267348).

[4] Chief Justice KELLY argues that "[b]y explicitly stating [in MCL 600.8312(5)] that MCL 600.1645 applies to venue in civil actions, the Legislature has implicitly indicated that it does not apply in criminal cases." MCL 600.8312(5) states that "[v]enue in civil actions . . . shall be governed by sections 1601 to 1659 . . . ." In my view, this language does not preclude the application of MCL 600.1645 to a criminal action,

Finally, this case illustrates the need for legislation or a court rule that specifically addresses criminal venue challenges. I would consider adopting a court rule or recommending legislation to codify the rule in *Grebner* and *Gross* for both civil and criminal proceedings.[5]

KELLY, C.J. (*dissenting*). I agree with the majority that MCL 762.8 is inapplicable to defendant's witness intimidation and solicitation convictions under the facts of this case.[1] I also concur that Saginaw County was an improper venue for both charges and that *People v Flaherty*[2] and *People v Fisher*[3] should be overruled. Finally, I agree with remanding this case to the Court of Appeals for consideration of whether the trial court articulated substantial and compelling reasons for imposing a departure sentence.

However, the remainder of the majority opinion suffers from a fundamental defect. It makes sweeping changes in an important area of the law without considering existing precedent or the ramifications of the changes. I would affirm the Court of Appeals judgment vacating defendant's conviction for solicitation to commit murder but on a somewhat different basis. I would

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particularly given that MCL 600.8312(1) through MCL 600.8312(4) only address where venue is proper in a criminal action; these subsections do not address the consequences of holding a criminal trial in an improper venue.

[5] The Court has opened an administrative file, ADM File No. 2009-24, to address this deficiency in the criminal law as it relates to venue and to consider whether to recommend legislative action.

[1] I do not believe that the crimes of solicitation to commit murder or witness intimidation could never consist of the culmination of two or more acts, making MCL 762.8 applicable. I also do not read the majority opinion to stand for that proposition.

[2] *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987).

[3] *People v Fisher*, 220 Mich App 133; 559 NW2d 318 (1996).

also vacate defendant's conviction for witness intimidation because *People v Raymond Hall*[4] is controlling and requires such a result.

I further dissent from the majority's decisions to apply MCL 769.26 and especially to apply MCL 600.1645 to venue errors in criminal cases. The majority approaches this case as though it is writing on a blank slate rather than dealing with established jurisprudence that suggests different answers from those the majority embraces. Moreover, the majority's reliance on MCL 600.1645 obviates the application of MCL 769.26. Venue errors, harmful or not, are no longer grounds for a new trial.

ANALYSIS

It is well established that a defendant must object to venue before the case is submitted to a jury. If he or she fails to object, improper venue is not a ground for disturbing the defendant's conviction.[5] Courts have frequently invoked MCL 767.45(1)(c) when declining to reverse a defendant's convictions in cases where an objection had not been timely raised.[6] However, when a defendant has preserved a venue objection, courts have granted relief.[7] MCL 767.45(1)(c) provides that the indictment or information charging a defendant shall include:

> That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be set aside or

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[4] *People v Raymond Hall*, 375 Mich 187; 134 NW2d 173 (1965).

[5] MCL 767.45(1)(c). This specific statutory provision was enacted in 1927 but existed in some form well into the 19th century.

[6] See, e.g., *People v Petrosky*, 286 Mich 397, 400-401; 282 NW 191 (1938); *People v Carey*, 36 Mich App 640, 641; 194 NW2d 93 (1971).

[7] *Hall*, 375 Mich at 192; see also *People v Sutton*, 36 Mich App 604, 606-607; 194 NW2d 3 (1971).

> a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

In *Hall*, this Court considered a defendant's appeal from his conviction for escape from prison. A preliminary examination was held, and the defendant was bound over for trial. Before trial, he filed a motion to dismiss, challenging the venue and the jurisdiction of the court. The trial court denied the motion, and the defendant was subsequently convicted.

This Court unanimously vacated his conviction. It concluded that the failure to prove venue at the preliminary examination deprived the circuit court of jurisdiction to conduct the subsequent trial. The *Hall* Court stated:

> Such proof established no venue in Alger county, nor any place else. This want of proof could not be supplied on trial. The proceedings before the magistrate were fatally defective. The motion to quash should have been granted. See *People* v. *Jackzo*, 206 Mich 183, pp 192, 193 [172 NW 557 (1919)].
>
> Our holding here should not be misconstrued as affecting the settled principle that no verdict shall be set aside nor new trial granted for failure to prove that the offense was committed within the jurisdiction of the court. (See *People* v. *Petrosky*, 286 Mich 397 [282 NW 191 (1938)], and CL 1948, § 767.45 (Stat Ann 1954 Rev § 28.985). Nor does it affect the equally settled holding that it is within the discretion of the trial court to reopen a case for the purpose of proving venue. *People* v. *Eger*, 299 Mich 49, 58 [299 NW 803 (1941)]. Both of the foregoing holdings are concerned with the failure to prove venue *upon trial* and the permissible remedies therefor. Here we are concerned with a failure to prove venue *on examination* and a timely motion to quash before trial. As we previously noted the question in this case required disposition before the defendant was

> held to trial. Because the proof on examination was fatally inadequate, and timely motion challenging the binding over was made, the circuit court on the record made in the magistrate proceeding was powerless to hold defendant to trial.[8]

In this case, before trial, defendant filed a timely motion to quash the bindover on the charge of solicitation to commit murder. In his accompanying brief, defense counsel argued that the case was not within the jurisdiction of the court because all the relevant alleged acts occurred in Arenac County, not Saginaw County. Therefore, *Hall* is analogous and is controlling here.[9] Defendant's conviction for solicitation to commit murder must be vacated and the case remanded with instructions to quash the bindover.

Regarding defendant's conviction for witness intimidation, defendant also filed a motion to dismiss this charge before trial. As with the solicitation charge, it was apparent at the time of the preliminary examination that the prosecution failed to offer any evidence to show that venue was proper in Saginaw County. Only under the effects-based analysis of the Court of Appeals decisions in *Flaherty* and *Fisher*, which the majority

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[8] *Hall*, 375 Mich at 192 (emphasis in original).

[9] I do not agree with the majority's attempt to distinguish *Hall* from this case. First, the majority discounts *Hall* because it cited *Jackzo* (which the majority today concludes was abrogated by MCL 769.26 and MCL 600.1645) and did not cite MCL 769.26. This argument makes *Hall* inapplicable only if one accepts without question the majority's underlying premise that MCL 769.26, not MCL 767.45(1)(c), applies here and that MCL 769.26 abrogated *Jackzo*.

The majority also cites a later case, *People v Lisa Hall*, 435 Mich 599; 460 NW2d 520 (1990), for the proposition that "error at the preliminary examination stage should be examined under a harmless error analysis." *Id*. at 602. But the 1990 *Hall* case did not involve venue. It did not cite the earlier *Hall* case that involved a different defendant, and nowhere stated that it applied to all errors at the preliminary examination stage.

overrules, could venue for this offense be proper in Saginaw County.[10] Absent that authority, defendant's conviction on this offense must fail also.

This conclusion is consistent with MCL 767.45(1)(c). MCL 767.45(1)(c) disallows setting aside a verdict or granting a new trial for failure to prove venue unless the accused objects before the case is submitted to the jury. The affirmative inversion of this rule, as past courts have noted, is that when the issue is preserved, verdicts will be set aside if venue is improper or unproven.[11]

THE MAJORITY'S NEW VENUE RULES

The preceding analysis should fully resolve the issue on appeal in this case. But the majority proceeds, explicitly or *sub silentio*, overruling numerous cases and jettisoning venerable jurisprudence in its wake. Consequently, I must explain my disapproval of the new venue rules that the majority creates today.

Because *Hall* controls the outcome of this case, I disagree with the majority's decision to invoke MCL 769.26 and MCL 600.1645. We did not specifically ask the parties to brief whether improperly laid venue can be harmless error. Hence, the parties devoted, *in toto*, 4 out of 198 pages of briefing to the harmless error issue, hardly a comprehensive treatment. Nonetheless, the majority seizes on this issue and summarily concludes that improper venue is subject to a harmless error analysis.

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[10] The prosecution's only argument was that venue was proper in Saginaw County because defendant intimidated the witness to prevent him from testifying in a proceeding in Saginaw County.

[11] I see no basis for distinguishing between allegations that venue was improper and allegations that venue was not proven. In either case, insufficient evidence exists to support venue in the location where the proceedings occurred.

The majority thereby discounts the venue error here by concluding that it was harmless under MCL 769.26 or, alternatively, that MCL 600.1645 prohibits vacating defendant's convictions "solely" on the basis of improper venue. I find the first conclusion unreliable for several reasons and the second wholly without support.

HARMLESS ERROR

The majority recognizes that, for a harmless error analysis to apply to venue errors, it must abolish the requirement that the prosecution prove venue beyond a reasonable doubt. It would be a meaningless exercise to require the prosecution to make such a showing if its failure to succeed would amount to nothing but harmless error.

But in so doing, the majority steamrolls longstanding precedent that requires the prosecution to prove venue beyond a reasonable doubt.[12] It rejects earlier caselaw, arguing that that precedent was abrogated by the Legislature's adoption of MCL 769.26 in 1927 and MCL 600.1645 in 1961.[13]

A more deliberative approach is needed. First, *Hall* and *Sutton*, both decided after enactment of these statutory provisions, constitute strong refutation of the abrogation argument. So too do decades of Court of Appeals caselaw post-dating MCL 769.26 and MCL 600.1645, cases holding that the prosecution must prove venue beyond a reasonable doubt.[14]

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[12] *People v Jackzo*, 206 Mich 183; 172 NW 557 (1919); *People v Warner*, 201 Mich 547; 167 NW 878 (1918); *People v Ayers*, 182 Mich 241; 148 NW 383 (1914).

[13] See *ante* at 592.

[14] *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009); *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004); *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996); *People v Belanger*,

Also to be considered is the language in MCL 767.45(1)(c), which the majority largely dismisses. In addition, the requirement that venue be proven beyond a reasonable doubt is enshrined in our standard jury instructions.[15] The majority implicitly overturns all of this and ignores the other arguments that contradict its conclusion, without so much as acknowledging any of it.[16]

Applying a harmless error analysis to venue errors is also an exercise in futility. As this Court recently asked, "[w]hat is the point . . . if the error is always going to be harmless?"[17] I can imagine few circumstances under which a defendant could demonstrate that it is more probable than not that a venue error was outcome determinative.[18]

Moreover, even if I accepted the majority's decision to analyze venue errors using a harmless error analysis, I would disagree that harmless error occurred in this case. This defendant offers a more compelling argument than most who allege venue errors; he claims that prosecutors in Arenac County specifically declined to prosecute him for solicitation to commit murder. This assertion, if true, would establish that it is more probable than not that the outcome would have been differ-

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120 Mich App 752, 755; 327 NW2d 554 (1982); *People v Plautz*, 28 Mich App 621, 622-623; 184 NW2d 761 (1970).

[15] See CJI2d 3.10.

[16] I agree with Justice CAVANAGH's observation that the majority also neglects the rule that "legislative amendment of the common law is not lightly presumed." *Post* at 608 (CAVANAGH, J., dissenting) (quotation marks and citations omitted).

[17] *People v Francisco*, 474 Mich 82, 92 n 10; 711 NW2d 44 (2006).

[18] I continue to believe that this Court's test for preserved nonconstitutional error established in *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), is wrong. See Justice CAVANAGH's dissenting opinion in *Lukity*, which I joined. *Id.* at 504-510 (CAVANAGH, J., dissenting).

ent but for the venue error. Indeed, it is hard to imagine a scenario that would more convincingly meet the "more probable than not" *Lukity* standard. Defendant persuasively argues that he would never have been charged with solicitation to commit murder if the case had not proceeded in Saginaw County.

APPLICATION OF MCL 600.1645 TO CRIMINAL CASES

The majority also errs by applying MCL 600.1645 to criminal proceedings, given the dearth of authority to support such an application. The prosecution and defendant also agreed that MCL 767.45(1)(c), not MCL 600.1645, is controlling. The applicability of MCL 600.1645 in criminal cases was not briefed by the parties or even cited in their supplemental briefs. When two justices inquired about the possible applicability of the provision at oral argument, defense counsel responded in part:

> First, I don't want to lose this case on something that I hadn't even briefed. So if you're thinking about that I'd appreciate it if I could maybe — I'm always up for writing another brief. So if I can submit another five pages or something on it I'd be more than happy to.

The parties did file post-argument briefs addressing the issue, but even then, they agreed that MCL 767.45(1)(c), not MCL 600.1645, governs venue in criminal proceedings. The prosecution and the majority can point to only one case, *People v Milton*,[19] where this Court stated generally that provisions of the Revised Judicature Act (RJA)[20] apply to criminal proceedings. However, *Milton* involved the specific question whether the provisions of the RJA defining jurisdiction applied

[19] *People v Milton*, 393 Mich 234; 224 NW2d 266 (1974).

[20] MCL 600.101 *et seq*.

to criminal cases. *Milton* did not involve venue or cite MCL 600.1645. Nor did it make any sweeping pronouncement that all provisions of the RJA apply in criminal cases.

The chapter of the RJA in which MCL 600.1645 is located, MCL 600.1601, *et seq*., specifically states that "[t]he provisions of this chapter relate to venue and are not jurisdictional."[21] Therefore, *Milton* is inapplicable. This issue appears to be an open question deserving far more analysis than the majority has given it.

There is little basis for the majority's decision to apply MCL 600.1645 to criminal cases. First, the language used in MCL 600.1645 suggests that it does not apply to criminal cases. MCL 600.1645 states that no "order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue."[22] By contrast, MCL 767.45(1)(c) states that "[n]o *verdict shall be set aside* or *a new trial granted* by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury."[23] It follows that MCL 767.45(1)(c) is more directly and specifically applicable to venue errors in criminal cases than MCL 600.1645.[24]

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[21] MCL 600.1601.

[22] MCL 600.1645.

[23] MCL 767.45(1)(c) (emphasis added). Thus, I cannot agree with the majority that MCL 600.1645 is "consistent" with MCL 767.45(1)(c). *Ante* at 592 n 38.

[24] " 'It is a rule of statutory construction—"that where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision . . . ." ' " *Reed v Secretary of State*, 327 Mich 108, 113; 41 NW2d 491 (1950), quoting *Heims v Davison*

Second, if the majority wishes to apply RJA provisions to criminal cases, it ought to apply those that explicitly state that they apply to such cases. MCL 600.8312(1) to (4) state that venue in criminal actions for violations of state law and various ordinances "shall" be in the county, district, or political subdivision where the violation took place.[25] MCL 600.8312(5), by contrast, specifically states that "[v]enue in civil actions . . . shall be governed by sections 1601 to 1659 . . . ." By explicitly stating that MCL 600.1645 applies to venue in civil actions, the Legislature has implicitly indicated that it does not apply in criminal cases.[26] Third, *Hall* also expressly contradicts the ma-

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Twp Sch Dist No 6, 253 Mich 248, 251; 234 NW 486 (1931), quoting *Crane v Reeder*, 22 Mich 322, 333-334 (1871).

[25] As we have stated numerous times, the word "shall" constitutes a mandatory directive. See, e.g., *Oakland Co v Michigan*, 456 Mich 144, 154-155; 566 NW2d 616 (1997) (opinion by KELLY, J.).

MCL 600.8312 is located in the section of the RJA addressing district courts, as the majority observes. I cite it because it offers support for the proposition that the Legislature did not intend MCL 600.1645 to be applied to criminal cases. Why would MCL 600.1645 apply only to "civil actions" in district courts, yet apply to both civil and criminal actions in circuit courts?

I also note that MCL 600.8311(d) gives district courts jurisdiction over preliminary examinations "in all felony cases and misdemeanor cases not cognizable by the district court . . . ." Thus, MCL 600.8312 does apply to felony cases, or, at a minimum, to their preliminary examinations. This conclusion is further bolstered by the fact that this Court recently cited MCL 600.8312 as authority in a criminal case tried in circuit court. *People v Jendrzejewski*, 455 Mich 495, 499 n 4; 566 NW2d 530 (1997).

[26] Thus, I strongly disagree with Justice CORRIGAN's concurrence, which would broaden the application of MCL 600.1645 even further than the majority does. Although requiring objections to improper venue in criminal cases to be raised in an interlocutory appeal may be a wise policy decision, it is not what the Legislature requires. Rather, MCL 767.45(1)(c), which does apply to such errors, requires only that a defendant raise a venue objection before the case is submitted to a jury.

jority's decision to apply MCL 600.1645 to criminal cases. *Hall* specifically held that a defendant's conviction is void because the court is "powerless" to try him if venue was not proven at the preliminary examination.[27]

Finally, the majority's application of MCL 600.1645 is unnecessary and its ramifications are unclear. Why must MCL 600.1645 apply at all to criminal cases if venue errors are subject to harmless error analysis under MCL 769.26? Conversely, applying MCL 600.1645 makes MCL 769.26 irrelevant in this context. Under the majority's analysis, venue errors are not cause for reversing a conviction "solely" on the basis of improper venue. Thus, MCL 769.26 is superfluous because, even if a defendant shows that a venue error was harmful, absent any other error, MCL 600.1645 would nevertheless preclude reversal.

Also, to what extent are other provisions of the RJA now applicable to criminal cases? Will other provisions of the Code of Criminal Procedure be rendered irrelevant because RJA provisions will control instead? The majority opinion spawns many questions but offers few answers.

CONCLUSION

I agree with the majority that MCL 762.8 does not apply to this case. I also agree that Saginaw County was an inappropriate venue for the witness intimidation and solicitation to commit murder charges and that *Flaherty* and *Fisher* should be overruled. However, I vigorously dissent from the new venue rules that this majority has so casually established.

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[27] *Hall*, 375 Mich at 192.

CAVANAGH, J. (*dissenting*). I disagree with the majority's hasty decision to affirm defendant's convictions. Although I generally agree with the majority that, under the facts of this case, venue was not proper in Saginaw County for defendant's trial on charges of witness intimidation and solicitation to commit murder, and I also agree that *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987), and *People v Fisher*, 220 Mich App 133; 559 NW2d 318 (1996), should be overruled because those cases gave MCL 762.8 an overly broad interpretation that exceeded the scope of the statute's plain language, I respectfully disagree with the remainder of the majority opinion.

To begin with, I disagree with the majority's decision to extend the harmless error analysis to claims of improper venue. As recognized by Chief Justice KELLY's dissent, extending the harmless error analysis to claims of improper venue will likely result in a futile exercise in most, if not all, cases under the majority's reasoning in this case. Further, the Court of Appeals did not address this argument, and, as mentioned by Chief Justice KELLY, this issue took up a small portion of the parties' briefs. Accordingly, I would remand to the Court of Appeals to consider this jurisprudentially significant issue of apparent first impression.

I also disagree with the majority's application of MCL 600.1645 to this case. This statute has never been applied to a criminal case, and it was mentioned for the first time at oral argument by justices of this Court. Further, given the majority's determination that any error in this case was harmless, I question the necessity of the majority's decision to affirm the jury's verdict on this alternative basis. Because the application of MCL 600.1645 is unnecessary to reach in this case and is,

thus, likely nothing more than obiter dictum, I would reserve judgment on this issue.[1]

Finally, I dissent from the majority's apparent holding that caselaw requiring the prosecution to *prove* venue beyond a reasonable doubt has been abrogated by statute. It is well established that " 'legislative amendment of the common law is not lightly presumed,' " *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) (citation omitted), and the Legislature should " 'speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law.' " *People v Serra*, 301 Mich 124, 130; 3 NW2d 35 (1942) (citation omitted). Yet the majority, without citation and with only a cursory analysis, eviscerates longstanding precedent on an issue that the parties were not directed to brief.[2]

Because I believe that the majority prematurely or unnecessarily reaches the aforementioned issues, I respectfully dissent.

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[1] I would also not reach the issue of whether, under MCL 600.1645, venue challenges in criminal cases must be resolved though an interlocutory appeal.

[2] In making its sweeping assertion, the majority also turns a blind eye to MCL 767.45(1)(c), which suggests that, if a defendant raises the issue before it is submitted to a jury, a verdict can be set aside "by reason of failure to *prove* that the offense was committed in the county . . . of the court" and, as a result, leaves the bench and bar with little guidance as to the appropriate burden of proof for claims regarding the prosecution's failure to prove venue.

PEOPLE v MARDLIN

Docket No. 139146. Argued April 13, 2010 (Calendar No. 4). Decided July 31, 2010.

Frederick J. Mardlin was charged in the St. Clair Circuit Court with arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75, after his house caught fire. The trial court, Daniel J. Kelly, J., allowed the prosecution to introduce evidence that property associated with defendant had been damaged by fires on four previous occasions. The jury found him guilty of both crimes. The Court of Appeals, ZAHRA, P.J., and O'CONNELL and K. F. KELLY, JJ., reversed his convictions and remanded the case for a new trial on the ground that the trial court had abused its discretion by admitting the evidence of the other fires under MRE 404(b)(1). Unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 279699). The Supreme Court granted the prosecution's application for leave to appeal. 485 Mich 870 (2009).

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

The trial court properly admitted evidence of the previous fires because it was logically relevant under the doctrine of chances to rebut defendant's claim that the fire at issue was an accident and because the probative value of the evidence outweighed the danger of unfair prejudice.

1. To admit evidence of other acts under MRE 404(b), the prosecution must first establish that the evidence is logically relevant to a material fact in the case and is not simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. MRE 404(b) is inclusionary, not exclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence reflects the defendant's character is then

considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice and to instruct the jury that it may consider the evidence only for proper, noncharacter purposes.

2. The doctrine of chances is a theory of logical relevance that is based on the idea that, as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act and the prior occurrences were not the result of natural causes. Under this theory, unusually frequent events, and particularly purported accidents, associated with a defendant and falling into the same general category of incidents are admissible to prove lack of accident or lack of innocent intent with regard to the charged event. Because this theory of relevance differs from the analysis that applies when admitting evidence of other acts to prove, for example, modus operandi, the incidents need not have a high level of similarity to the charged offense, and the fact that a defendant has innocent explanations for them does not render them inadmissible. In this case, evidence of the previous fires was admissible because the fires constituted a series of similar incidents the frequency of which objectively suggested that one or more of them was not caused by accident.

Convictions reinstated; judgment reversed and case remanded to the Court of Appeals.

Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would hold that the doctrine of chances does not apply in this case because of the dissimilarities between the previous fires and the charged fire, and that even if evidence related to the previous fires had been relevant, it would have been inadmissible under MRE 403 because the danger of unfair prejudice substantially outweighed whatever probative value it had.

1. EVIDENCE — DOCTRINE OF CHANCES — DEFINITION OF DOCTRINE OF CHANCES.

The doctrine of chances is a theory of logical relevance that is based on the idea that, as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act and the prior occurrences were not the result of natural causes.

2. EVIDENCE — DOCTRINE OF CHANCES — APPLICATION OF DOCTRINE OF CHANCES.

Unusually frequent events, and particularly purported accidents, associated with a defendant and falling into the same general

category of incidents as the charged crime may be admissible under the doctrine of chances to prove lack of accident or lack of innocent intent.

3. EVIDENCE — DOCTRINE OF CHANCES — DEGREE OF SIMILARITY TO CHARGED OFFENSE.

Previous incidents that are in the same general category as the charged offense need not have a high level of similarity to the charged offense to be admissible under the doctrine of chances.

4. EVIDENCE — DOCTRINE OF CHANCES — EXISTENCE OF INNOCENT EXPLANATIONS.

The fact that a defendant has innocent explanations for previous incidents that are in the same general category as the charged offense does not render them inadmissible under the doctrine of chances.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris*, Assistant Prosecuting Attorney, for the people.

Tieber Law Office (by *F. Martin Tieber*) for defendant.

Amicus Curiae:

Terrence E. Dean for the Prosecuting Attorneys Association of Michigan.

CORRIGAN, J. The Court of Appeals erroneously concluded that evidence of an unusual number of prior fires—each associated with property owned or controlled by defendant—was inadmissible in this arson case in which defendant was accused of intentionally starting a fire in his home. Because the evidence was not offered to prove defendant's bad character or his propensity to act in conformity with a bad character, the trial court correctly concluded that MRE 404(b)(1) did not preclude admission of the evidence. Further, the trial court did not abuse its discretion by concluding

that the evidence was sufficiently probative to outweigh any danger of unfair prejudice under MRE 403. The Court of Appeals, like the dissent in this Court, incorrectly concluded that the lack of direct evidence that defendant intentionally set the past fires precluded or weighed *against* admission. To the contrary, as precedent of this Court has clearly established, defendant's apparent lack of direct culpability weighed *in favor of* admission because it minimized impermissible negative inferences about his character. Indeed, the evidence was noncharacter evidence admissible under the theory of logical relevance known as the doctrine of chances. Accordingly, we reverse the May 5, 2009 opinion of the Court of Appeals,[1] reinstate defendant's convictions, and remand to the Court of Appeals for that Court to consider defendant's remaining arguments on appeal.

I. FACTS AND PROCEEDINGS

Defendant admitted that he was the only person present at his home just before it caught fire on the afternoon of November 13, 2006. He left the premises to visit his brother shortly before the fire was reported by neighbors. After the fire, defendant filed an insurance claim seeking compensation for the damage to his home. The investigating police detective and a fire investigator for defendant's insurer both concluded that the fire had been intentionally set and originated from a love seat in the living room. Accordingly, the prosecution charged defendant with arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. Defendant claimed that the fire was an accident likely caused by faulty electrical wiring.

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[1] *People v Mardlin*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 279699).

At trial, the prosecution showed that defendant had fallen behind on his mortgage payments and utility bills before the fire occurred. The prosecution also showed that defendant had been associated with four previous home or vehicle fires—each of which also involved insurance claims and arguably benefitted defendant in some way—in the 12 years preceding the charged fire. Specifically, defendant's home caught fire in the spring of 2006, apparently as the result of a blanket being left on a kerosene heater. Defendant filed an insurance claim for the resulting smoke damage. In 2003, a van driven by defendant but owned by his employer caught fire. The prosecution argued that defendant had a motive to damage this van. The employer had recently transferred a newer van, previously issued to defendant, to another employee; it then issued the van that later caught fire, which was an older model, to defendant. After the older van burned, the employer was forced to replace it. In 2001, defendant's own van caught fire and the fire spread to his mobile home. Defendant received an insurance payment for that van. Finally, in 1994, defendant's truck caught fire, for which he submitted an insurance claim. Although none of these fires was established to have resulted from arson,[2] the prosecution argued that the pattern was probative to rebut defendant's claim that he had not intentionally set the November 2006 fire.

The jury indeed concluded from all the evidence that defendant intentionally set the November 2006 fire. It convicted him, as charged, of arson of a dwelling house and burning insured property. The trial court sentenced defendant to concurrent prison terms of 3 to 20 years and 1 to 10 years.

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[2] Not all of the fires were investigated by police or fire officials.

The Court of Appeals reversed, concluding that the trial court improperly admitted the evidence of previous fires under MRE 404(b)(1). The appeals panel concluded that this evidence was irrelevant, inadmissible, and improperly prejudicial. Accordingly, it remanded for a new trial.

The prosecution applied in this Court for leave to appeal the Court of Appeals decision. We granted leave and directed the parties to address

> whether evidence provided under the "doctrine of chances" may be used to establish that a fire did not have a natural or accidental cause, and whether more than the mere occurrence of other fires involving the defendant's property is necessary for admission of such evidence.[3]

II. STANDARD OF REVIEW

A trial court's discretionary decisions concerning whether to admit or exclude evidence "will not be disturbed absent an abuse of that discretion."[4] When the decision involves a preliminary question of law, however, such as whether a rule of evidence precludes admission, we review the question de novo.[5]

III. MRE 404(b)(1)

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or

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[3] *People v Mardlin*, 485 Mich 870 (2009).

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

[5] *Id*.

> accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To admit evidence under MRE 404(b),[6] the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character.[7] The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity.[8] Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is

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[6] Although applying MRE 404(b)(1) to the facts of some cases has produced divisions among the justices of this Court in the past, we have unanimously confirmed that the opinions in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), and *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), "continue to form the foundation for a proper analysis of MRE 404(b)." *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

[7] *VanderVliet*, 444 Mich at 60-61, 74.

[8] *Crawford*, 458 Mich at 385; *VanderVliet*, 444 Mich at 65-66. The prosecution, however, does not bear a "heightened" burden to "establish[] the theory of admissibility" nor does the prosecution's "failure to identify at trial the purpose that supports admissibility require[] reversal." *Sabin*, 463 Mich at 59 n 6. Rather, consistent with the notice requirement of MRE 404(b)(2), the prosecution must provide a "rationale for admitting the evidence . . . to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether to exclude the evidence under MRE 403." *Id.* In part because *all* relevant evidence is admissible, MRE 402, *unless* evidence bears solely on a defendant's character, MRE 404(b)(1), "[t]he prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence." *Id.* at 59 n 6; see also *id.* at 56.

inadmissible under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity.[9] Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character.[10] Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403.[11] Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes.[12]

IV. THE DOCTRINE OF CHANCES

The doctrine of chances—also known as the "doctrine of objective improbability"—is a " 'theory of logical relevance [that] does not depend on a character inference.' "[13] Under this theory, as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and*/*or* the prior occurrences were not the result of natural causes. The doctrine is commonly

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[9] *Crawford*, 458 Mich at 385; *VanderVliet*, 444 Mich at 63-64.

[10] *VanderVliet*, 444 Mich at 64-65; see also *Sabin*, 463 Mich at 56. Indeed, MRE 404(b) is not even implicated if the prosecution seeks to introduce logically relevant evidence of other acts performed by the defendant if the evidence does not generate an intermediate inference as to his character. *VanderVliet*, 444 Mich at 64.

[11] *Crawford*, 458 Mich at 385; *VanderVliet*, 444 Mich at 74-75.

[12] *Crawford*, 458 Mich at 385; *VanderVliet*, 444 Mich at 75.

[13] *Crawford*, 458 Mich at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 5:05, p 12.

discussed in cases addressing MRE 404(b) because the doctrine describes a logical link, based on objective probabilities, between evidence of past acts or incidents that may be connected with a defendant and proper, noncharacter inferences that may be drawn from these events on the basis of their frequency. If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance. To illustrate, *United States v York*[14] provides a classic description of the doctrine when used to negate innocent intent:

> The man who wins the lottery once is envied; the one who wins it twice is investigated. It is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance. . . . This inference is purely objective, and has nothing to do with a subjective assessment of [the defendant's] character.[15]

The seminal English case employing the doctrine, *Rex v Smith*,[16] acknowledged that evidence of past

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[14] 933 F2d 1343 (CA 7, 1991), overruled in part on other grounds *Wilson v Williams*, 182 F3d 562, 565 (CA 7, 1999).

[15] *Id.* at 1350; see also *VanderVliet*, 444 Mich at 79 n 35, quoting *York*.

[16] See 11 Crim App Rep 229 (1915).

alleged accidents may be admitted to show "whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence [sic] which would otherwise be open to the accused."[17] *Rex v Smith* infamously involved a defendant accused of drowning his wife in the bath.[18] The Court of Criminal Appeal concluded that the trial court properly admitted evidence that two other wives of the defendant were each similarly found dead in their baths from apparent accidental drowning.[19] Consistent with the modern rule, the court acknowledged that the prosecution generally may not

> adduce evidence tending to shew [sic] that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence [sic] for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew [sic] the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury . . . .[20]

Thus, the evidence that several of the defendant's wives had drowned in their baths was properly admitted "for the purpose of shewing [sic] the design of the [defendant]."[21] The court also observed that the judge was appropriately "careful to point out to the jury the use they could properly make of the evidence."[22]

The doctrine of chances is often similarly employed in cases alleging arson to argue that the fire at issue was

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[17] *Id.* at 237 (citation and quotation marks omitted).

[18] *Id.* at 229.

[19] *Id.* at 229, 237.

[20] *Id.* at 237 (citation and quotation marks omitted).

[21] *Id.*

[22] *Id.*

not an accident, but was intentionally caused by the defendant. Indeed, arguably the doctrine is epitomized in arson cases in which apparently accidental fires befall property linked to the defendant with uncommon frequency. As explained by Professor Edward Imwinkelried:

> Based on ordinary common sense and mundane human experience it is unlikely that a large number of similar accidents will befall the same victim in a short period of time. Considered in isolation, the charged fire . . . may be easily explicable as an accident. However, when all similar incidents are considered collectively or in the aggregate, they amount to an extraordinary coincidence; and the doctrine of chances can create an inference of human design. The recurrence of similar incidents incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus. [1 Imwinkelried, Uncharged Misconduct Evidence (rev ed, March 2008 supp), § 4:3, pp 4-42 and 4-43.]

V. APPLICATION TO THIS CASE

The fires here were admissible precisely because they constituted a series of similar incidents—fires involving homes and vehicles owned or controlled by defendant—the frequency of which[23] objectively suggested that one or more of the fires was not caused by accident. The Court of Appeals principally erred by incorrectly assum-

[23] Indeed, during voir dire the prosecutor asked the jurors if any of them had "experienced" a fire in their lifetimes. One juror had experienced one fire. In contrast, defendant experienced 5 fires in 12 years. Defendant's association with burned property is certainly unusual. This association was thus probative of the credibility of defendant's statements that the November 2006 fire was a mere accident or had natural causes because the unusually high occurrence of fires in relation to defendant's property creates a permissible inference of human design. Ultimately, it was up to the jury to determine whether defendant simply is extraordinarily jinxed or had engaged in wrongdoing that caused some or all of the burned vehicles and houses.

ing that evidence of the past fires could only be admitted if the prosecutor proved that defendant intentionally set them or that they shared other special qualities or additional significant indices of similarity. Defendant and the dissent similarly err by concluding that, in the words of the dissent, *Crawford*, *supra*, established, as a general rule, that past incidents must be "sufficiently similar to the charged offense to warrant admission," and that "*Crawford* makes it clear that similarity is a key factor in determining the applicability of the doctrine of chances." These blanket conclusions are incorrect.

To the contrary, application of the doctrine of chances "varies with the issue for which it is offered."[24] As with all arguments involving prior acts or events, the "method of analysis to be employed depends on the purpose of the offer and its logical relevance."[25] The acts or events need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity. As the *VanderVliet* Court explained:

> "If we ask, does [the] misconduct have to exhibit striking similarity with the misconduct being investigated, the answer is, only if similarity is relied on. Otherwise not. There are only two classes of case[s] [those in which similarity is relied on and those in which it is not], and they do not depend on the nature of the evidence, but on the nature of the argument."[26]

Crawford, in which the Court stressed similarity, did not involve a series of purported accidents as here. Rather, there the prosecution offered evidence of a past

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[24] *VanderVliet*, 444 Mich at 79 n 35.

[25] *Id.* at 67.

[26] *Id.*, quoting Elliott, *The young person's guide to similar fact evidence—I*, 1983 Crim L R 284, 288 (brackets in original).

drug-related conviction centrally to prove the defendant's *mens rea* or *knowledge* that drugs were concealed in the dashboard of his car.[27] Thus, the specific holding of *Crawford* is largely inapposite. The same holds true for the cases on which the Court of Appeals here relied in concluding that the prior fires were too dissimilar to be admitted: *Sabin*, *supra*, and *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). Both these cases involved theories of relevance explicitly rooted in similarities between the past events and the crime charged. In *Sabin*, the prosecution "stressed the similarities between the charged incident [of the defendant's sexual abuse of his daughter] and the [past sexual] abuse of [his] stepdaughter" in seeking admission of the past abuse.[28] This Court concluded that the past abuse was admissible only under the theory that the defendant employed a similar plan, scheme, or system in doing an act.[29] This theory of relevance requires that "the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."[30] *Golochowicz*, in turn, was a murder case in which the prosecution sought to admit evidence of a prior, similar assault in order to advance a "*modus operandi theory* to prove *identity.*"[31] *Golochowicz* thus established a test for admission under such a theory that required substantial evidence that the defendant committed the prior act and some "special quality" of the act that tended to prove the defendant's identity.[32]

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[27] *Crawford*, 458 Mich at 394-397.

[28] *Sabin*, 463 Mich at 50.

[29] *Id.* at 61, 67-68.

[30] *Id.* at 63.

[31] See *VanderVliet*, 444 Mich at 66.

[32] *Golochowicz*, 413 Mich at 307-309.

Here, to the contrary, the prosecution did not move to admit evidence of the past fires only on the basis of theories of logical relevance requiring a high degree of similarity to the charged fire. As we emphasized in *VanderVliet* while advancing a more flexible test than the one described in *Golochowicz*: "the *Golochowicz* approach to modus operandi cases to show identity is not a 'conceptual template' to 'mechanically test' all misconduct evidence barring use of other permissible theories of logical relevance."[33] Rather, "[w]here the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, *similarity between charged and uncharged conduct is not required*."[34] Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission. Thus, the "level of similarity required when disproving innocent intent is less than when proving modus operandi."[35] "When other acts are offered to show innocent intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.' "[36] Past events—such as fires in relation to an arson case—that suggest the absence of accident are offered on the basis of a theory of logical relevance that is a subset of innocent intent theories.[37] As such, the past events need *only* be of the

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[33] *VanderVliet*, 444 Mich at 67, quoting *Golochowicz*, 413 Mich at 314.

[34] *VanderVliet*, 444 Mich at 69 (emphasis added).

[35] *Id.* at 80 n 36.

[36] *Id.* at 79-80, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23. We stress that, contrary to the dissent's suggestions, we do not here invent the "same general category" requirement or the notion that different theories of relevance require different degrees of similarity among the proffered evidence. These concepts come directly from majority opinions of this Court.

[37] *VanderVliet*, 444 Mich 80 n 37.

same general category as the charged offense. Professor Imwinkelried explained, in the context of arson cases:

> Suppose that the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant *and even nonarson fires at premises owned by the defendant*. In these cases, the courts invoke the doctrine of objective chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires . . . .[38]

Accordingly, here the Court of Appeals erred by basing its analysis on its conclusion that the past fires were not highly similar to the charged fire due largely to the lack of definitive proof that defendant intentionally set the past fires. Because defendant owned or controlled all the burned property,[39] the unusual number of past fires was classically relevant to defendant's claim

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[38] 1 Imwinkelried, Uncharged Misconduct Evidence (rev ed, March 2008 supp), § 4:1, pp 4-6 to 4-9 (emphasis added).

[39] Contrary to the dissent's apparent fears, our acknowledgement that past events need only fall into the same "general category" under these circumstances does not extinguish the need for similarity to whatever extent similarity is relevant in a particular case. Here the fires were sufficiently similar or related because they each involved a *home or vehicle that was under defendant's control*. It is not as if, for example, the prosecution sought to introduce evidence that an unusual number of fires occurred in the county where defendant lives without otherwise linking the fires to defendant in some way. In other words, although such fires would be of the same general category on some level, we do not suggest that they could be admitted without additional evidence linking them to the defendant. The dissent's fears overstate the nature of our holding, which is perfectly consistent with cases such as *Rex v Smith* and *United States v Woods*, 484 F2d 127 (CA 4, 1973), where admission was appropriate because the past events were sufficiently similar to support a lack of accident theory (in *Rex v Smith*—the *defendant's wives* apparently drowning accidentally in their baths at an unusual rate; in *Woods*—children *cared for by the defendant* apparently spontaneously

that the November 2006 fire was an accident; the frequency of past fires so closely associated with defendant logically suggested a lack of coincidence. The defense theory in a case in part governs what evidence is logically relevant.[40] Indeed, as was the case in *York*, *supra*,[41] the "fact that [the] defense included innocent explanations" for acts surrounding his allegedly illegal activity actually "underscore[d] the relevance" of the prior acts evidence.[42] In response to the defendant's arguments that the prior acts were not sufficiently similar, the *York* Court opined that he was "looking at trees rather than the forest"; "when evidence is offered to prove intent, the degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent. . . . The prior acts need not be duplicates of the one for which the defendant is now being tried."[43]

In sum, the past fires were logically relevant to the objective probability that the November 2006 fire was intentionally set. Thus, the fires were admissible to negate defendant's claim that the fire was a mere accident.[44]

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developing similar health conditions at an unusual rate; here—property *controlled by defendant* catching fire at an unusual rate).

[40] *VanderVliet*, 444 Mich at 75.

[41] As noted, *York* was cited with approval by *VanderVliet*, 444 Mich at 79 n 35.

[42] *York*, 933 F2d at 1350.

[43] *Id.* at 1351 (citations and quotation marks omitted; ellipses in original).

[44] Moreover, although more similarity among the fires was unnecessary for admission, arguably the fires were sufficiently similar to prove identity, motive, or that defendant acted consistent with a scheme or plan to burn property in order to gain a benefit for himself. Indeed, each fire resulted in an insurance claim that arguably benefitted defendant. Even the fire involving his employer's van resulted in replacement of the burned van, which was an older model recently issued to defendant.

Although defendant and the dissent emphasize that he offered innocent explanations for the past fires and other evidence tending to show that he had no motive to burn particular property, his innocent explanations do not control the admissibility analysis. For example, he claimed that the fire involving his employer's van also destroyed defendant's personally owned work tools. He also established that, although he turned on the kerosene heater involved in the spring 2006 house fire, his housemate admitted leaving the fire-causing blanket on the heater. He stressed that the 2001 fire involving his insured van spread to his mobile home, which was not insured. Further, he presented evidence that, after the 1994 fire that damaged his truck,[45] he nonetheless was required to keep making payments on the damaged truck despite obtaining the insurance proceeds. With regard to the November 2006 fire, defendant also presented an expert who opined that the fire began *behind* the love seat, thus implying that an electrical fault might have caused it; defendant also showed that the prosecution had not appointed an expert to test this wiring.[46]

But these explanations do not render evidence of the past fires *inadmissible*. Rather, the very function of the doctrine of chances is to permit the introduction of events that might appear accidental in isolation, but that suggest human design when viewed in the aggregate. Because the prosecution's noncharacter theory for admission was sound, the evidence was admissible.[47]

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[45] The truck appears to have been possessed and paid for by defendant, but owned by his father.

[46] Defendant's claim that his trial attorney should have retained an expert to test the wiring before trial should be considered by the Court of Appeals on remand.

[47] Compare *York*, 933 F2d at 1350 (stating that the odds of particular events benefitting the defendant may be "low enough to support an

Further, a jury may generally decide whether a defendant's claim of innocence—here his claim that all five fires were accidental—is more credible or likely than the prosecution's claim of guilt. The jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations.[48] Indeed, "a basic premise of our judicial system [is that] providing more, rather than less, information will generally assist the jury in discovering the truth."[49] The weight to be given to admitted evidence is left to a properly instructed jury's common sense and judgment.[50] On this point, I respectfully suggest that the dissent usurps the jury's role by concluding that the previous fires were inadmissible because defendant received "little, if any, insurance money" or on the basis of the *dissent*'s rejection of the argument that defendant benefitted from the past fires. It is for the jury to decide whether defendant benefitted from the fires or might have anticipated benefitting without accurately predicting their ultimate impact on his property or finances.

The trial court could also take into account defendant's claims of innocence with regard to the fires in

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inference that the windfalls were the product of design rather than the vagaries of chance . . . [and] [t]his inference is purely objective, *and has nothing to do with a subjective assessment of [the defendant's] character*") (emphasis added).

[48] *People v Lundy*, 467 Mich 254, 258 n 6; 650 NW2d 332 (2002).

[49] *People v Anstey*, 476 Mich 436, 457; 719 NW2d 579 (2006); see also *Harvey v Horan*, 285 F3d 298, 299 (CA 4, 2002) ("The American criminal justice system rightly sets the ascertainment of truth and the protection of innocence as its highest goals.").

[50] E.g., CJI2d 2.4(2) ("You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is."); CJI2d 2.6(2) ("In deciding which testimony you believe, you should rely on your own common sense and everyday experience.").

deciding whether evidence of the past fires was more probative than unduly prejudicial under MRE 403. But the court did not abuse its discretion in nonetheless admitting the evidence under this rule. The trial court is in the best position to make MRE 403 determinations on the basis of "a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . ."[51] Accordingly, we review its decisions admitting or excluding evidence under a deferential standard and will reverse only if we identify "a clear abuse of discretion."[52]

No such abuse occurred here. As explained above, first, the prior fires were highly, objectively relevant to defendant's claim that all five fires, including the November 2006 fire, were mere accidents. Second, the amount of "unfair prejudice," MRE 403, was minimal. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[53] Thus, MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so."[54] Here, there was minimal unfair prejudice—such as improper character implications—because any prejudice arose properly from the objective frequency of fires associated with property owned or controlled by defendant.[55]

Indeed, defendant's insistence—echoed by the Court of Appeals and the dissent—that there was no proof he

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[51] *VanderVliet*, 444 Mich at 81.

[52] *Crawford*, 458 Mich at 383.

[53] *Id*. at 398.

[54] *Id*.

[55] Moreover, *even if* one could conclude that the unfair prejudice issue creates a close question concerning whether the evidence should have been admitted under the MRE 403 balancing test, "[a]s we have often observed, the trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *Sabin*, 463 Mich at 67.

intentionally caused the past fires actually weighs in favor of admission because, absent proof of past criminal intent associated with the evidence, the evidence does not create the traditional intermediate inference about character or criminal propensities associated with established, past criminal acts or convictions. Thus, the evidence stands in stark contrast to the proffered evidence in *Crawford*, *supra*, where the Court opined that the danger of unfair prejudice is prevalent when the jury "learns that a defendant *has previously committed the same crime as that for which he is on trial*" because the jury may therefore presume that he is likely to commit the same crime again because he is "a bad person, a convicted criminal . . . ."[56]

Indeed, the dissent's approach here threatens to contradict this Court's critical observation that MRE 404(b)(1) is "*inclusionary* rather than exclusionary"; "[t]here is no policy of general exclusion relating to other acts evidence."[57] Justices of this Court have long been concerned that a misunderstanding of MRE 404(b)(1) would erode the rule's proper application in this manner. Notably, in her *Crawford* dissent, Justice BOYLE—joined by Justices WEAVER and TAYLOR—concluded that the majority used an erroneous exclusionary approach when it barred evidence that appears significantly *more* unfairly prejudicial than the evidence here (because the evidence in *Crawford* revealed that

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[56] *Crawford*, 458 Mich at 398 (emphasis added); cf. *VanderVliet*, 444 Mich at 64 (explaining that the general rule excluding mere character evidence reflected in MRE 404(b) is not even implicated if the evidence is logically relevant but does not generate an intermediate inference as to character).

[57] *VanderVliet*, 444 Mich at 64-65 (citation and quotation marks omitted); see also *Crawford*, 458 Mich at 390-391 n 8 ("*VanderVliet* embraced the 'inclusionary' approach to prior misconduct evidence"; "[t]he 'inclusionary' theory . . . recognizes the rule's restrictive application to evidence offered *solely* to prove criminal propensity . . . .") (emphasis added).

the defendant actually committed a crime in the past). She expressed concern that, "[p]rotestations to the contrary," the *Crawford* majority went too far and effectively utilized the incorrect exclusionary approach.[58]

Finally, the trial court correctly instructed the jury to consider the evidence only for proper, noncharacter purposes pursuant to MRE 105. A limiting instruction generally "suffice[s] to enable the jury to compartmentalize evidence and consider it only for its proper purpose . . . ."[59]

VI. CONCLUSION

The trial court properly admitted evidence of the past fires, which were logically relevant particularly to rebut defendant's claim that the November 2006 fire was a mere accident. The Court of Appeals erroneously held that a high degree of similarity between past acts or events and the crime charged is necessary in order for evidence of the past events to be admissible. To the contrary, precedent examining MRE 404(b) and the doctrine of chances clearly establishes that unusually frequent events—and *particularly* purported accidents—associated with the defendant and falling into the same general category of incidents are admissible to prove lack of accident or lack of innocent intent with regard to the charged event. Such evidence is particularly useful in arson cases where unusually frequent individual fires, which could appear to be accidents when viewed in isolation, may constitute the most probative objective evidence that the defendant intentionally set the fire underlying the arson charge.

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[58] *Crawford*, 458 Mich at 400 (BOYLE, J., dissenting).

[59] *Id.* at 399 n 16.

For these reasons, we reverse the Court of Appeals' opinion, affirm the trial court's evidentiary ruling, and reinstate defendant's convictions. This case is remanded to the Court of Appeals for consideration of defendant's remaining arguments on appeal.

We do not retain jurisdiction.

WEAVER, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

KELLY, C.J. (*dissenting*). Defendant was accused of setting fire to his house and charged with arson of a dwelling house and burning insured property. The question presented is whether evidence of four fires with which defendant had some connection in the preceding 12 years was properly admitted at trial under the doctrine of chances to prove lack of accident.

I believe that the doctrine does not apply in this case because of the dissimilarities between the previous fires and the charged fire. Furthermore, even if the previous fires were relevant, any probative value they have is substantially outweighed by the danger of unfair prejudice. Hence, the evidence is inadmissible under MRE 403. For those reasons, I respectfully dissent.

FACTS AND PROCEDURAL HISTORY

After a seven-day trial, a jury convicted defendant of arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75. The convictions arose from a fire at defendant's house on the afternoon of November 13, 2006. At the time of the fire, defendant was at his brother's house nearby. However, he had recently been at his own house and was the only person there that afternoon.

Michigan State Police Detective Sergeant Michael Waite, an expert in the cause and origin of fires, investigated and concluded that the fire originated from a love seat in the living room. Testing failed to reveal the presence of an accelerant. But Waite believed that charring on the front part of the love seat and the speed with which the fire spread were consistent with the use of an accelerant. After ruling out possible accidental causes of the fire, Waite concluded that it was started by an intentional act.

During trial, the prosecution presented evidence that defendant and his family were having financial difficulties at the time of the fire. They were in arrears on their mortgage payments and several utility bills. The prosecution also presented evidence of previous fires involving property that defendant had at one time owned or possessed. It is this evidence that is at issue here.

The first fire occurred in 1994, 12 years earlier. Defendant's Ford Ranger caught fire while he and friends were ice fishing. The truck was insured under defendant's father's name, but defendant was paying for it. Defendant continued to make payments on the truck loan afterwards because the insurance coverage did not extend to the entire amount owing on the vehicle.

The second fire took place in 2001. At that time, defendant owned an older van that had many mechanical problems. The van caught on fire and the fire spread to defendant's mobile home. The fire chief for Bruce Township determined that the fire started under the hood of the van. There was only a small insurance payment for the damage to the van, and the damage to defendant's home was not covered by insurance. The fire chief found nothing suspicious about the fire.

Another fire occurred when, in 2003, a van owned by defendant's employer caught on fire. The fire was determined to have started in the engine compartment. Defendant received no insurance proceeds because he did not own the van. He lost all his personal tools used for his employment.

The last fire occurred in 2006 at defendant's residence. It allegedly started when one of defendant's roommates left a blanket on top of a kerosene heater. The fire department was not called, and the fire caused only smoke damage. Defendant received insurance benefits for this fire.[1]

The prosecutor sought to introduce evidence of the 2006 fire at defendant's home, the 2001 vehicle fire that spread to defendant's mobile home, and the 1994 truck fire. The purpose was to demonstrate a pattern of behavior, motive, scheme, plan, and system in causing the fires.

The trial court ruled that the evidence could be admitted under MRE 404(b)(1) for these purposes, as well as to prove lack of accident. Under the same rule, it also allowed the prosecutor to introduce evidence of the fire involving defendant's employer's vehicle. In addition, the court allowed the jury to consider the evidence for other purposes. It instructed the jury that the evidence might be considered to determine whether defendant (1) had a reason to commit the charged crime, (2) specifically in-

[1] I do not agree with the majority's assertion that each of these fires "arguably benefitted defendant in some way." The 1994 fire destroyed defendant's father's truck, and defendant had to continue to make payments on it; the 2001 fire burned defendant's van and mobile home, and the damage to the mobile home was not covered by insurance; defendant collected no insurance proceeds on the burned work vehicle, and all his personal tools were destroyed. If defendant wanted a new work truck enough to set the one he drove on fire, one would think he would have taken his tools out of it beforehand.

tended to burn his residence, (3) acted purposefully and not by accident or mistake, or because he misjudged the situation, and (4) had a plan, system, or characteristic scheme that he used before or after. Thus, the court allowed consideration of the other fires as proof of motive, intent, absence of mistake or accident, a scheme, plan, or system in doing an act, and identity.

Defendant was convicted as charged. He was sentenced to concurrent prison terms of 3 to 20 years for the arson of a dwelling house conviction and 1 to 10 years for the burning of insured property conviction.

On appeal, the Court of Appeals held that the trial court abused its discretion by admitting the other acts evidence of the four fires with which defendant was associated.[2] It agreed with defendant that the prosecutor had not established its relevance. The Court of Appeals considered and rejected each of the prosecutor's proffered bases for admission of the evidence under MRE 404(b)(1). It also concluded that evidence of the other fires was inadmissible under MRE 403 because they were minimally probative and the danger of unfair prejudice substantially outweighed their probative value. After determining that the error in admitting the evidence was outcome determinative, it reversed the convictions and remanded the case for a new trial.

On the prosecution's application, this Court granted leave to appeal and directed the parties to address "whether evidence provided under the 'doctrine of chances' may be used to establish that a fire did not have a natural or accidental cause, and whether more than the mere occurrence of other fires involving the

[2] *People v Mardlin*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 279699).

defendant's property is necessary for admission of such evidence."[3]

MRE 404(b)—THE ADMISSION OF OTHER ACTS EVIDENCE

The decision to admit or exclude evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. An abuse occurs if the trial court chooses an outcome falling outside the range of principled outcomes.[4] Preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo.[5]

The admission of evidence under MRE 404(b) involves a preliminary question of law. It is a codification of the fundamental principle that courts and juries try cases, not persons; thus, in reaching its verdict, a jury may consider only evidence of the events in question, not the defendant's prior acts.[6] A jury should not convict a defendant inferentially on the basis of his or her bad character. Rather, it should determine whether he or she is guilty of the crime charged.[7]

MRE 404(B)(1) permits the admission of evidence of other crimes, wrongs, or acts if (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403.[8] The prosecution must "weave a logical thread linking the prior act" to a proper, noncharacter purpose.[9]

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[3] *People v Mardlin*, 485 Mich 870 (2009).

[4] *People v Babcock*, 469 Mich 247, 269-270; 666 NW2d 231 (2003).

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

[6] *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

[7] *Id.*

[8] *Id.* at 385.

[9] *Id.* at 390.

The prosecutor argues that, in this case, evidence of the previous fires is admissible under what is known as the "doctrine of chances." Accordingly, a discussion of that doctrine is warranted.

THE DOCTRINE OF CHANCES

The doctrine of chances is used to establish the relevancy of certain types of past acts evidence and to avoid the prohibition against character evidence.[10] Basically, it states that, when someone suffers a specific type of accident with extraordinary frequency, it is objectively probable that one or more of the incidents were not accidents. A treatise describes it as follows:

> Based on ordinary common sense and mundane human experience it is unlikely that a large number of similar accidents will befall the same victim in a short period of time. Considered in isolation, the charged fire . . . may be easily explicable as an accident. However, when all *similar* incidents are considered collectively or in the aggregate, they amount to an extraordinary coincidence; and the doctrine of chances can create an inference of human design. The recurrence of *similar* incidents incrementally reduces the possibility of accident. The improbability of a coincidence of act creates an objective probability of an actus reus.[11]

The doctrine of chances has been traced to the 1915 English case of *Rex v Smith*.[12] The defendant, Smith,

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[10] Imwinkelried, *An evidentiary paradox: Defending the character evidence prohibition by upholding a non-character theory of logical relevance, The doctrine of chances*, 40 U Rich L R 419, 422 (2006). The doctrine is viewed as a subset of MRE 404(b) rather than a stand-alone doctrine.

[11] 1 Imwinkelried, Uncharged Misconduct Evidence (rev ed, March 2008 supp), ch 4, § 4:3, pp 4-42 and 4-43.

[12] *Rex v Smith*, 11 Crim App Rep 229 (1915). Also known as the "brides in the bath" case. See Metropolitan Police, *The 'Brides in the Bath' Murders*

married three women between 1912 and 1914. After each marriage, he purchased an insurance policy on the life of his new wife and convinced her to sign a will making him her beneficiary. Each of the three women was later found dead in her bath by drowning. At Smith's trial, the prosecution was allowed to introduce evidence of all three deaths over the defendant's objection that the evidence was nothing more than evidence of his bad character.

The appellate court held that the evidence had been properly admitted. In affirming the conviction, it "focused on the objective improbability of so many similar accidents befalling Smith. Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an *actus reus*."[13]

The seminal American case that accepted the doctrine of chances as a noncharacter basis for admitting other acts evidence is a 1973 case of the United States Court of Appeals for the Fourth Circuit, *United States v Woods*.[14] The defendant in *Woods* was convicted of first-degree murder and numerous other assaultive charges relating to the death of her eight-month-old pre-adoptive foster son. He began suffering from breathing difficulties and cyanosis shortly after going to live with the defendant. On appeal, she argued that the government had improperly used evidence of other acts involving her care of her other nine children.[15]

To prove that the child's death was neither accidental nor from natural causes, the prosecution introduced the

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<http://www.met.police.uk/history/brides.htm> (accessed May 13, 2010).

[13] Imwinkelried, 40 U Rich L R at 435 (2006) (footnotes omitted).

[14] *United States v Woods*, 484 F2d 127 (CA 4, 1973).

[15] The evidence established that three of the defendant's children got sick or died while being held in her arms, one died while in bed with the defendant, and another child was alone with the defendant when he died.

testimony of a forensic pathologist. It then produced evidence that, during the previous 24 years, the defendant had custody of or access to nine other children among whom there were at least 20 episodes of cyanosis.

> The appellate court found that the evidence had been properly admitted, ruling that it would prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by defendant's wrongdoing, and at the same time, would prove the identity of defendant as the wrongdoer.[16]

Another case, *United States v York*, explains clearly how the doctrine of chances can be applied to negate innocent intent:

> The man who wins the lottery once is envied; the one who wins it twice is investigated. It is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance.[17]

These cases stand for the proposition that evidence of other bad acts can be admissible when its logical relevance is not necessarily linked to an impermissible

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[16] *Id*. at 135.

[17] *United States v York*, 933 F2d 1343, 1350 (CA 7, 1991), cert den 502 US 916 (1991).

character inference. Thus, the proponent of other acts evidence does not necessarily ask "the trier of fact to infer the defendant's conduct . . . from the defendant's personal, subjective character."[18] Instead, the proponent may properly ask the trier of fact "whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused."[19]

This Court addressed the doctrine of chances in *People v Crawford*, recognizing that the doctrine is "widely accepted."[20] The defendant in *Crawford* was convicted of possession with intent to distribute cocaine. The prosecution was allowed to introduce evidence of a previous conviction of the same type. On appeal, this Court stated that "the prosecutor must 'make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person,' " and that "the applicability of the doctrine of chances depends on the similarity between the defendant's prior conviction and the crime for which he stands charged."[21]

In *Crawford*, the prior conviction was for the sale of cocaine to an undercover police officer.[22] The defendant's pending charges stemmed from an incident where the police stopped the defendant for a routine traffic violation and discovered cocaine in his vehicle.[23] Although both his earlier conviction and the act

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[18] *Crawford*, 458 Mich at 393 (citation and quotation marks omitted).

[19] Imwinkelried, 51 Ohio St L J 575, 586-587; see also *Crawford*, 458 Mich at 393.

[20] *Crawford*, 458 Mich at 393.

[21] *Id*. at 394-395 (citation omitted).

[22] *Id*. at 396.

[23] *Id*.

charged involved narcotics, this Court found the two offenses insufficiently similar to warrant admission of the similar acts evidence:

> The prior conviction only demonstrates that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine . . . . Defendant's prior conviction was mere character evidence masquerading as evidence of "knowledge" and "intent."[24]

A majority of this Court also touched on the doctrine of chances in *People v VanderVliet*.[25] There, the defendant had been charged with second-degree criminal sexual conduct for incidents involving clients of the company where he worked as a case manager. The defendant denied any sexual contact with one victim and claimed his contact with the second victim was accidental. A third victim was discovered during the investigation.

The prosecution sought to introduce testimony of all three victims. The trial court held that the acts involving the other victims were not admissible in either of the pending cases. The Court of Appeals affirmed. A majority of this Court reversed the decision and held that the testimony of the first victim was relevant to show that the touching of the second victim was not accidental or inadvertent. A majority of this Court stated that

> [e]vidence of both of the alleged assaults is logically relevant and probative of the defendant's intent in the [second] case because it negates the otherwise reasonable assumption that the contact described in testimony by [the

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[24] *Id*. at 396-397.

[25] *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

second victim] was accidental, as opposed to being for the purpose of sexual gratification.[26]

APPLICABILITY OF THE DOCTRINE OF CHANCES TO THE PRESENT CASE

Crawford is instructive here. Under *Crawford*, the prosecution must make persuasive showings that (1) the past incidents are sufficiently similar to the charged offense to warrant admission, and (2) the accused has been involved in such incidents more frequently than the typical person.[27] The prosecutor has failed to meet the similarity prong in this case.

Defendant's involvement in four fires in the span of 12 years is more frequent than the typical person experiences. Therefore, the prosecution has satisfied the second prong of *Crawford* for admitting the evidence under the doctrine of chances.

However, the prosecutor has failed to persuasively show a sufficient factual nexus between the prior fires and the charged offense. *Crawford* makes it clear that similarity is a key factor in determining the applicability of the doctrine of chances. All four fires in this case involved property that defendant either owned or possessed. However, three of them involved unexplained vehicle fires, one of which concerned his employer's vehicle. The fourth fire caused smoke damage to defendant's dwelling and was admittedly caused by the defendant's roommate when he left a blanket on a kerosene heater.

The prosecution repeatedly stated in its closing argument that it did not have to prove the origin or the

[26] *VanderVliet*, 444 Mich at 80-81.

[27] *Crawford*, 458 Mich at 394. The determination of what constitutes "more frequently than the typical person" is one best left to the trial court. But I agree with Imwinkelried that statistical data is helpful in establishing frequency. See Imwinkelried, 51 Ohio St L J at 591.

cause of the fires. Instead, it simply asserted that there were fires and defendant was somehow connected to them. There was no proof that defendant caused any of the prior fires. None was considered suspicious, and defendant received little, if any, insurance money. And, in one case, defendant had to continue paying for the vehicle that the fire destroyed. Finally, the prosecution conceded that engine fires are not unusual and, in the case of defendant's employer's van, that defendant was not charged with maintaining the vehicle.

The prosecution has not shown sufficient similarity between the prior fires and the charged fire. No evidence was offered to show the cause of the vehicle fires. Likewise, no evidence was presented linking the fires, such as a common type of accelerant. The charged fire was a house fire and was allegedly started by the use of an accelerant on the living room love seat. Furthermore, it is worth noting that sometime before the charged fire, defendant substantially reduced the insurance coverage on his house.

The decision whether to apply the doctrine of chances is made on a case-by-case basis considering the particular facts of the case. This Court noted in *Crawford* that if the defendant's "prior crime involved the concealment of drugs in the dashboard of his car (as the charged crime did), that evidence would likely be admissible under the doctrine of chances because of the stark similarity of the two crimes."[28]

Likewise, in the present case, if the past fires were similar, whether in time, location, or other characteristics, they would likely have been admissible. I am hesitant to adopt a bright-line rule as to what constitutes a sufficient nexus between the past and the

[28] *Crawford*, 458 Mich at 395 n 13.

charged crimes. The specific facts and circumstances of a particular case must govern whether the evidence should be admitted. However, I reject the prosecutor's suggestion that this Court adopt a liberal application of the doctrine of chances lest it weaken the prohibition against character evidence, especially when used to prove the *actus reus*.[29]

I strongly disagree with the majority's position that the past fires were admissible to negate defendant's claim that the fire was a mere accident. First, the majority claims that the other acts must be only of "the same general category." This is contrary both to *Crawford*, as discussed earlier, and to *Rex v Smith*, the case that gave birth to the doctrine. Similarity was essential in *Rex v Smith*: the defendant's previous two wives were found drowned in the bathtub, just as was *Smith*'s present wife.[30] Also, in *Woods*: nine children under the defendant's care suffered at least 20 episodes of cyanosis, and seven of these children died. The defendant was on trial for the murder of her eight-year-old son who died the same way.[31] A showing of similarity should be essential in the case on appeal, as well.

To allow prior acts evidence under the doctrine of chances whenever someone has the misfortune of being connected to an event of "the same general category" eviscerates the concept that "in our system of jurisprudence we try cases, rather than persons . . . ."[32] Furthermore, a majority of this Court in *VanderVliet* cautioned that using unlikely coincidence to prove the *actus reus*

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[29] See Imwinkelried, 51 Ohio St L J at 588.

[30] *Smith*, 11 Crim App Rep at 230; see also Eggleston, *Evidence, Proof and Probability* (2d ed), pp 92-93.

[31] *United States v Woods*, 484 F2d 127 (CA 4, 1973).

[32] *Crawford*, 458 Mich at 384, citing *United States v Mitchell*, 2 US 348, 357; 1 L Ed 410 (1795).

"requires a more rigorous enforcement of relevancy because it more closely approaches the forbidden inference of character to conduct."[33]

Because the evidence of the past fires in this case was not admissible under MRE 404(b), I would hold that the trial court abused its discretion in admitting it. It was impermissible character evidence.

MRE 403

Even if the evidence of the previous fires were relevant, I would exclude it under MRE 403 because the danger of unfair prejudice substantially outweighed its probative value. *People v Oliphant* discusses the framework for evaluating evidence under MRE 403:

> In determining admissibility [under MRE 403] the court must balance many factors including: the time necessary for presenting the evidence and the potential for delay; how directly it tends to prove the fact in support of which it is offered; whether it would be a needless presentation of cumulative evidence; how important or trivial the fact sought to be proved is; the potential for confusion of the issues or misleading the jury; and whether the fact sought to be proved can be proved in another way involving fewer harmful collateral effects.[34]

Evidence is unfairly prejudicial if a danger exists that the jury will give marginally probative evidence undue or preemptive weight.[35] Under *Oliphant* and *Crawford*, whether the charged act is similar to the uncharged act is important when determining the probative value of

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[33] *VanderVliet*, 444 Mich at 87 n 47. *Actus reus* is defined as the wrongful deed that comprises the physical components of a crime and that generally must be combined with criminal intent to establish criminal liability. Black's Law Dictionary (8th ed).

[34] *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).

[35] *Crawford*, 458 Mich at 398.

the uncharged act. In this case, the probative value of the uncharged acts is slight given the dissimilarities between them and the charged fire.

The potential prejudice of introducing the other fires in this case was great. In fact, as long as it was not carefully examined, it was the best evidence that the prosecution had against defendant. The only substantive evidence against him was the fire investigators' testimony and a possible motive established by his need for money. When presenting her case, the prosecutor came back repeatedly to the previous fires. It is likely that the jury drew the unsubstantiated inference that defendant had the propensity to start fires.

In *Crawford*, this Court made a similar determination regarding the defendant's prior drug conviction, stating:

> Even if we were to find that the evidence of the defendant's prior conviction had some logical relevance distinct from the impermissible character inference, we would nonetheless conclude that it should have been excluded by MRE 403 because the danger of unfair prejudice substantially outweighed whatever marginal probative value it might have had.[36]

This Court added that "the specter of impermissible character evidence is likely to have significantly overshadowed any legitimate probative value."[37] The evidence at issue in *Crawford* was a prior conviction, which is arguably more prejudicial than the prior fires in this case because the prior drug offense was attributable to the defendant. In this case, it was only implied that defendant committed the prior fires. However, I believe similar logic applies.

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[36] *Id*. at 397-398.

[37] *Id*. at 398.

Moreover, the fact sought to be proved in this case, a lack of accident, could have been argued through other, less prejudicial evidence.[38] Specifically, the prosecution put three experts on the stand. Two stated that, in their opinion, the fire was arson. One reasoned that the burn patterns ruled out accidental causes. In fact, the prosecution concedes that "there was substantial evidence that the instant fire was an incendiary fire, set by some human agency."[39] In addition, the prosecution presented circumstantial evidence that defendant was associated with the fire, showing that he was the last person to leave the house and was in arrears on mortgage payments.

Therefore, the prosecution could have attempted to make its case for an intentional act without using past acts evidence that involved harmful collateral effects.[40] Given that the prior fires were dissimilar to the charged fire, the evidence about them was unnecessary to prove lack of accident, and its probative value was minimal.

However, because "[t]he distinction between a verboten character theory and a permissible chances theory is a thin line which a lay juror could easily lose sight of,"[41] I think that the prejudicial effect was high. There was little evidence connecting defendant to the

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[38] Cf. *United States v Lewis*, 224 US App DC 74, 80; 693 F2d 189 (1982) (stating that extrinsic acts evidence was neither cumulative nor unnecessary where it "could prove something that the other evidence could not prove: that appellant . . . was the mastermind of the money order 'scam' ").

[39] Prosecutor's brief, p 38.

[40] Notably, this Court granted leave to appeal to determine if the other fires could be used to show a lack of accident. If the prosecution was seeking to use the other fires to prove identity, the acts were not sufficiently similar to be admissible. See *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), and Imwinkelried, 51 Ohio St L J at 589.

[41] Imwinkelried, 51 Ohio St L J at 602.

fires, and the repeated references to the other fires likely greatly enhanced the danger of unfair prejudice.[42]

Finally, although the trial court gave a limiting instruction to the jury, because of the slight probative value of the evidence, the instruction was likely ineffective. As one critic of the doctrine has noted "such a limiting instruction does more to satisfy legal scholasticism than to direct the minds of real jurors" because "[t]o the ordinary human mind, . . . the division between the prescribed and the proscribed uses [of the uncharged misconduct evidence] may be a bit difficult to perceive."[43]

Thus, the evidence of the other fires was inadmissible under MRE 403.

HARMLESS ERROR

I agree with the Court of Appeals that the improper introduction of the evidence was not harmless. The evidence against defendant was not overwhelming and the prosecution relied substantially on the prior fires to argue the charged fire must have been intentional.[44]

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[42] See *Crawford*, 458 Mich at 400 n 17. Contrary to the majority's suggestion, this does not contradict the "inclusionary" approach to prior misconduct evidence. *Id.* at 400 n 8 ("The distinction between MRE 404(b) as a rule of 'inclusion' as opposed to a rule of 'exclusion' does not signify a shift to a more liberal policy toward the admission of prior acts evidence."). Nor does the inclusionary approach mean the courts should err on the side of admission. *Id.*

[43] Imwinkelried, 40 U Rich L R at 442, quoting Uviller, *Evidence of character to prove conduct: Illusion, illogic, and injustice in the courtroom*, 130 U Pa L R 845, 879 (1982).

[44] Although not affecting this analysis, I also note that after defendant was convicted, an expert who previously worked with the Detroit Fire Department offered to investigate on a pro bono basis. He tested a power cord that ran behind the couch to an electrical outlet. Defendant's roommate testified that the power cord was from a computer and had to be "jiggled" to get the computer to work. Defendant's electrical expert

The prosecution argued in closing that defendant had a "pattern" of fires and that the prior fires were important to show his knowledge of fires and his intent. As a result, I agree with the Court of Appeals that the prosecution "relied substantially on the number of prior fires to argue that the charged fire must have been intentionally set by defendant."[45] Because of this, there was a high chance that the evidence of the other fires affected the outcome.

CONCLUSION

The evidence of past fires that was introduced at trial was improper character evidence and it was therefore not relevant. I would not carve out an exception to admit the evidence under the doctrine of chances given the dissimilarities between the past fires and the charged fire. The past-fires evidence was also inadmissible under MRE 403 because the danger of unfair prejudice substantially outweighed whatever probative value it had. The error in admitting the evidence of the past fires was not harmless.

Accordingly, the Court of Appeals properly remanded this case for a new trial.

CAVANAGH and HATHAWAY, JJ., concurred with KELLY, C.J.

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tested the wiring and junction box and determined that they were the cause of the fire. The testing was videotaped. None of the prosecution's witnesses tested this box or wire. This evidence, in correlation with the improperly admitted evidence in this case, raises serious concerns about the fairness of defendant's trial.

[45] *Mardlin*, unpub op at 5.

SHAY v ALDRICH

Docket No. 138908. Decided August 23, 2010.

Thomas J. Shay brought an action in the Wayne Circuit Court against three police officers from the city of Melvindale (John Aldrich, William Plemons, and Joseph Miller) and two police officers from the city of Allen Park (Wayne Allbright or Albright and Kevin Locklear), alleging assault and battery with respect to the Melvindale defendants and gross negligence through the inaction of the Allen Park defendants during the assault. Following case evaluation, plaintiff executed releases of the Allen Park defendants, and the court, Prentis Edwards, J., entered an order dismissing plaintiff's claims against those defendants with prejudice. A trial date was set for plaintiff's claims against the Melvindale defendants. The releases contained language referring to the release of "all other persons," and the Melvindale defendants moved for summary disposition, asserting that this language effectively released them as well. The court denied their motion, ruling that dismissal on that basis would have been proper only if the releases had been executed before plaintiff filed the lawsuit and that the Melvindale defendants could have relied on the releases only if they had asserted the releases as a defense in their first responsive pleading. The Melvindale defendants moved to amend their affirmative defenses, relying on *Romska v Opper*, 234 Mich App 512 (1999), which held that the language "all other parties" in a release was unambiguous and that there was consequently no need to look beyond the language of the release to determine the release's scope. The Melvindale defendants similarly argued that the language "all other persons" unambiguously released them and that parol evidence should not be used to determine the scope of the releases. The court denied the motion, and the Melvindale defendants sought leave to appeal. Applying *Romska*, the Court of Appeals, JANSEN, P.J., and METER and FORT HOOD, JJ., reversed in an unpublished opinion per curiam, issued March 5, 2009 (Docket No. 282550), and remanded the case for entry of judgment in the Melvindale defendants' favor. Plaintiff applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant plaintiff's application or take other peremptory action. 485 Mich 911 (2009).

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

The standard for determining whether a person is a third-party beneficiary of a release is an objective one, and third-party-beneficiary status must be determined from the language of the contract only. Courts may consider extrinsic evidence of the intended scope of a release when an unnamed party seeks to enforce third-party-beneficiary rights based on broad language in the release and an ambiguity exists with respect to the intended scope of the release.

1. MCL 600.1405 governs the rights of third-party beneficiaries and provides that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation directly to or for the person. A third-party beneficiary may be a member of a class, but the class must be sufficiently described. An objective standard must be used to determine from the releases whether plaintiff executed them directly for the benefit of the Melvindale defendants. They qualified as third-party beneficiaries under MCL 600.1405 because the releases unambiguously released all other persons.

2. The status of third-party beneficiary confers on a person the right to sue to enforce the contract, but the third-party beneficiary only has the same rights that the original promisee would have had. Those rights are subject to any conditions, limitations, and infirmities of the contract to which the promisee's rights would be subject.

3. Traditional principles of contract interpretation apply to the determination of a third-party beneficiary's rights under a release. Releases are subject to the parol evidence rule, but a court may use extrinsic evidence to determine the actual intent of the parties when an ambiguity exists.

4. A latent ambiguity exists when the contract language appears to be clear and intelligible and suggests a single meaning but other facts create the need for interpretation or a choice among two or more possible meanings. To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if it supports an argument that under the circumstances of the contract's formation, the language at issue is susceptible to more than one interpretation. If a latent ambiguity exists, the court must examine the extrinsic evidence again to ascertain the meaning of the language.

5. The Melvindale defendants were included in the group of "all other persons" covered by the releases. The extrinsic evidence

plaintiff presented in this case, however, supported his argument that a latent ambiguity existed in the language, and the Melvindale defendants did not dispute that evidence. It is clear that the settling parties did not intend to release the Melvindale defendants from liability.

6. *Romska* is overruled to the extent that it prohibits courts from considering extrinsic evidence of the intended scope of a release when an unnamed party seeks to enforce third-party-beneficiary rights based on broad language included in the release and an ambiguity exists with respect to the intended scope of the release.

Reversed and remanded.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, would affirm the judgment of the Court of Appeals and would not overrule *Romska*. *Romska* is grounded on well-established contract principles and has been consistently applied, providing clear notice that unambiguous language releasing "all other persons" in fact releases "all other persons," a class that undisputedly includes the Melvindale defendants. The Court of Appeals correctly determined that the releases contained no ambiguity of any kind and, as a matter of law, accomplished what they stated. The majority holding undermines the fundamental freedom of parties to contract, creates uncertainty in contract law, and will generate unnecessary litigation.

RELEASE — THIRD-PARTY BENEFICIARIES — EVIDENCE — PAROL EVIDENCE — SCOPE OF RELEASES.

The standard for determining whether a person is a third-party beneficiary of a release is an objective one, and third-party-beneficiary status must be determined from the language of the release only, but courts may use extrinsic evidence to determine the scope of a release when an unnamed party seeks to enforce third-party-beneficiary rights based on broad language in the release and an ambiguity exists with respect to the intended scope of the release (MCL 600.1405).

David A. Robinson & Associates (by *David A. Robinson* and *Theophilus E. Clemons*) and *Bendure & Thomas* (by *Mark R. Bendure*) for Thomas J. Shay.

Plunkett Cooney (by *Ernest R. Bazzana* and *Peter W. Peacock*) for John Aldrich, William Plemons, and Joseph Miller.

Amicus Curiae:

Barbara H. Goldman for the Michigan Association for Justice.

WEAVER, J. In this case, we decide whether the Michigan Court of Appeals case, *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999), was correctly decided. After examination of the *Romska* decision regarding the scope of a release from liability, we overrule *Romska* to the extent that its holding precludes the use of parol evidence when an unnamed party asserts third-party-beneficiary rights based on broad language included in a release from liability and an ambiguity exists with respect to the intended scope of that release. Accordingly, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, which heavily relied on *Romska*, and remand this case to the trial court for further proceedings.

I. FACTS AND PROCEDURAL BACKROUND

Plaintiff, Thomas Shay,[1] alleged that he was assaulted by Melvindale and Allen Park police officers. On the day of the alleged assault, Officers John Aldrich and William Plemons of the Melvindale Police Department visited plaintiff at his home in response to a car alarm. After speaking with plaintiff, Officers Aldrich and Plemons left the home. They returned later that day, accompanied by Officer Joseph Miller of the Melvindale Police Department. In addition to the Melvindale police

[1] Thomas Shay died approximately four months after oral argument on his application for leave to appeal in this Court, and Nicole Shay, the personal representative of his estate, was substituted as plaintiff. References to "plaintiff" in this opinion are to Thomas Shay.

officers, two officers from the Allen Park Police Department, Wayne Allbright (or Albright) and Kevin Locklear, were present. Plaintiff alleged that Officer Aldrich struck him and he fell to the ground. Plaintiff further alleged that other officers present assaulted him after he fell.

Plaintiff filed suit, naming five defendants: Officers Aldrich, Plemons, and Miller ("the Melvindale Officers"), as well as Officers Allbright and Locklear ("the Allen Park Officers"). With respect to the Melvindale Officers, plaintiff alleged that they committed an assault and battery. As for the Allen Park Officers, plaintiff alleged that their inaction during the alleged assault amounted to gross negligence.

The Melvindale and Allen Park Officers, and their respective municipalities, were covered by different insurance companies and different insurance polices. Additionally, the Melvindale and Allen Park Officers, and their respective municipalities, were represented by separate defense counsel. Plaintiff, the Melvindale Officers, and the Allen Park Officers agreed to appear for a case-evaluation hearing. After the hearing, the following awards, based on each defendant's respective liability, were issued: $500,000 against Melvindale Officer Aldrich, $500,000 against Melvindale Officer Plemons, $450,000 against Melvindale Officer Miller, $12,500 against Allen Park Officer Allbright, and $12,500 against Allen Park Officer Locklear.

Plaintiff accepted the case-evaluation awards against the Allen Park Officers, and both Allen Park Officers agreed to the awards. Plaintiff additionally accepted the case-evaluation award against Melvindale Officer Miller, but rejected the case-evaluation awards against Melvindale Officers Aldrich and Plemons. All three of the Melvindale Officers rejected the case-evaluation

awards. Accordingly, the Allen Park Officers were dismissed from the case, while a trial date was set for the remaining defendants, the three Melvindale Officers.

Plaintiff executed two releases, one naming Allen Park Officer Allbright and one naming Allen Park Officer Locklear. The two releases were identical in all respects except for the named Allen Park Officer indicated in the document. The release naming Officer Locklear read in part as follows:

> For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS to me in hand paid by **Michigan Municipal Liability and Property Pool** do for ourselves, executors, administrators, successors and assigns, discharge, **ALLEN PARK POLICE OFFICER KEVIN LOCKLEAR and Michigan Municipal Liability and Property Pool, insurer,** together with all other persons, firms and corporations, from any and all claims, demands and actions which I have now or may have arising out of any and all damages, expenses, and any loss or damage resulting from an incident occurring on September 8, 2004.

Each release also stated that "the execution of this agreement shall operate as a satisfaction of my claims against such other parties to the extent that such other parties are or may be entitled to recover, by way of contribution, indemnity, lien or otherwise, from the parties herein released." Additionally, each release stated that plaintiff further agreed to "indemnify and hold harmless the above-named released and discharged parties . . . ." Plaintiff signed the releases, and the trial court entered a stipulated "Order for Dismissal with Prejudice as to Defendants, Allen Park Police Officer Albright and Allen Park Police Officer Locklear, Only."

Approximately two months later, the Melvindale Officers moved for summary disposition under MCR 2.116(C)(7), relying on the Allen Park Officers' re-

leases. The Melvindale Officers asserted that the language "all other persons" contained in the releases effectively released them as well. The trial court denied the Melvindale Officers' motion for summary disposition, agreeing with plaintiff that dismissal based on (C)(7) would only be proper if the releases had been executed before the commencement of plaintiff's suit. Furthermore, the trial court ruled that the Melvindale Officers could only have relied on the releases if they had raised the language as a defense in their first responsive pleading.

The Melvindale Officers moved to amend their affirmative defenses in order to include the language of the releases as a defense. The Melvindale Officers relied heavily on *Romska*. In *Romska*, the Court of Appeals majority held that the language "all other parties" in a release was unambiguous and, therefore, there was "no need to look beyond the . . . language of the release" to determine its scope.[2] The Melvindale Officers argued that the language "all other persons" contained within the releases was clear and unambiguous, just as the language in the release in *Romska* was. Thus, the Melvindale Officers asserted that they too were released by the language "all other persons" and that parol evidence should not be used to determine the scope of the Allen Park Officers' releases.

The trial court denied the Melvindale Officers' motion to amend their affirmative defenses and rejected their argument that the language of the releases was broad enough to release them as well. The trial court instead found the releases to be ambiguous, noting that the names of the Allen Park Officers and their insurance carrier were in capital letters and bold type, which suggested the limiting nature of the language. This bold

[2] *Romska*, 234 Mich App at 515-516.

type was used in both the first and last paragraphs of the releases, which the trial court reasoned was further indication that the releases were intentionally limited to the persons named in bold. The trial court additionally noted that the Melvindale Officers were not mentioned anywhere in the releases.

After concluding that the releases were ambiguous and, therefore, that parol evidence was admissible, the trial court noted that the dismissal order entered as a result of the releases was entitled "Order for Dismissal with Prejudice as to Defendants, Allen Park Police Officer Albright and Allen Park Police Officer Locklear, Only." The order also indicated that the "entry of this Order does not resolve the last pending claim between the parties and does not close the case." Additionally, the trial court acknowledged an affidavit from the attorney for the Allen Park Officers explaining that he had intended to negotiate the releases with plaintiff for the Allen Park Officers only.

The trial court further indicated that the amount of consideration for the releases indicated that they were not meant to dispose of claims against the Melvindale Officers. The case-evaluation awards against the Melvindale Officers totaled $1,450,000, while the releases were executed in exchange for the $25,000 combined case-evaluation amount against the Allen Park Officers. The trial court reasoned that it was unlikely that plaintiff would forgo his claims against the Melvindale Officers for just $25,000.

Plaintiff filed an emergency motion to reform the releases. However, before any decision on that motion, the Melvindale Officers filed an application for leave to appeal in the Court of Appeals. The Court of Appeals found *Romska* instructive and concluded

that the Allen Park Officers' releases were unambiguous and must be applied as written.[3] The Court of Appeals therefore concluded that plaintiff's claims against the Melvindale Officers were barred.[4] The Court of Appeals reversed the trial court's order denying the Melvindale Officers' motion for summary disposition and remanded the case to the trial court for entry of judgment in favor of the Melvindale Officers.[5]

Plaintiff filed an application for leave to appeal in this Court. We ordered that oral argument be heard on the application, directing the parties to address "whether *Romska v Opper,* 234 Mich App 512 (1999), was correctly decided."[6]

II. STANDARD OF REVIEW

This Court reviews de novo decisions on motions for summary disposition.[7] When determining whether a motion for summary disposition brought pursuant to MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it.[8] This issue also involves questions of law regarding the construction of a contract, which we review de novo as well.[9]

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[3] *Shay v Aldrich*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 282550), pp 3-4.

[4] *Id*. at 4.

[5] *Id*. at 5.

[6] *Shay v Aldrich*, 485 Mich 911 (2009).

[7] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

[8] *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008).

[9] *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008).

III. ANALYSIS

A. THE *ROMSKA* DECISION

In *Romska*, the plaintiff was driving her car when she was struck by a car driven by Veliko Velikov.[10] Velikov hit the plaintiff's car after swerving to avoid a vehicle driven by the defendant, David Opper.[11] The plaintiff filed personal injury claims against both Velikov's and Opper's insurance carriers and was able to reach a settlement with Velikov's carrier, Farm Bureau Insurance Company, for $45,000.[12] She executed a standard release form, releasing Farm Bureau, as well as "all other parties, firms, or corporations who are or might be liable."[13]

The plaintiff was unable to reach a settlement with Opper's carrier, American States Insurance Company.[14] As a result, the plaintiff filed suit against Opper himself.[15] Opper then moved for summary disposition, relying on the language "all other parties" in the Farm Bureau release.[16]

In a split decision, the Court of Appeals held that the language of the Farm Bureau release was unambiguous.[17] Because Opper could be classified within the phrase "all other parties, firms or corporations who are or might be liable," the majority reasoned that there

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[10] *Romska*, 234 Mich App at 513.

[11] *Id*.

[12] *Id*. at 513-514.

[13] *Id*. at 514.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 515. The Court of Appeals majority opinion was authored by then Judge MARKMAN and joined by Judge SAAD. Judge HOEKSTRA authored a partial concurrence and partial dissent.

was "no need to look beyond the plain, explicit, and unambiguous language of the release in order to conclude that he has been released from liability."[18]

The majority noted that the plaintiff provided and received adequate consideration under the release and, thus, the release was valid.[19] Additionally, the majority gave weight to the existence of a merger clause within the release, reasoning that the clause dictated that "disputes concerning the release are to be resolved exclusively by the resort to the language of the release itself."[20] Therefore, the majority concluded that in order to give effect to the merger clause, it must not consider extrinsic evidence that might have been otherwise considered had the merger clause not been included.[21]

The majority went on to reason that the settling parties likely included broad language in the release for the purpose of avoiding future legal burdens that could potentially arise out of lawsuits brought by the plaintiff against third parties.[22] The majority cautioned that finality might never be truly achieved through a release if even unambiguous release language, coupled with a merger clause, cannot effectively preclude such future lawsuits.[23]

In contrast, the partial dissent opined that when a "stranger" to a release seeks to apply broad language contained in a release to bar claims against the stranger, it *is* appropriate for a court to consider parol evidence of intent in order to determine the true scope

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[18] *Id*.

[19] *Id*. at 516.

[20] *Id*. at 516-517.

[21] *Id*.

[22] *Id*. at 517-518.

[23] *Id*.

of the release.[24] The partial dissent noted that Michigan's Legislature abolished in MCL 600.2925d the common-law principle that the release of one joint tortfeasor is the release of all.[25] The partial dissent opined that it would be fundamentally unfair to bar the plaintiff's claim against Opper on the basis of the broad release language because this would effectively deprive the plaintiff of a cause of action against a tortfeasor whom she did not intend to release.[26]

The partial dissent acknowledged that an unambiguous document must generally be interpreted "solely on the basis of the information contained within its four corners," but it noted that this situation "is not always the case."[27] The partial dissent concluded as follows:

> Indeed, this Court, too, has stated that it agrees with "the majority of courts which hold that the parol evidence rule cannot be invoked either by or against a stranger to the contract." *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989), citing 30 Am Jur 2d, Evidence, § 1031, pp 166-167. Therefore, because the parol evidence rule is operative only with respect to parties to a document, it cannot be invoked either by or against a stranger to the contract. Hence, in order to determine the intentions of the parties about the scope of a general release, extrinsic evidence should be allowed to determine whether a stranger may rely on the omnibus language "all other parties, firms, or corporations" that is contained within a release.[28]

B. WHETHER *ROMSKA* AND THIS CASE WERE CORRECTLY DECIDED

In *Romska*, the majority and partial dissent presented opposing views regarding a question critical to

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[24] *Id*. at 533 (HOEKSTRA, J., concurring in part and dissenting in part).

[25] *Id*. at 527.

[26] *Id*. at 528.

[27] *Id*. at 531.

[28] *Id*. at 533.

the resolution of this matter: May a court properly consider extrinsic evidence of the settling parties' intent regarding the scope of a release when a nonparty to the release attempts to rely on broad release language? We conclude that courts may consider extrinsic evidence of the intended scope of a release when an unnamed party seeks to enforce third-party-beneficiary rights based on the broad release language but the evidence presented establishes that an ambiguity exists with respect to the intended scope of the release.

At common law, the release of one joint tortfeasor effectively released all other joint tortfeasors.[29] In 1974, however, the Michigan Legislature abrogated the common-law rule and dictated by statute that the release of one joint tortfeasor from liability does not automatically release other joint tortfeasors from liability *unless the terms of the release so provide*.[30]

This Court has traditionally applied theories of contract law to disputes regarding the terms of a release.[31] "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."[32] Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning.[33] On the other hand, if the language of a contract is ambiguous, courts may consider extrinsic evidence to determine the intent of the parties.[34] Applying this principle, the Court of Appeals majority in *Romska* concluded that "[t]here cannot be any broader classification than the word 'all,' and 'all'

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[29] *Slater v Ianni Constr Co*, 268 Mich 492, 494; 256 NW 495 (1934).

[30] MCL 600.2925d(a).

[31] See *Denton v Utley*, 350 Mich 332, 335-338; 86 NW2d 537 (1957).

[32] *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).

[33] *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2005) (opinion by CAVANAGH, J.).

[34] *Id*. at 198.

leaves room for no exceptions."[35] Therefore, the majority reasoned that it would be "inappropriate to look to parol evidence here in determining the scope of the release."[36]

In this case, the trial court found the broad release language ambiguous and denied the Melvindale Officers' motion for summary disposition after considering extrinsic evidence that neither plaintiff nor the Allen Park Officers had intended that the Melvindale Officers would also be released by the documents executed. The Court of Appeals, however, noted that the releases "use the same broad language as the release at issue in *Romska*, and they also employ the word 'all.' "[37] Therefore, the Court of Appeals concluded that the trial court erred by considering extrinsic evidence of the intentions of plaintiff and the Allen Park Officers and ordered that judgment be entered for the Melvindale Officers.[38] We disagree with the Court of Appeals' conclusion.

First and foremost, it is undisputed that the Melvindale Officers were not involved in the Allen Park Officers' settlement negotiations with plaintiff, were not named in the executed releases, and did not sign the releases. The parties negotiating the releases included plaintiff and the Allen Park Officers only. Plaintiff presented an affidavit from counsel for the Allen Park Officers stating:

> My only intent with regard to the Release, Settlement and Order of Dismissal was to release my clients, defendant Allen Park Officers Albright and Locklear, from liability in this matter for the consideration of the $25,000.00 Case Evaluation Award.

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[35] *Romska*, 234 Mich App at 515-516.

[36] *Id*. at 516.

[37] *Shay*, unpub op at 4.

[38] *Id*. at 5.

Additionally, during oral argument in this Court, counsel for the Melvindale Officers conceded that plaintiff and the Allen Park Officers, as the only parties negotiating the releases, did not intend to release the Melvindale Officers.

The Melvindale Officers have not asserted that they were parties to the release negotiations and executions; rather, they simply seek to benefit from the boilerplate language contained in the Allen Park Officers' releases. Again, the Melvindale Officers concede that neither plaintiff nor the Allen Park Officers intended to release them from liability.[39]

Acknowledging that they were not parties to the releases, the Melvindale Officers argue that they were nevertheless released from liability by the Allen Park Officers' releases because they are third-party beneficiaries of the agreement between plaintiff and the Allen Park Officers. MCL 600.1405 governs the rights of third-party beneficiaries in Michigan and states, in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promise.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

This Court has interpreted the applicable statutory language as follows:

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[39] During oral argument, defense counsel conceded that neither plaintiff nor the Allen Park Officers intended to release the Melvindale Officers from liability. Nevertheless, defense counsel requested that this Court conclude that the broad release language created third-party-beneficiary rights in the Melvindale Officers.

> In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier "directly." Simply stated, *section 1405 does not empower just any person who benefits from a contract to enforce it*. *Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person*. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.[40]

This Court has additionally explained that "a third-party beneficiary may be a member of a class, but the class must be sufficiently described."[41] Thus, in order for the Melvindale Officers to qualify as third-party beneficiaries, the language of the releases must have demonstrated an undertaking by plaintiff *directly* for the benefit of the Melvindale Officers or for a sufficiently designated class that would include the Melvindale Officers.[42]

An objective standard must be used to determine from the release documents whether plaintiff executed the releases directly for the benefit of the Melvindale Officers.[43] The trial court did not conclude that the language used in the releases indicated that they were executed directly for the benefit of the Melvindale Officers. Instead, the trial court found that the language appeared intentionally limiting in nature, noting that the Allen Park Officers were named in bold font

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[40] *Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999) (emphasis added).

[41] *Id*. at 680.

[42] See *id*. at 683.

[43] *Brunsell v Zeeland*, 467 Mich 293, 297-298; 651 NW2d 388 (2002).

while the Melvindale Officers were not named anywhere in the documents.

While the trial court acknowledged that the release in *Romska* contained similar broad language, it concluded that *Romska* was distinguishable from the present case for various reasons. The trial court noted that the Melvindale Officers rejected the case-evaluation awards against them, a trial date was set for them, and the court entered a consent order indicating that plaintiff's case was dismissed against the Allen Park Officers *only*. Therefore, it is undisputed that the Melvindale Officers remained parties to plaintiff's lawsuit after the Allen Park Officers were released.

The trial court correctly concluded that plaintiff, the Allen Park Officers, and the Melvindale Officers were aware that the Melvindale Officers would remain parties to plaintiff's lawsuit after the releases were executed. However, as previously explained, this Court has long held that the standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only.[44] A majority of this Court has affirmed this rule in recent cases and further emphasized that the promise must be made *directly* for the person and, thus, that incidental beneficiaries of contracts could not recover.[45]

This rule reflects "the Legislature's intent to ensure that contracting parties are clearly aware that the scope

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[44] See, e.g., *Guardian Depositors Corp v Brown*, 290 Mich 433, 437; 287 NW 798 (1939) (stating that "[t]he standard which the legislature has prescribed for determining when a 'promisor * * * has undertaken' to perform or refrain from performing a given act, we think, is an objective one, determined from the form and meaning of the contract itself").

[45] See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); *Brunsell*, 467 Mich at 296-298.

of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract."[46] Although if taken out of context this sentence could be read to mean that the important inquiry is the subjective understanding of the contracting parties, when read in context, it is clear that contracting parties' "intent" with regard to third-party beneficiaries is to be determined solely from the "form and meaning" of the contract.[47]

Given this Court's long history of interpreting the third-party-beneficiary statute to require an objective interpretation of the language, we conclude that the Melvindale Officers qualify as third-party beneficiaries under the applicable statute because on its face, the release language unambiguously releases "all other persons."

Once it has been determined that a party qualifies as a third-party beneficiary, we must address the significance of this determination. This Court has held that the significance of a party being recognized under the third-party-beneficiary statute is that the status confers on parties a cause of action and the right to sue.[48] A party who qualifies as a third-party beneficiary effectively "stands in the shoes" of the original promisee and "has the same right to enforce said promise that he

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[46] *Brunsell*, 467 Mich at 297.

[47] See *Koenig*, 460 Mich at 680 (stating that "an objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something directly to or for' the putative third-party beneficiary") (citation omitted; emphasis omitted).

[48] See *id*. at 684, *Lidke v Jackson Vibrators, Inc*, 379 Mich 294, 300; 150 NW2d 737 (1967), and *Guardian Depositors*, 290 Mich at 442; see also *Williams v Polgar*, 391 Mich 6, 14; 215 NW2d 149 (1974) (recognizing third-party beneficiaries as an exception to the common-law privity rule).

would have had if the said promise had been made directly to him as the promisee."[49]

The third-party-beneficiary statute expressly provides that the rights of the third-party beneficiary are "subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject."[50] Thus, a person who qualifies under the third-party-beneficiary statute gains the right to sue to enforce the contract. But in doing so, that person stands in the shoes of the original promisee and only gains the same right that the original promisee would have had. Accordingly, a third-party beneficiary is not automatically entitled to the sought-after benefit merely by *qualifying* as a third-party beneficiary. While a third-party beneficiary has the right to seek enforcement of a promise, courts must still apply basic principles of contract interpretation when determining the extent of the third party's rights under the contract.[51]

Accordingly, an objective test is used to determine whether a third party is entitled to pursue a cause of action for enforcement of a contract promise, but that

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[49] MCL 600.1405.

[50] MCL 600.1405(2)(a).

[51] See, e.g., *Lidke*, 379 Mich at 299-300 (affirming the trial court's determination that the plaintiff was "entitled to maintain a cause of action" as a third-party beneficiary of a contract and proceeding to analyze the extent of the plaintiff's rights under the contract), *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 677; 66 NW2d 227 (1954) (remanding the case to the trial court to interpret the contract on the merits after this Court determined that the plaintiff was "entitled to maintain his cause of action under the third-party beneficiary statute"), and *Szymanski v John Hancock Mut Life Ins Co*, 304 Mich 483; 8 NW2d 146 (1943) (the named beneficiary of her deceased husband's insurance contract was able to sue to attempt to enforce her rights but ultimately unable to recover because this Court determined that the promise she sought to enforce did not extend to the relief that she was seeking).

same objective test does not also govern the interpretation of the contract. Instead, the usual principles of contract interpretation apply, and the promise is subject to the same "limitations" and "infirmities" as it would be if it were being enforced by the original promisee.[52] On the face of the release documents, the Melvindale Officers are third-party beneficiaries of the promise, i.e., the release from liability, and may seek to enforce it. Given that we have determined that the Melvindale Officers are third-party beneficiaries, we must now apply traditional principles of contract interpretation to determine the scope of the Melvindale Officers' rights under the release.

As previously stated, releases are generally treated as contracts under Michigan law and, thus, subject to the parol evidence rule, which prohibits the use of extrinsic evidence to interpret unambiguous language within a document.[53] However, if a contract is ambiguous, then "extrinsic evidence is admissible to determine the actual intent of the parties."[54]

An ambiguity may either be patent or latent. This Court has held that extrinsic evidence may not be used to identify a patent ambiguity because a patent ambiguity appears from the face of the document. However, extrinsic evidence may be used to show that a latent ambiguity exists.[55] With respect to a latent ambiguity, we have explained as follows:

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[52] See MCL 600.1405(2)(a).

[53] See, generally, *Paul v Univ Motor Sales Co*, 283 Mich 587; 278 NW 714 (1938).

[54] *Grosse Pointe Park*, 473 Mich at 198 (opinion by CAVANAGH, J.).

[55] *Id.* at 198-201; *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964); *Sault Ste Marie Tribe of Chippewa Indians v Granholm*, 475 F3d 805, 812 (CA 6, 2007) (applying the "well-settled tenet of Michigan contract law" that extrinsic evidence may be admitted to identify and interpret a latent ambiguity).

> A latent ambiguity, however, is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist."[56]

A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the " 'necessity for interpretation or a choice among two or more possible meanings.' "[57] To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation.[58] Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue.[59]

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[56] *Grosse Pointe Park*, 473 Mich at 198 (opinion by CAVANAGH, J.) (citations omitted).

[57] *McCarty*, 372 Mich at 575 (citation omitted). See also *In re Kremlick Estate*, 417 Mich 237; 331 NW2d 228 (1983), in which a will bequeathed half of an estate to the "Michigan Cancer Society," which was an existing organization that could have received the money from the estate pursuant to the terms of the will. Thus, the language could have been applied *without* confusion. Nonetheless, this Court permitted extrinsic evidence to show that the grantor actually intended the beneficiary to be the "Michigan Division of the American Cancer Society" instead, explaining that a latent ambiguity can arise " 'where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates' the possibility of more than one meaning.' " *Id*. at 240, quoting *In re Butterfield Estate*, 405 Mich 702, 711; 275 NW2d 262 (1979).

[58] *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 206; 220 NW2d 664 (1974).

[59] *Id*. at 206, 209-210.

The latent-ambiguity doctrine has a long history in Michigan law, as demonstrated by *Ives v Kimball*, 1 Mich 308, 313 (1849), in which this Court explained that a latent ambiguity may be shown by parol evidence:

> There is no more useful, just and practical rule of law, than that which admits evidence of surrounding circumstances and collateral facts, within certain well defined limits, for the purpose of enabling courts to ascertain and carry into effect the intention of contracting parties. The cases in which this rule has been applied are almost innumerable.

This Court has applied the latent-ambiguity doctrine when extrinsic evidence demonstrates that there is an ambiguity concerning the identity of the intended beneficiary of a promise in a contract. In *Hall v Equitable Life Assurance Society of the United States*, in the context of an insurance contract, this Court stated " '[w]here *from the evidence which is introduced*, there arises a doubt as to what party or parties are to receive the benefit of the policy, parol evidence is admissible to determine such fact.' "[60] In *Hall*, although the decedent's insurance policy clearly named a certain person as the beneficiary, extrinsic evidence made it clear that the decedent had only intended to name that person temporarily, as a guardian, until he determined who would properly act as the guardian of his estate, but he died before being able to make that determination. This Court applied the latent-ambiguity doctrine and held that even though a specific person was unambiguously named in the policy, the proceeds would go to the estate generally.[61]

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[60] *Hall v Equitable Life Assurance Society*, 295 Mich 404, 411; 295 NW 204 (1940) (emphasis added; citation omitted).

[61] *Id.*

In addition, this Court noted in *Meyer v Shapton*, 178 Mich 417, 425; 144 NW 887 (1914), that "parol evidence may be admitted to correct, identify, or explain the name given and party intended in writing as grantee, devisee, or promisee, not to pervert the written instrument, but to prevent the written instrument being perverted from the true intent of the contracting parties."[62] In *Meyer*, one of the named parties in a contract of sale was a corporation that no longer existed, and, rather than voiding the contract, the Court examined the surrounding circumstances to determine who the intended party really was.[63]

We do not dispute that the Melvindale Officers are "persons," as the term is used in the releases. In fact, it is possible that any person in the world could fall into this broadly defined group of "all other persons." However, this conclusion alone does not dictate that we must apply the release language to the Melvindale Officers without even considering whether an ambiguity arises from the undisputed extrinsic evidence presented by plaintiff.[64] Courts are obligated in construing releases

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[62] In *Meyer*, the disputed language was given a meaning by the courts that was inconsistent with the plain meaning of the language itself because the seller in the contract at issue was designated as "Meyer Bros." when, in fact, the extrinsic evidence indicated that "Herman C. Meyer" was the intended seller and that "Meyer Bros." was no longer in existence.

[63] *Id*. at 424-425.

[64] The Third Restatement of Torts expressly addresses what it characterizes as the "frequently occurring problem" of "a plaintiff [who] enters into a release with a defendant that releases the defendant and provides that it also releases 'all persons' . . . ." Restatement Torts, 3d, Apportionment of Liability, § 24, comment g, p 302. The reporter's note to comment g states that some jurisdictions inquire "into the intent of the parties to the settlement agreement" and "[s]ome require a showing by the plaintiff *that the 'all persons' language is ambiguous* or constitutes a mistake . . . ." *Id*. at 307.

such as those at issue, to effectuate the intent of the parties, and extrinsic evidence is admissible to the extent necessary to do so.[65]

Plaintiff presented extrinsic evidence to support his argument that the release language is ambiguous, including the following facts: (1) the Allen Park Officers and the Melvindale Officers were represented by different counsel, (2) it was expressly agreed that plaintiff would accept the combined $25,000 case-evaluation awards with respect to the Allen Park Officers, but would not accept the $1.5 million award with respect to the Melvindale Officers, (3) counsel for the Allen Park Officers explained to plaintiff that the releases were drafted in order to settle plaintiff's claims against his clients, (4) a stipulation and order dismissing the Allen Park Officers *only* was entered, and (5) the Melvindale Officers remained parties to plaintiff's lawsuit with a trial date set for plaintiff to proceed against them. The extrinsic evidence is further bolstered by the affidavit from counsel for the Allen Park Officers—the drafter of the releases—indicating that when he drafted the releases, he had not intended to provide for the release of the Melvindale Officers as well.

Again, a latent ambiguity has been described as one that " 'arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon

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The Restatement adopts this "intent" approach, relying on Professor Corbin, and explains that "[c]ontract law permits inquiry into extrinsic evidence that might explain the negotiations of the parties, the circumstances in which the release was prepared, the respective goals of the parties in entering into the settlement and release . . . ." *Id*. In contrast, the Restatement rejects the approach adopted in *Romska*, noting that only a "distinct minority" of jurisdictions treat the " 'all persons' language as unambiguous, which therefore cannot be challenged by extrinsic evidence of the parties' intent." *Id*. at 306.

[65] *Grosse Pointe Park*, 473 Mich at 198 (opinion by CAVANAGH, J.).

those words when applied to the object or to the subject which they describe.' "[66] " 'And where, from the evidence which is introduced, there arises a doubt as to what party or parties are to receive the benefit [of a contract], parol evidence is admissible to determine such fact.' "[67] "In construing [contractual] provisions due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances."[68] "Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement."[69]

The extrinsic evidence presented here is not disputed by the Melvindale Officers, and it undeniably reveals the clear intent of the parties. Furthermore, the language of the releases expressly contemplates a situation in which the Allen Park Officers might be liable by way of contribution or indemnity to another party. This language implies the existence of the continued lawsuit against other parties. Given the undisputed extrinsic facts that the Melvindale Officers remained parties to plaintiff's lawsuit and were former codefendants of the Allen Park Officers, it would be entirely reasonable for the Allen Park Officers to include language in the releases that would protect them from actions for contribution or indemnity by remaining parties. Considering the language of the releases and the extrinsic evidence presented, it is clear that the settling parties did not include the term "persons" in the releases in

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[66] *Hall*, 295 Mich at 409 (citation omitted).

[67] *Id*. at 411 (citation omitted).

[68] *W O Barnes Co, Inc v Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953).

[69] *Id*. at 377.

order to effectuate an intent to release the Melvindale Officers from liability.

It is an elementary rule of construction of contracts that in case of doubt, a contract is to be strictly construed against the party by whose agent it was drafted.[70] However, the drafter here *agrees* with plaintiff's assertions about the intent of the settling parties. Not only are the settling parties in full agreement about their intent, but the Melvindale Officers do not even seriously contest this point and have expressed agreement with this same intent. There is no indication whatsoever that counsel for either the Allen Park Officers or the Melvindale Officers took any action in relation to this matter without their clients' agreement. Any suggestions to the contrary are entirely unfounded.

This is simply not a case in which a stranger to a contract or release comes forward sometime after the formation of the contract or release and seeks to benefit from its terms. Instead, the Melvindale Officers were readily ascertainable codefendants in a pending lawsuit by plaintiff. In addition, this is not a case in which there is any legitimate dispute about the settling parties' intent. Defendants do not even dispute the parties' actual intent.

Under the facts of this case, if plaintiff were not permitted to present extrinsic evidence in order to ascertain the intent of the settling parties, the settling parties' intent would undoubtedly be perverted.[71] Plaintiff would be deprived of his claim for assault and battery against the Melvindale Officers, which he expressly preserved by rejecting the case-evaluations awards assessed against them. In addition, counsel for

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[70] *Mich Chandelier Co v Morse*, 297 Mich 41, 46; 297 NW 64 (1941).

[71] *Meyer*, 178 Mich at 424-425.

the Allen Park Officers would be deemed responsible for releasing the Melvindale Officers' from liability when it was not his intention to do so. Further, the Melvindale Officers would obtain a complete windfall by being released from liability for their acts in exchange for no bargained-for promise and no consideration at all, despite the fact that they do not dispute that this was not the intent of the settling parties. Not only would this be an unjust result, it would be contrary to the cardinal rule of contract interpretation: that the contracting parties' intent should control.[72]

In this case, plaintiff has shown that the circumstances surrounding the execution of the releases created a latent ambiguity about whom the parties intended to include within the scope of the releases. All the contracting parties agree that neither plaintiff nor the Allen Park Officers intended the releases to have any effect on the Melvindale Officers' liability. Even the Melvindale Officers *themselves* did not believe that the releases were intended to include them.[73] Further, it is

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[72] The dissent, authored by Justice MARKMAN, who also authored *Romska* in the Court of Appeals, is unpersuasive, despite its 32 pages in length, because the arguments are repetitive of Justice MARKMAN's analysis in *Romska*, which we have rejected today. The dissent claims that this decision is inconsistent with the law of this state. To support this claim, the dissent merely provides a string citation to Court of Appeals decisions decided *after Romska*. Given that these lower court decisions were bound by *Romska*, it is hardly remarkable that they utilized *Romska*'s legal analysis. The only other citations offered by the dissent in support of its claim are federal cases. In fact, it is the dissent's limited formulation of the latent-ambiguity doctrine that is inconsistent with cases in which *this* Court has applied that doctrine. See, e.g., *Keller v Paulos Land Co*, 381 Mich 355, 362; 161 NW2d 569 (1968), in which this Court concluded that the parties intended that an easement for "ingress and egress" would be an easement for parking instead, even though this understanding "was not a use of ingress and egress within the common legal meaning."

[73] This Court has held that when interpreting an ambiguity, it is significant if the relevant parties were aware of the circumstances. See,

illogical to think that plaintiff would have accepted the case-evaluation amounts for the Allen Park Officers as consideration for releasing *all* defendants when the claims against the Melvindale Officers had much larger case-evaluation amounts. Although on the face of the releases the Melvindale Officers are entitled as third-party beneficiaries to seek enforcement of the releases, the releases are subject to the same "limitations" and "infirmities" as they would have been if they had been made directly for those officers. This means that the release language must be subject to evidence of the latent ambiguity demonstrating that the Melvindale Officers are not included in plaintiff's release from liability of "all other persons."

In sum, to determine whether an unnamed party is released from liability by broad or vague release language, the party's status as a third-party beneficiary must be established by an objective analysis of the release language. However, traditional contract principles continue to apply to the release, and courts may consider the subjective intent of the named and unnamed parties to the release under certain circumstances, such as when there is a latent ambiguity. The third-party-beneficiary statute indicates that the Legislature intended to allow parties who are direct beneficiaries to sue to enforce their rights, but the statute expressly states that third-party beneficiaries have only the "same right" to enforce as they would if the promise had been made directly to them. MCL 600.1405. That is, the statute creates a cause of action, but it is not

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e.g., *Loyal Order of Moose v Faulhaber*, 327 Mich 244, 250; 41 NW2d 535 (1950) (noting that when it is necessary for a court to construe an agreement, it must determine the intent of the parties and "[a]s bearing on the question of such intent at the time the contract was made, it was proper to show by parol testimony the actual situation that then existed to the knowledge of defendant as well as plaintiff").

intended to afford third parties greater rights than they would have if they had been the original promisee.

If this Court were to extend the objective test it has adopted for determining whether there is a third-party beneficiary to interpreting the scope of the rights of the third-party beneficiary, it would be contrary to the statute in instances in which, as here, because of the latent-ambiguity doctrine, the subjective intent of the party would be relevant to determining the party's rights if the promise had been made directly to the party. Thus, while the objective approach for determining whether a party is a third-party beneficiary must be applied, traditional contractual principles, including the latent-ambiguity doctrine, must also be applied in order to determine the scope of the third-party beneficiary's rights.

IV. CONCLUSION

In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and overrule *Romska* to the extent that it prohibits a court from considering extrinsic evidence of the intended scope of a release when an unnamed party seeks to enforce third-party-beneficiary rights based on broad language included in a release from liability and an ambiguity exists with respect to the intended scope of that release. Accordingly, we remand this case to the trial court for further proceedings in conformity with this opinion.

Reversed and remanded.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

MARKMAN, J. (*dissenting*). Not all cases that come before this Court are defined in terms of their core

dispute with as much clarity as this one. At issue here is how a contract is properly read in the state of Michigan. That is, should a contract be read as a function of the parties' subjective intent or should it be read as a function of the unambiguous words of the contract itself? This case is that simple and that significant. Relying on the rule from *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999), which embodied the principles of more than a century of Michigan contract law, the Court of Appeals properly adopted the latter approach, holding that the unambiguous language of an agreement releasing "all other persons" in fact releases "all other persons." *Shay v Aldrich*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 282550). Today, in reversing the Court of Appeals and overruling *Romska*, a majority of this Court newly adopts the former approach. Because the majority's rule will "engender uncertainty among parties to releases where currently there is none, breed opportunities for litigation where currently there are none, and erode the ability of individuals to fashion their own rules for dispute resolution free of the uncertainties of judicial intervention," I dissent. *Romska*, 234 Mich App at 521.

I. MICHIGAN CONTRACT LAW

A. FUNDAMENTAL PRINCIPLES

It has been the rule in Michigan for well over a century that the first and foremost principle of contract law is that unambiguous contracts are not open to judicial construction and must be enforced as written, unless the contract violates public policy. See, e.g., *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999); *Juif v State Hwy Comm'r*, 287 Mich 35, 41; 282 NW 892 (1938); *Forbes v Darling*,

94 Mich 621, 625; 54 NW 385 (1893). In other words, "an unambiguous contract reflects the parties' intent as a matter of law." *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

Extrinsic evidence may be admitted to determine the intent of the parties when a contract is ambiguous. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). Whether a contract is ambiguous is a question of law, which this Court reviews de novo. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). Michigan courts are not permitted to "create ambiguity where the terms of the contract are clear." *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

"Ambiguity in written contracts can fairly be said to consist of two types: patent and latent." *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005) (opinion by CAVANAGH, J.). " 'A patent ambiguity is one apparent upon the face of the instrument . . . .' " *Hall v Equitable Life Assurance Society of the United States*, 295 Mich 404, 409; 295 NW 204 (1940) (citation omitted). A contract is patently ambiguous only if, after the court has engaged in its judicial duties of giving effect to the contract's language, the court concludes that a term "is *equally* susceptible to more than a single meaning," *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), or that "two provisions of the same contract irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

A latent ambiguity, on the other hand, " 'arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they

describe.' " *Zilwaukee Twp v Saginaw-Bay City R Co*, 213 Mich 61, 69; 181 NW 37 (1921) (citation omitted).[1] When a court is determining whether a contract contains a latent ambiguity, first "extrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract." *Grosse Pointe Park*, 473 Mich at 201 (opinion by CAVANAGH, J.). Because the latent-ambiguity doctrine permits the admission of extrinsic evidence *before* an ambiguity is found to exist, it is in tension with the fundamental rule of contracts that when a contact is clear and unambiguous on its face, a court will not consult extrinsic evidence and will enforce the contract as written. See, e.g., *Farm Bureau*, 460 Mich at 566. This Court in *Mich Chandelier Co v Morse*, 297 Mich 41, 48; 297 NW 64 (1941), addressed this tension and provided its proper resolution by making clear that

> "[a]n omission or mistake is not an ambiguity. Parol evidence under the guise of a claimed latent ambiguity is

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[1] Justice YOUNG has observed that

> [t]he classic example of a latent ambiguity is found in the traditional first-year law school case of *Raffles v Wichelhaus*, 2 Hurl & C 906; 159 Eng Rep 375 (1864). In *Raffles*, two parties contracted for a shipment of cotton "to arrive ex Peerless" from Bombay. However, as it turned out, there were two ships sailing from Bombay under the name "Peerless." Thus, even though the contract was unambiguous on its face, there was a *latent* ambiguity regarding the ship to which the contract referred. [*Grosse Pointe Park*, 473 Mich at 217 n 21 (opinion by YOUNG, J.).]

Thus, at the time the parties in *Raffles* signed the contract, they believed their words to be clear and unambiguous, although an ambiguity lay dormant in the text: unbeknownst to the parties, there happened to be two ships named *Peerless*. Because of that latent ambiguity, it was no longer clear from the four corners of the document what the parties meant by their use of the name *Peerless*, and so parol evidence was properly admitted to determine the parties' intent.

> not permissible to vary, add to or contradict the plainly expressed terms of this writing or to substitute a different contract for it to show an intention or purpose not therein expressed." [Citation omitted.]

Similarly, this Court in *Hall*, in finding a latent ambiguity, explained that " '[a]n ambiguity is properly latent, in the sense of the law, when the . . . extrinsic circumstances to which the words of the instrument refer [are] susceptible of explanation by a mere development of extraneous facts *without altering or adding to the written language* . . . .' " *Hall*, 295 Mich at 409 (citation omitted) (emphasis added). Under this proper understanding of the latent-ambiguity doctrine, a court does not "cross the point at which the written contract is *altered* under the guise of contract *interpretation*." *Grosse Pointe Park*, 473 Mich at 218 (opinion by YOUNG, J.). And importantly, pursuant to this understanding, the doctrine's exception, by which extrinsic evidence is permitted to ascertain intent *before* an ambiguity has been found to exist, does not nullify the most basic and fundamental rule of contract law—that unambiguous contracts are not open to judicial construction and must be enforced as written.

A related and equally settled principle of Michigan contract law is that " 'one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' " *Farm Bureau,* 460 Mich at 567-568 (citation omitted).[2] While this general rule is not applicable if the

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[2] As this Court recognized in 1858,

> [t]o hold that a party may reply to an action upon a written instrument, "It is true I made the contract, but it was not my agreement, and I did not intend to be bound by it," would set the law of contracts all afloat, render the certainty of the law a fiction,

failure to read the instrument was "induced by some stratagem, trick, or artifice on the part of the one seeking to enforce the contract," it applies in all situations in which the neglect to read was because of carelessness alone. *Int'l Transp Ass'n v Bylenga*, 254 Mich 236, 239; 236 NW 771 (1931). Every citizen of this state is on notice of this commonsense and fundamentally fair rule because this Court stated long ago in clear and certain terms that a party to a contract has the "duty to examine the contract, to know what he signed, and complainants cannot be made to suffer for this neglect on his part." *Liska v Lodge*, 112 Mich 635, 637; 71 NW 171 (1897).

There are reasons why these fundamental principles have withstood the test of time and have served as the bedrock of contract law in this state from time immemorial. Courts adhere to these fundamental rules—enforcing contracts according to their unambiguous terms, responsibly and diligently executing their judicial duty in determining if a contract is ambiguous, and insisting that parties read their contracts—because "doing so respects the freedom of individuals freely to arrange their affairs via contract." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). " '[T]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (citation omitted). As *Rory*, 473 Mich at 469, demonstrated, this notion is "ancient and irrefutable":

> It draws strength from common-law roots and can be seen in our fundamental charter, the United States Con-

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and place the obligations of parties beyond judicial control. [*Adair v Adair*, 5 Mich 204, 209 (1858).]

> stitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society.

It is precisely because these fundamental principles are so well settled and so essential to a free society, governed by the equal rule of law, that our citizens' reliance on them is so great. Courts rightly adhere to these rules so as not to upend the expectations of the citizenry in an area of the law that touches upon their personal and commercial relations every day in myriad ways.

B. *ROMSKA*

With these well-settled principles of Michigan contract law to guide it, our Court of Appeals in *Romska v Opper* was asked to give effect to an unambiguous release that included, in the very first sentence of the document, language releasing " 'all other parties, firms, or corporations who are or might be liable . . . .' " *Romska*, 234 Mich App at 514 (emphasis omitted). The plaintiff in *Romska* executed the release as part of a negotiated settlement agreement with the insurer of one of the drivers involved in a three-car accident. She ultimately settled with the insurance company of one of the drivers for $45,000. Unable to reach a settlement with the other driver, David Opper, or with his insurer, the plaintiff filed suit against him. Opper moved for summary disposition based on the release, which the trial court granted, observing, " '[T]his release is clear and unambiguous on its face, it was entered into knowingly and intelligently, and it is clear that the plaintiff acknowledged full settlement and satisfaction of all of her claims that may arise out of this accident.' " *Id.* at 515 n 2.

The Court of Appeals affirmed. Consistent with the established common-law rule governing the legal effect of an unambiguous instrument, the Court reasoned:

> Because defendant clearly fits within the class of "all other parties, firms or corporations who are or might be liable," we see no need to look beyond the plain, explicit, and unambiguous language of the release in order to conclude that he has been released from liability. "There cannot be any broader classification than the word 'all,' and 'all' leaves room for no exceptions." [*Id.* at 515-516 (citation omitted).][3]

The Court of Appeals partial dissent would have departed from the majority's "common-law" rule by adopting what it termed as an "intent rule," explaining:

> While it is generally correct that an unambiguous document must be interpreted solely on the basis of the information contained within its four corners, that is not always the case. When a *stranger* to a release attempts to rely on omnibus language contained within the document, as in this case, parol evidence is admissible to establish whether the parties intended the release to apply to the nonparty.

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[3] As an additional reason for affirming the trial court, *Romska* noted that the "release contains an explicit merger clause that independently precludes resort to parol evidence" and that a contrary ruling would give "no effect at all to the merger clause by allowing resort to exactly the same extrinsic evidence as might be allowed absent the merger clause." *Romska*, 234 Mich App at 516-517. In the instant case, the releases also contain merger language, as they expressly provide that "all agreements and understandings between the parties in reference thereto are embodied herein." The majority does not even take note of this provision. While the effect of this merger language is not the primary reason why the releases should be enforced as written, the inclusion of that language only strengthens this conclusion. As *Romska* explained, if "clear release language, coupled with a merger clause, does not afford protection against [having to defend against remaining claims], it is hard to understand how finality could ever be achieved through a negotiated release." *Id.* at 518.

> [*Id.* at 531 (HOEKSTRA, J., concurring in part and dissenting in part) (citation omitted).][4]

In response to this proposed rule, and specifically questioning the appropriateness of the partial dissent's adoption of the "intent rule" nomenclature, the *Romska* majority stated:

> [I]n our judgment, the common-law rule better deserves this description. The common-law rule holds that a general release of "any and all persons" unambiguously releases "any and all parties." The common-law rule holds that the language of a release should be accorded meaning. It is predicated on the intentions of the parties but, unlike the rule of the dissent, derives such intentions from the language of the release to which they have freely assented. [*Id.* at 517 (majority opinion).]

When *Romska* was appealed in this Court, we denied the plaintiff's application for leave to appeal. *Romska v Opper*, 461 Mich 927 (1999). For the ensuing decade, our Court of Appeals has consistently applied its rule, holding that language in an unambiguous release that releases "all other persons" in fact releases "all other persons," and this Court has consistently denied leave to appeal when sought in cases challenging those rulings.[5] Thus, the citizens of this state and the bench and

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[4] While the partial dissent in *Romska* would have permitted parol evidence on its theory that the defendant was a "stranger" to the release, it should be noted that the partial dissent did not find that the release contained any ambiguity, patent or latent.

[5] See, e.g., *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 647; 620 NW2d 310 (2000); *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000), lv den 463 Mich 934 (2000); *Beck v McKinzie*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2001 (Docket No. 223680); *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650 n 6; 624 NW2d 903 (2001); *Samuel v Mitsubishi*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2002 (Docket No. 229464), lv den

bar have been on clear notice that an unambiguous release that includes language releasing "all other persons" means what it says.

II. APPLICATION OF PRINCIPLES

It is against this legal backdrop that this Court is now called upon to give effect to the releases at issue that each include a provision releasing "all other persons . . . from any and all claims . . . resulting from an incident occurring on September 8, 2004." Plaintiff, represented by counsel, signed two identical, self-contained, two-page releases, each containing this language in the context of accepting a case-evaluation award with respect to the Allen Park police officers, Wayne Allbright (or Albright) and Kevin Locklear, who were also represented by counsel. Two months after signing the releases, plaintiff provided them to the Melvindale police officers, John Aldrich, William Plemons, and Joseph Miller, who then moved for summary disposition, claiming that the releases' reference to "all other persons" released them from liability. The Court of Appeals unanimously reversed the trial court's denial of summary disposition because it concluded that the language of the releases was unambiguous and operated to bar plaintiff's claims against the Melvindale officers.

I would affirm the Court of Appeals because that court engaged in the proper analysis under Michigan law and correctly determined that the releases here contained no ambiguity and thus, as a matter of law, accomplished what they stated. The burden on the majority is therefore to refute that the releases mean what they say, and to demonstrate that they are somehow ambiguous because they contain either a patent or

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467 Mich 953 (2003); *Ruppel v Carlson*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2002 (Docket No. 235266).

a latent ambiguity. The question whether the releases contain a patent ambiguity has been in issue throughout this litigation. The trial court found the language of the releases to be ambiguous. And although plaintiff initially took the position that the releases were unambiguous, he subsequently argued on appeal that the releases were "internally inconsistent or ambiguous" on their face.

The majority is less clear in its own determination of whether the releases are patently ambiguous, which, it should be remembered, implicates a court's primary duty in addressing a legal instrument. The majority variously disparages the release language (1) as "broad," albeit without any explanation of why being "broad" is bad or in any way legally suspect, (2) as "vague," without identifying any specific language that is unclear or imprecise, and (3) as "boilerplate language," absent either any justification for this characterization or any explanation of the consequences of such a characterization.[6] The majority also devotes an inordinate amount of time to repeating the trial court's reasons for its conclusion that the releases are patently ambiguous, albeit without actually adopting this conclusion. Apparently, even the majority cannot with a straight face characterize the language of these releases as patently ambiguous. Indeed, it is simply hard to imagine how the three words at issue ("all other persons") could be any *less* "vague" or any *more* comprehensible. As even plaintiff's counsel acknowledged at oral argument, these "three words . . . are certainly broad enough to include [the Melvindale officers]." Without the adoption of Humpty Dumpty's approach to

[6] As best as I can understand the significance of the majority's "boilerplate" characterization, I assume that it is to communicate that such language may be safely ignored.

linguistic interpretation in *Through the Looking Glass*—" 'When I use a word, . . . it means just what I choose it to mean—neither more nor less"—no patent ambiguity can possibly be found in the clear language of these releases.[7]

Not to be deterred by the obviously *un*ambiguous language of the releases, the majority offers the novel argument that the releases contain a *latent* ambiguity. Before discussing the merits of the majority's application of this doctrine, it is important to recognize just how very novel the majority's argument is. Not only was it not raised by any of the parties or lower courts in this case, according to the available caselaw, it has never even been mentioned by *any* court, or by *any* party, that has ever addressed the issue of whether a release containing the language "all other persons," or some variation thereof, is enforceable as written under Michigan law.[8] As in the instant case, the plaintiffs in these

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[7] Carroll, *Through the Looking Glass and What Alice Found There*, in *The Annotated Alice* (New York: Bromhill House, 1960), p 269. Equally without merit is plaintiff's argument that the interplay of the language "all other persons" in the releases' first paragraph and the indemnity provision in the third paragraph somehow creates a patent ambiguity. These paragraphs are separate and distinct promises. There is nothing even slightly inconsistent about the fact that one promise may be broader than another. Nor is there anything inconsistent about the Allen Park officers' desire to obtain maximum security against future claims by including both provisions in the releases. Rather, these simply reflect prudent precautions.

[8] See, e.g., *Meridian*, 242 Mich App at 650; *Collucci*, 240 Mich App at 658; *Heritage Resources Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 641-643; 774 NW2d 332 (2009); *Beck*, unpub op at 2-3; *Samuel*, unpub op at 2; *Collier v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2005 (Docket No. 252018); *Murray v Arce*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 238757); *Ruppel*, unpub op at 2-3; *Whitmore v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2001 (Docket No. 216132); *Dilorenzo v Kirkpatrick*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006

other cases claimed that they did not "intend" to release the defendants from liability. And, as with plaintiff in the instant case, those plaintiffs offered extrinsic evidence to support their claims.[9] Despite these similarities, *no* court, to the best of my review—and none is identified by the majority—has ever detected a latent ambiguity of the sort that the majority unearths today.

Turning to the merits of the majority's latent ambiguity argument, I find no reason to conclude that the majority today gets it right, while every other judge who has addressed this issue has gotten it wrong. The majority concludes that "plaintiff has shown that the circumstances surrounding the execution of the releases created a latent ambiguity about whom the parties intended to include within the scope of the releases." Central to the majority's conclusion is its assertion that "[a]ll contracting parties agree that neither plaintiff nor the Allen Park Officers intended the releases to have any effect on the Melvindale Officers' liability. Even the Melvindale Officers *themselves* did not believe that the releases were intended to include them." This is simply not true. The majority not only

(Docket No. 261748); *Hampton v Ketz*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2002 (Docket No. 227656); see also *Taggart v United States*, 880 F2d 867, 870 (CA 6, 1989); *Kessler v Nat'l Presto Indus*, 1995 US Dist LEXIS 11015 (ED Mich, June 12, 1995); *Rutcoskey v U-Haul, Inc*, 1994 US Dist LEXIS 12062 (WD Mich, August 1, 1994). When courts have found a release to be ambiguous, and thus distinguished *Romska,* it was because of a *patent* ambiguity created by the release language, not because of any supposed latent ambiguity. See, e.g., *Herrick v Sosnowski*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 252299).

[9] The extrinsic evidence offered in these cases often included an affidavit stating that one party did not "intend" to release another from liability—the exact evidence which the majority here finds dispositive. None of the courts in these cases determined that such evidence created a latent ambiguity. See, e.g., *Meridian*, 242 Mich App at 650; *Beck*, unpub op at 3 n 2.

frustrates the intent of the parties as expressed by the very words of the releases being nullified here, but fails to consider the parties themselves at all by conflating *their* subjective intent with that of their *attorneys*. Specifically, the majority accepts as evidence of the Allen Park *officers*' intentions an affidavit from their *attorney* explaining that *he* intended to negotiate the releases with plaintiff for the Allen Park officers only. Notably, the Allen Park officers themselves, i.e., the *actual* parties, have offered no such sworn statements. Similarly, defense counsel's concession at oral argument that neither plaintiff nor the Allen Park officers intended to release the Melvindale officers from liability is not supported by any statements offered by the Melvindale officers *themselves*.[10]

While the subjective intent of the parties may conceivably have been in accord with that of their attorneys, there are several reasons why it may not be appropriate to reflexively conflate the intent of one with the other, as the majority does. First, given that plaintiff might conceivably have a legal malpractice claim against his attorney if the releases were read to mean what they say, the latter's assertions regarding his client's intentions should be approached with some measure of caution, absent clearer evidence in this regard. Second, it would hardly be remarkable to suppose that there might be some sense of empathy on the part of police officers in one community toward police officers in a neighboring community who have become the target of a lawsuit alleging assault and battery, such a lawsuit being an occupational hazard for even those

[10] Although the majority finds defense counsel's opinion that there was "no actual subjective intent to release [his] clients" to be significant, it is not clear how defense counsel can conclusively know the *other* parties' subjective intent.

police officers conducting themselves in the most highly professional manner. Therefore, the Allen Park officers' subjective intent in settling with plaintiff may well have been different from their attorney's subjective intent, especially in view of the reality that including the Melvindale officers within the scope of the releases would not have diminished in any way complete release of the Allen Park officers from liability. For these reasons, absent an affidavit from the Allen Park officers themselves, it is not obvious to me why their *lawyer's* subjective intentions with regard to the Melvindale officers are necessarily and conclusively reflective of the intentions of these officers themselves.[11]

However, even if the majority's consideration of the extrinsic evidence presented in this case were sound, it still could not salvage its latent ambiguity analysis because no latent ambiguity exists in these releases; that is, no ambiguity is created when the unambiguous words "all other persons" are " 'applied to the object or to the subject which they describe.' " *Zilwaukee Twp*, 213 Mich at 69 (citation omitted). Again, the provision at issue releases "all other persons . . . from any and all claims . . . resulting from an incident occurring on Sep-

[11] As additional evidence of the claimed latent ambiguity, the majority relies on the fact that plaintiff and the Allen Park officers accepted case-evaluation awards and that plaintiff and the Melvindale officers rejected a larger award. I question the wisdom of the precedent the majority sets with its reliance on this information because such information is protected in nonjury trials. See MCR 2.403(N)(4). While the trial court was not acting here as fact-finder, the majority's use of this information creates a perverse incentive for future parties to disclose award amounts precisely in order to prove the existence of a claimed ambiguity and thereby nullify a release that otherwise provides litigative finality. Using the information in this manner is incompatible with the goal of case evaluation, which is "to expedite and simplify the final settlement of cases." *Bennett v Med Evaluation Specialists*, 244 Mich App 227, 231; 624 NW2d 492 (2000).

tember 8, 2004." It is to state what is beyond obvious to almost all but the majority to say that the Melvindale officers are "persons." They were involved in "an incident occurring on September 8, 2004," and that incident resulted in plaintiff's "claims."[12] Where is the latent ambiguity that is created when these words are applied to the "subject which they describe"?

There *is* no such latent ambiguity, of course, a conclusion that is confirmed when the purported latent ambiguity here is compared to actual latent ambiguities that courts have properly found in other cases, some of which the majority cites in support of its decision. For instance, in *Raffles v Wichelhaus*, 2 Hurl & C 906; 159 Eng Rep 375 (1864), the textbook latent-ambiguity case, such an ambiguity was created when the contractual provision stating that the shipment was " 'to arrive ex "Peerless" ' " was applied to the subject it described because unbeknownst to the parties, there happened to be two ships named *Peerless* sailing on that particular day. In *Hall*, this Court properly found that a latent ambiguity was created when the language naming "Emma H. Foote (guardian)" as the beneficiary of an insurance contract was applied to the subject it described because Emma H. Foote was never the dece-

[12] The majority does not even consider the entire sentence at issue in its latent-ambiguity analysis. It states that, although it "do[es] not dispute that the Melvindale Officers are 'persons,' " "any person in the world could fall into this broadly defined group . . . ." To begin with, while the majority is apparently offended by the result of this "broad' language, it does not identify the *legal* principle under which that result is impermissible, because there is no such principle. Further, the majority's statement here is not even accurate. By their clear terms, the contracts at issue released "all . . . persons" from claims resulting from the "incident occurring on September 8, 2004." That is, the contracts released persons from certain *specific* claims. The Melvindale officers certainly fall within this specifically defined group, but not all "person[s] in the world" do.

dent's guardian. *Hall*, 295 Mich at 410. And in *Meyer v Shapton*, 178 Mich 417, 424-425; 144 NW 887 (1914), this Court reasonably found that a latent ambiguity was created when the designation of the seller in a contract of sale, "Meyer Bros.," was applied to the subject it described because the corporate entity Meyer Bros. had been out of existence for years.

The contracts in each of these cases contained genuine latent ambiguities, and the courts properly applied the relevant doctrine. However, these cases are so far afield from the case before us that it is simply impossible to apply their reasoning. Indeed, the majority does not even *attempt* to do so, for what could it argue—that, unbeknownst to the parties at the time they signed the releases, the Melvindale officers were actual "persons"? While the majority relies on *Hall* and *Meyer*, these cases, with their examples of true latent ambiguities, in actuality cast into relief the utter lack of serious legal underpinnings of the majority's argument. And it becomes increasingly clear that, in its decision today, the majority misuses the latent-ambiguity doctrine, in contravention of this Court's clear directive that

> "[p]arol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to or contradict the plainly expressed terms of this writing or to substitute a different contract for it to show an intention or purpose not therein expressed." [*Mich Chandelier*, 297 Mich at 49 (citation omitted).]

Surely, the majority is aware of this limitation on the latent-ambiguity doctrine. It cites *Mich Chandelier*, as does this dissent. Yet the majority has no apparent explanation for its disregard of this limitation and for its resultant misapplication of the doctrine. The majority does not explain why, " 'under the guise of a claimed latent ambiguity,' " it permits parol evidence that un-

deniably " 'var[ies], add[s] to or contradict[s] the plainly expressed terms of this writing . . . .' " *Id.* According to the releases' clear language, "all other persons" are released from liability; according to the parol evidence offered by plaintiff, only the Allen Park officers are released. Not only does this evidence contradict a plainly expressed term of the releases, it nullifies the term altogether. In permitting this evidence, the majority abuses the latent-ambiguity doctrine and offends traditional principles of freedom of contract by " 'substitut[ing] a different contract' " for the contract to which the parties freely assented. *Id.*

In my view, instead of pursuing its novel latent-ambiguity theory when no such ambiguity exists, the majority would have been better advised to apply what is perhaps the most well-established of all rules of contract law, and one that provides a straightforward resolution of this case: that " 'one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' " *Farm Bureau*, 460 Mich at 567 (citation omitted).[13] Surely the majority is aware of this basic rule of contracts, yet it entirely ignores the rule, one undoubtedly recognized and acted on by all prudent citizens in their own contractual dealings. These citizens, knowing their obligations as responsible adult persons and reading the majority's opinion, must be asking themselves: "But I thought I had to read my contracts before I signed them. Why doesn't the Michigan Supreme Court talk about that rule?" This confu-

[13] In fact, the majority's decision arguably places in doubt the viability of *Farm Bureau* and the string of cases dating back well over a century that have espoused this rule. See, e.g., *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972); *Gardner v Johnson*, 236 Mich 258, 260; 210 NW 295 (1926); *Liska*, 112 Mich at 637-638.

sion is understandable because, as the circumstances of this case reveal, it is impossible to view the instant dispute at its core as anything other than an instance in which a party claims relief because he has not read his own legal document. Plaintiff is seeking to be excused from his own dereliction of personal responsibility, and the majority accommodates him, to the eventual detriment of all who have taken more care in their responsibilities, all of whom will now be less certain that their contracts will be upheld as intended by the courts of this state.

The releases at issue are not lengthy, complex, or technical. Plaintiff does not claim that he was fraudulently induced into signing them. To the contrary, he was represented by counsel when he knowingly signed the same release *twice*. Under these circumstances, the only logical explanation for his predicament is that plaintiff and his counsel did not read even *the first sentence of their releases* before assenting to their terms. And the procedural history of this case only compounds the carelessness of their error. Plaintiff executed the releases in July, but did not even provide them to the Melvindale defendants until October, at which time it appears that neither he nor his attorney had read even the first sentence of these two-page documents to which he committed himself.

Because the law so clearly does not support the result reached, I can only give the majority the benefit of the doubt and assume that it makes new law in order to accommodate what it views as the sympathetic facts of this case, thus reaffirming the adage that "bad facts make bad law." There is no dispute that the facts of this case are "bad" in the sense that the appellant is more sympathetic than the appellant in *Romska.* The majority takes note of several factors that the trial court

relied on to distinguish *Romska*: that the Melvindale officers rejected the case-evaluation awards against them, that a trial date was set, and that the court entered a consent order dismissing the Allen Park officers only.[14] While I find it interesting that the majority feels the need to distinguish a case and overrule it at the same time, I do not disagree that the facts here make this case different from *Romska*, at least to the extent that they evoke some greater sympathy for plaintiff's and counsel's predicaments. However, these facts, while distinguishing in the sense that every case can be distinguished in its facts from another, are *legally irrelevant*, and it is up to courts to recognize what distinctions are and are not legally relevant. While one does not have to be Atticus Finch, attuned to walking in another's shoes, to empathize with plaintiff and his attorney once they finally read their own releases, the majority fails to explain why the specific facts of this case warrant disregard for time-honored principles of contract law.

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[14] The majority's characterizations of some of the distinguishing aspects of this case are questionable and deserve further comment. First, the majority's statement that plaintiff "expressly preserved [his claim for assault and battery against the Melvindale officers] by rejecting the case-evaluation awards assessed against them" is misleading. Both plaintiff *and* the Melvindale officers rejected the case-evaluation awards. Second, the majority's contention that the Melvindale officers' release from liability was not supported by consideration is simply legally incorrect. There is no requirement that the consideration for an agreement come from a third-party beneficiary of the agreement. As the Court of Appeals explained in this case, " 'the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one . . . .' " *Shay*, unpub op at 5, quoting *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005). Thus, I disagree with the majority's conclusion that the "Melvindale officers would obtain a complete windfall by being released from liability for their acts" and that this would "be an unjust result . . . ." Such a conclusion improperly suggests that plaintiff's allegations are true, and it is premised on a misconstruction of basic contract law.

This Court has applied evenhanded justice to facts that are far more difficult than those presented in this case, one in which no loved one has died and no child has been permanently injured. Michigan courts have regularly applied our contract principles to facts that suggest that the parties may not have intended the meaning expressed in the unambiguous language of a contract. See, e.g., *Mich Chandelier*, 297 Mich at 49 (explaining that the Court might have reached a different conclusion "[i]f we were permitted to glean from the mind of [the defendant] his actual intent"); *Meridian*, 242 Mich App at 650 (refusing to consider an affidavit similar to that offered by plaintiff in this case because of "the clear and unambiguous language of the release"). And this Court has made clear that a " 'mistake is not an ambiguity.' " *Mich Chandelier*, 297 Mich at 48 (citation omitted). By steadfastly applying Michigan's fundamental principles of contract law, even to cases involving what the majority may view as "bad facts," this Court has determined over time that stability of contract, the equal rule of law in giving meaning to contracts, and the integrity of the judicial process all predominate over the goal of allowing a careless person who has failed to read his contract to avoid the consequences of his carelessness. There will be subtle, but inevitable, costs to the legal system from the majority's failure to give this same consideration to these values in today's decision.

III. MAJORITY'S NEW RULE

While there is much that is unclear about the majority's new rule, what *is* clear is that by disregarding well-settled contract principles, this Court has embarked on a new approach in which the parties' intentions as expressed in the vehicle through which such

intentions have traditionally been communicated—the contract itself—are no longer dispositive.[15] Indeed, the majority's studied silence in response to this dissent, and with regard to established rules of contract law, suggests that the majority is not much interested in reconciling its decision with rules that have governed the law of contracts in this state for more than a century.[16] Instead, according to the majority's new rule, a court may now consider extrinsic evidence to deter-

[15] Contrary to the assertions of the majority, the well-settled and long-established body of Michigan contract law governs this case, not the Third Restatement of Torts.

[16] The majority does not respond to *any* of the criticisms offered in this dissent, concluding summarily that it finds the dissent "unpersuasive, despite its 32 pages in length, because the arguments are repetitive of Justice MARKMAN's analysis in *Romska* . . . ." However, given that the majority has never before responded to the arguments in *Romska*, it is hard to understand the relevance of its observation that a response on its part would be "repetitive." In short, the majority has *never* offered any such response. Thus, all that is truly repetitive here is the majority's failure to explain why the arguments offered in this dissent are neither compelling nor persuasive.

The majority also incorrectly suggests that the only authorities offered in support of this dissent are "Court of Appeals decisions decided *after Romska.*" These post-*Romska* decisions, of course, are not cited to justify *Romska*, but are cited to demonstrate the uniformity with which *Romska* has been applied and the resulting reliance on its rule. The actual authority cited in support of this dissent consists of the various rules of contract developed by this Court for over a century, including such long-established principles of contract law as those asserting that (a) courts do not create ambiguity and instead enforce unambiguous contracts as written, see, e.g., *Smith Trust*, 480 Mich at 24; *Frankenmuth*, 460 Mich at 111; *Juif*, 287 Mich at 40-41; (b) parties are required to read their contracts before they sign them, see, e.g., *Farm Bureau*, 460 Mich at 567; *Komraus Plumbing*, 387 Mich at 290; *Gardner*, 236 Mich at 260; *Liska*, 112 Mich at 637-638; (c) the latent-ambiguity doctrine is limited by the proposition that extrinsic evidence is not permitted to alter a written contract, see *Mich Chandelier*, 297 Mich at 48-49; *Hall*, 295 Mich at 409-410; and (d) freedom of contract is an overriding principle of contract law in Michigan, see, e.g., *Terrien*, 467 Mich at 71; *Rory*, 473 Mich at 469.

mine the scope of a release from liability "when an unnamed party seeks to enforce third-party-beneficiary rights based on the broad release language but the evidence presented establishes that an ambiguity exists with respect to the intended scope of the release." I know what this rule does *not* mean—it no longer means that extrinsic evidence is permitted only to determine the intent of the parties upon a finding of a patent ambiguity or the existence of a latent ambiguity. But ascertaining what it *does* mean is considerably less clear. Thus, increased contract litigation in this state is all but certain.

The first prong of the majority's rule considers whether an "unnamed party seeks to enforce third-party-beneficiary rights based on the broad release language." As a threshold matter, with the very first word of this inquiry, the majority leaves open the possibility that it is adopting a "specific identity rule," which holds that a general release will only discharge those " 'specifically named in the release' . . . ." *Romska*, 234 Mich App at 526 (HOEKSTRA, J., concurring in part and dissenting in part), quoting Recent Developments, *Tort law—The general release forms: Three distinct views*, 21 Am J Trial Advoc 445, 446 (1997). Even the Court of Appeals partial dissent in *Romska* rejected this rule, observing that this approach "strays the furthest from the common law rule," and can "create a trap for unwary plaintiffs' attorneys." *Romska*, 234 Mich App at 526, 530 (citations and quotation marks omitted). The majority here is less explicit about its intentions. Its decision does not preclude the requirement that every discharged person and entity be specifically named in a release in order to be within the release's scope, but it also does not acknowledge this. If it is the majority's intention to adopt the "specific identity rule," then it has effectively abolished the use

of general releases in this state; if this is not the majority's intention, then by its silence it is ensuring uncertainty and confusion in a realm of law in which uncertainty and confusion are most damaging to the conduct of personal and business affairs.

The majority opinion also cites favorably the formulation of the rule the *Romska* partial dissent would have adopted:

> [I]n order to determine the intentions of the parties about the scope of a general release, extrinsic evidence should be allowed to determine whether a *stranger* may rely on the omnibus language "all other parties, firms, or corporations" that is contained within a release. [*Id.* at 533 (emphasis added).]

If this is the purpose behind its new rule, the problem is that the "very provision in controversy, and agreed to by the parties to the contract, explicitly relates to the interests of strangers." *Romska*, 234 Mich App at 516 n 4 (majority opinion). A person relying on the language "all other persons" in a release *is* necessarily a "stranger," at least in a legal sense, to the extent that he or she is not a named party. Thus, stating that a contract provision providing for the release of "all other persons" is effective with regard to everyone *except* a "stranger" is equivalent to saying that it is not effective at all. *Id.* Since this seems to be the result the majority desires, it could accomplish this in a far more forthright manner by simply holding that the words "all other persons" in a release will no longer be given legal effect in this state. This would, at least, clarify the legal proposition intended by the majority.[17]

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[17] Additionally, I note that this focus on the stranger/non-stranger status of the person who relies on a release misconceives the legal issue, which "does not concern the rights of strangers, but rather the rights of

However, instead of providing a straightforward and comprehensible, albeit wrong, rule, the majority crafts a new rule that is both wrong *and* interjects confusion into contract law in general, specifically obscuring the law governing the rights of third-party beneficiaries. The majority premises its holding on its unnecessarily convoluted determination that "the Melvindale officers qualify as third-party beneficiaries under the applicable statute . . . ." The third-party-beneficiary statute, MCL 600.1405, provides, in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

In *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003), this Court provided clear guidance for determining third-party-beneficiary status under MCL 600.1405, explaining that a "person is a third-party beneficiary of a contract only when that *contract* establishes that a promisor has undertaken a promise 'directly' to or for that person." (Emphasis added.) *Schmalfeldt* further emphasized that the test for third-party-beneficiary status is objective and, therefore, a court should look no further than the " 'form and meaning' of the contract itself to determine

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the *parties* to a contract to achieve agreed-upon ends, including litigative finality." *Romska*, 234 Mich App at 516 n 4 (majority opinion). Accordingly, the majority's new rule "gives little credence to the possibility that, by including broad language in the release, the settling parties wanted to avoid the possibility of future legal burdens potentially arising out of lawsuits by plaintiff against third parties." *Id.* at 517.

whether a party is an intended third-party beneficiary within the meaning of [MCL 600.1405]." *Id.*

In light of these first principles, I agree with the majority that the Melvindale defendants are third-party beneficiaries of the releases because the releases objectively establish that plaintiff undertook a promise "directly" to them. Specifically, by releasing "all other persons . . . from any and all claims . . . resulting from an incident occurring on September 8, 2004," plaintiff promised to refrain from doing something *directly* to those defendants—that is, he promised to refrain from pursuing potential claims against them resulting from the specified incident. This determination is not nearly as difficult as the majority makes it. Contrary to the majority's suggestion, our caselaw governing third-party beneficiaries cannot "be read to mean that the important inquiry is the subjective understanding of the contracting parties," even if "taken out of context," something no one involved in this case, save apparently the majority, has ever thought to do. Rather, our caselaw unequivocally establishes an objective test to determine third-party-beneficiary status, and the Melvindale defendants are clearly third-party beneficiaries of the releases under this test.

Even more troubling than the majority's strained determination that the Melvindale defendants *are* in fact third-party beneficiaries is its misunderstanding regarding the *relevance* of this determination to the disposition of this case. The majority deems this determination significant because "[a]lthough . . . the Melvindale Officers are entitled as third-party beneficiaries to seek enforcement of the releases, the releases are subject to the same 'limitations' and 'infirmities' as they would have been if they had been made directly for those officers." I can only speculate about the meaning

of the majority's analysis here, and even then arrive only at a logical black hole. It is beyond dispute that a third-party beneficiary effectively stands in the shoes of the original promisee. See MCL 600.1405. Accordingly, the Melvindale officers have the same rights as the original promisees, the Allen Park officers. Since under the majority's rule, the Melvindale officers have *no* rights under the contract, is this because the majority has found that the Allen Park officers' rights are somehow limited or infirm? No one has called the Allen Park officers' rights into question, nor does the majority provide any explanation for why this would be so. The only alternative rationale that could support the majority's analysis is that the Melvindale officers would have no rights under these contracts *even if* the promise were "made directly to" them. MCL 600.1405. This rationale is directly contrary to the statute, which affirmatively grants defendants the "same right to enforce said promise that [they] would have had if the said promise had been made directly to [them]." *Id.*[18]

Fortunately, the law when properly applied does not require these legal convolutions and contortions. The third-party-beneficiary statute is significant in this case because, as third-party beneficiaries of the releases, the Melvindale defendants had the right to *enforce* their terms. MCL 600.1405(1). And once defendants' rights became vested, plaintiff lost the ability to reform the releases without defendants'

[18] Moreover, this rationale also appears inconsistent with the majority's own rule, as far as I can understand it. According to the majority, the "infirmity" in the releases is the claimed latent ambiguity that is created when the phrase "all other persons" is applied to the Melvindale officers. Thus, if the promise had been made directly to them, and if the Melvindale officers had been named in the releases, there would have been no latent ambiguity even by the majority's erroneous standards and thus no infirmity to somehow limit their rights under the contract.

consent. MCL 600.1405(2)(a).[19] In this case, the Melvindale defendants' rights became vested once they relied on the language "all other persons" and acted on the promise by moving for summary disposition. At that point, the equitable remedy of reformation became unavailable to plaintiff under the principle that a court may not act in equity "to avoid application of a statute," in this case the third-party-beneficiary statute. *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672; 649 NW2d 371 (2002). Thus, the relevance of the Melvindale defendants' third-party-beneficiary status goes to the availability of equitable relief for plaintiff on his "emergency motion for reformation," which, it should be remembered, he filed two months after the Melvindale defendants moved for summary disposition and more than four months after he executed the releases.[20]

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[19] MCL 600.1405(2)(a) states:

> The rights of a person for whose benefit a promise has been made, as defined in [MCL 600.1405(1)], shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.

See also Anno: Comment Note—*Mutual rescission or release of contract as affecting rights of third-party beneficiary*, 97 ALR2d 1262, 1264, which explains that "where a third-party beneficiary contract has been accepted or acted upon by the third party, it cannot be rescinded by the principal parties without the third party's consent."

[20] In light of this chronology, there are additional reasons why reformation may not have been available to plaintiff, including one derived from the following equitable maxim: " 'Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.' " *Powers v Indiana & Mich Electric Co*, 252 Mich 585, 588; 233 NW 424 (1930) (citation omitted).

However, the first prong of the majority's new rule, which considers whether an "unnamed party seeks to enforce third-party-beneficiary rights," suggests that the statute is relevant for a different reason. That is, it appears that under the majority's rule, the fact that an "unnamed" third-party beneficiary is relying on a release somehow transforms the legal effect of the release, rendering ambiguous what would otherwise be unambiguous. I am unaware of any existing rule of interpretation that adopts such a novel approach by which the legal effect of unambiguous language depends on the persons *to whom* such language applies. Quite simply, the confusion the majority introduces into the law governing third-party beneficiaries is inexcusable and unnecessary. The third-party-beneficiary statute is relevant in this case only because it precludes a court from considering plaintiff's motion for reformation, not because it provides a basis for rewriting Michigan contract law.

The second prong of the majority's new rule considers whether "the evidence presented establishes that an ambiguity exists with respect to the intended scope of the release." With this statement, the majority conclusively illustrates its profound misunderstanding regarding contractual ambiguity. Contrary to the majority's assertion here, as a general rule, when a contract is clear and unambiguous on its face, extrinsic evidence is *not* permitted to "establish[] that an ambiguity exists with respect to the intended scope of the release." Such evidence is only permitted in the exceptional case to prove the existence of a *latent* ambiguity, and a latent ambiguity is found to exist only when the " 'circumstances to which the words of the instrument refer [are] susceptible of explanation by a mere development of extraneous facts *without altering or adding to the written language* . . . .' " *Hall*, 295 Mich at 409 (citation

omitted; emphasis added). That is, a " 'claimed latent ambiguity is not permissible to vary, add to or contradict the plainly expressed terms of th[e] writing . . . .' " *Mich Chandelier*, 297 Mich at 48. The majority has it exactly backwards by allowing extrinsic evidence to be presented to "*establish*[] that *an ambiguity* [apparently patent or latent] exists . . . ." (Emphasis added.) Thus, in its holding today, the majority uses the latent-ambiguity doctrine's exception, which permits extrinsic evidence to discern intent *before* an ambiguity has been found to exist, to rewrite the fundamental rule of contracts that when a contact is clear and unambiguous on its face, a court will not consider extrinsic evidence and will enforce the contract as written. See, e.g., *Farm Bureau,* 460 Mich at 566. The majority does not even acknowledge this remarkable break with more than 150 years of contract law in this state.

Tragically, the impact of the majority's new rule will be felt by the millions of citizens of this state who rely on the promises of contracts, and the good faith of those who enter into such contracts, to structure their personal and business affairs. There is simply no principled reason in the law why the majority's new rule should not be extended to contact law in general. Although the majority might consider its ruling as a narrow one that is limited to "unnamed" third-party beneficiaries of a contract, there is not one rule of contract law in Michigan that applies to disputes between parties and another rule that applies to disputes involving third parties, at least before today. Indeed, MCL 600.1405 makes clear that a third party has the same right to enforce a promise that he would have had if the promise had been made directly to him. Moreover, there is no principled reason for limiting the majority's new rule to releases only, as opposed to contracts generally. As the majority itself recognizes, this Court has always applied

the same theories of contract law to disputes regarding a release. See *Denton v Utley*, 350 Mich 332, 335-338; 86 NW2d 537 (1957). As in any other contract, " '[t]he validity of a release turns on the intent of the parties,' " and " '[i]f the language of a release is clear and unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language.' " *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650; 624 NW2d 903 (2001) (citation omitted). Finally, citizens should not take false hope that the majority will limit its ruling because, unfortunately, the instant decision is consistent with the actions of this Court as of late in the realm of contract law.[21] In my view, it is self-evident that the rule of law demands that contracts be respected and that this Court provides the leadership and legal direction to ensure that this occurs. Unfortunately, I am not convinced that my colleagues in the majority share this view. Therefore, although I wish I could believe that the majority's new rule will not apply broadly to contracts in general, I see no rational reason why this would be so. Doubtless, after years of unnecessary litigation, we will learn whether this is the case or not.

IV. CONCLUSION

For all these reasons, I would affirm the unanimous judgment of the Court of Appeals, which reversed the trial court and remanded for entry of judgment in favor of the Melvindale defendants. In deciding to the contrary and overruling *Romska v Opper*, the majority's decision recklessly unsettles contract law in this state on the basis of an essentially impenetrable analysis. Because the majority's new "rule" undermines the

[21] See, e.g., *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 483 Mich 907 (2009).

freedom to contract, and because it ignores the express language of the relevant lawmakers of this contract, the parties themselves, I strongly dissent.

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

PEOPLE v SZALMA

Docket No. 140021. Argued May 11, 2010. Decided August 26, 2010.

George Szalma was charged in Macomb Circuit Court with first-degree criminal sexual conduct (CSC-I), MCL 750.520b, for allegedly penetrating the anus of his four-year-old son. The trial court, Matthew Switalski, J., granted defendant's motion for a directed verdict on the ground that there was no evidence that defendant had committed the penetration for a sexual purpose. The Court of Appeals, OWENS, P.J., and SERVITTO and GLEICHER, JJ., reversed and remanded for a new trial, explaining that the constitutional protection against double jeopardy was not implicated by doing so because the trial court had focused on the credibility of the witnesses rather than on the sufficiency of the evidence in granting a directed verdict. Unpublished opinion per curiam of the Court of Appeals, issued August 11, 2009 (Docket No. 285632). The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 485 Mich 1117 (2010).

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

The constitutional protection against double jeopardy precludes retrying defendant because the directed verdict of acquittal was based on the sufficiency of the evidence, notwithstanding the trial court's erroneous understanding of the elements of the charged offense.

1. The determination of what constitutes an acquittal for double jeopardy purposes is not controlled by the form of the court's action, but whether the ruling represents a resolution of some or all of the factual elements of the offense charged. Where the ruling is based on an impermissible credibility judgment rather than a ruling on the sufficiency of the evidence, the defendant may be retried without offending double jeopardy principles. In this case, the trial court based its ruling on the prosecution's failure to present sufficient evidence to prove the agreed-upon elements of the offense, which included that the penetration had been committed for a sexual purpose. Under

People v Nix, 453 Mich 619 (1996), the fact that the prosecution was not required to establish this element is irrelevant to the double jeopardy analysis.

2. The prosecution's concession at trial that a sexual purpose was a necessary element of CSC-I constitutes an intentional relinquishment or abandonment of the right to raise this error on appeal and precludes reconsideration of *Nix*.

Court of Appeals judgment reversed; directed verdict of acquittal reinstated.

Justice CAVANAGH, joined by Chief Justice KELLY, concurred in the result only, stating that whether the trial court erroneously interpreted the elements of the crime is irrelevant.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — ACQUITTALS.

An acquittal for double jeopardy purposes occurs when the trial court's ruling represents a resolution of some or all of the factual elements that comprise the charged offense (US Const, Am V; Const 1963, art 1, § 15).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — ACQUITTALS BASED ON LEGAL ERROR — PRESERVATION.

The erroneous addition of an element to a charged offense may not serve as the basis for an argument that no acquittal occurred for double jeopardy purposes when the prosecution conceded to the addition of the element at trial (US Const, Am V; Const 1963, art 1, § 15).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

Maceroni & Maceroni, PLLC (by *Patricia A. Maceroni*), for defendant.

YOUNG, J. In this case, the trial judge's determination that the prosecutor failed to present sufficient evidence to convict defendant was based on an erroneous legal analysis. The question this case poses is whether that erroneous legal analysis precludes defendant's retrial under the double jeopardy clauses of the United States

and Michigan constitutions.[1] This Court's decision in *People v Nix* holds that such legal error precludes retrial.[2] Our adversarial system of justice precludes the prosecution from harboring error at the trial level and subsequently seeking relief on the basis of that error. Accordingly, this Court is left with no other option. Had the prosecution not conceded the trial court's legal error, this case would have provided an opportunity to revisit the correctness of *Nix*. Because the prosecution supported the legal error and because *Nix* squarely compels a reversal, we reverse the Court of Appeals judgment and reinstate the trial court's directed verdict of acquittal.

I. FACTS AND PROCEDURAL HISTORY

Defendant George Szalma was charged with first-degree criminal sexual conduct (CSC-I) based on the allegation that he digitally penetrated the anus of his four-year-old son during his parental visitation time on June 30, 2007.[3] At trial, the complainant testified that, when both he and defendant were in the bathroom naked, defendant "put his hand inside my butt," and it felt "not good." He also testified that he did not see defendant's hand because defendant was standing behind him at the time.

The complainant's mother also testified. She explained that the sometimes acrimonious custody situation required her and defendant to meet at the Harper Woods Police Station to exchange the complainant and his brother before and after defendant's parental visi-

[1] US Const, Am V; Const 1963, art 1, § 15.

[2] *People v Nix*, 453 Mich 619, 628; 556 NW2d 866 (1996).

[3] Defendant is the ex-boyfriend of the complainant's mother. Before the CSC allegation, defendant had visitation rights with the complainant and complainant's brother every other weekend.

tation time. She also testified that the complainant exhibited odd behavior on the evening of the alleged sexual assault. After defendant's visitation time, the complainant exhibited "unusually aggressive" behavior at the park. That night, the complainant woke up crying and upset, which his mother considered "really unusual" for him. Finally, she testified that, when she examined the complainant's rectal area three days later, it appeared "weird," "red," and "gaped open."

The prosecution also presented the testimony of the two physicians who examined the complainant. Neither physician's examination of the complainant, however, conclusively established whether penetration had occurred. The two investigating police officers similarly testified that no physical evidence existed either to support or to refute the charges.

Once the prosecution rested its case, defense counsel moved for a directed verdict under MCR 6.419(A),[4] explaining that "the record is void of any evidence which would allow this jury to make a decision that my client is guilty of this charge beyond a reasonable doubt." Counsel elaborated:

> I think a statement on the record, most favorable to the prosecution would suggest the following: That [the complainant] testified that his father put his hand in his butt, that he never saw specifically what occurred, and that it hurt.
>
> * * *
>
> So, with all the numerous other things that could have been causing this irritation, it was a four-year-old child's

[4] MCR 6.419(A) provides, in relevant part: "After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction."

> suggesting his father put his hand in his butt. Was it for wiping a four-year-old little boy who . . . are not always as cleanly [sic] as they should be, because they are four years old, they are little boys, and they would rather be out playing soccer instead of, you know, cleaning themselves.
>
> We don't have anything beyond that. There have been numerous other things that it could have been. This case is replete with doubt. And I can't see how any jury can logically and legally convict Mr. Szalma of such a horrendous offense.

Before making its ruling, the trial court clarified the elements of the charged offense with the prosecution and defense counsel, with both parties *agreeing* that CSC-I contains an element not actually included in the corresponding statute:

> *The Court*: A couple of questions: I don't have your finished instructions in front of me. The mens rea needed for this charge would be what? Anybody[?]
>
> [*Prosecutor*]: The specific intent instruction has been stricken, so it does indicate in the jury instruction that we have to prove the Defendant engaged in a sexual act.
>
> [*Defense Counsel*]: Judge, I can add to that. It is not just any touching, or even any penetration that makes the crime out. It has to be for sexual purposes.
>
> *The Court*: It is not strict liability?
>
> [*Prosecutor*]: No.
>
> [*Defense Counsel*]: No.
>
> *The Court*: It has to be for a sexual purpose.
>
> [*Defense Counsel*]: Yes, sir.
>
> [*Prosecutor*]: Even given that, I believe that the testimony and the evidence brought forth indicates that it easily could be believed to be for a sexual purpose.[5]

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[5] MCL 750.520b(1) provides, in relevant part:

The trial court then proceeded to make its ruling on the basis of this erroneous understanding about the elements of the charged crime:

> *The Court*: Well, here are my thoughts: A wonderful, young boy who testified, a very precious, dear child. He made a wonderful impression, anyone would be lucky to have him as your child.
>
> The mother made a very good impression, very likable, very engaging, very polite when cross examined. . . .
>
> * * *
>
> . . . Now, you have a four-year-old boy, he's almost five at the time. . . . A very dear boy. And he testifies, he's in the bathroom with his dad, and something he says—it's hard to even say what he says. The construction of what he says, is, the inference is that it was his dad's finger went into his anus, and it didn't feel that great. . . .

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

MCL 750.520a(r) defines "sexual penetration," in part, as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ."

In contrast, the Legislature criminalized certain types of "sexual contact" with another person, MCL 750.520c(1), as second-degree criminal sexual conduct. In doing so, it made sexual gratification an explicit element of the offense. Second-degree "sexual contact" is defined as:

> [T]he intentional touching of the victim's . . . intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger. [MCL 750.520a(q).]

He essentially repeats that, this is what happened to me, he tells it to a couple of doctors. Now, it is true, a complainant's story need not be corroborated if, in and of itself, it is good enough to convince you beyond a reasonable doubt. . . .

Now, here, my best reading of the medical testimony, particularly the last doctor, it doesn't really educate you in any way. It is consistent with it happening, and with it not happening. It is not particularly edifying to a finder of fact. It's really not anything you can hang your hat on. [The investigators] really can't do anything to help or hurt the case. . . .

* * *

. . . It is a very unfortunate thing that happened. Unfortunate for everybody involved. Now, what it boils down to then, I guess, is you have to make the argument, the natural father, . . . on this record, decided for sexual purposes to penetrate his child. . . .

[I]t is easier to say, hey, give it to the jury. But, not everything has to go to the jury in a criminal case. [The prosecutor] did a fantastic job with this case, but she's only got so much to work with. It would have to be logical on the record, that there would be something on the record to indicate that the Defendant, I guess, did this, in a criminal trial with that mind set, that it was for sexual purposes, that there is just not another just as logical explanation. I'm not seeing that on this record. . . .

[B]ased on this record, even in the light most favorable to the nonmoving party, I don't find that a reasonable jury could find beyond a reasonable doubt that the crime was committed as charged.

With that, I'm going to grant [defendant's] motion for a directed verdict. That will be that on the case. . . . [T]here is not enough on this record.

The prosecution appealed, and the Court of Appeals reversed the directed verdict of acquittal and remanded

for a new trial. The panel accepted the prosecution's argument that the verdict of acquittal was an improper determination of the witnesses' credibility, not the legal sufficiency of the evidence. The Court of Appeals determined that "the trial court engaged in a somewhat lengthy analysis of its empirical, objective, sense of what the evidence showed," but that the trial court's analysis "unequivocally focused on the credibility of the witnesses."[6] The panel concluded that "[t]he jury in this case might reasonably have come to a conclusion different from that of the trial court, had it been allowed to proceed to a verdict."[7]

On receiving the defendant's application for leave to appeal, this Court directed oral argument on whether to grant leave to appeal or take other peremptory action.[8]

II. STANDARD OF REVIEW

Defendant claims that the Court of Appeals decision subjects him to a new trial in violation of the double jeopardy provisions of the United States and Michigan Constitutions.[9] Such a claim is reviewed de novo.[10]

III. ANALYSIS

A. DOUBLE JEOPARDY JURISPRUDENCE

The Fifth Amendment of the United States Constitution protects a criminal defendant from "be[ing] subject for the same offence to be twice put in jeopardy

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[6] *People v Szalma*, unpublished opinion per curiam of the Court of Appeals, issued August 11, 2009 (Docket No. 285632), p 2.

[7] *Id.* at 3.

[8] 485 Mich 1117 (2010).

[9] US Const, Am V; Const 1963, art 1, § 15.

[10] *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

of life or limb . . . ."[11] A parallel provision of the Michigan Constitution provides a criminal defendant with similar protection.[12] In adopting this parallel provision, "the people of this state intended that our double jeopardy provision would be construed consistently with Michigan precedent and the Fifth Amendment."[13]

The double jeopardy prohibition originated in the English common law. Blackstone called it "a universal maxim of the common law of England" that "no man is to be brought into jeopardy of his life, more than once, for the same offence."[14] He elaborated:

> And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[15]

Michigan's own Blackstone, Justice THOMAS M. COOLEY, articulated the following principle in one of his many treatises:

> One thing more is essential to the complete protection of jury trial, and that is, that the accused shall not be twice

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[11] US Const, Am V. The United States Supreme Court incorporated the Fifth Amendment's Double Jeopardy Clause to the states in *Benton v Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

[12] Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

[13] *People v Nutt*, 469 Mich 565, 591; 677 NW2d 1 (2004). Even before the people enacted the 1963 constitution, this Court determined that the Double Jeopardy Clause in previous Michigan constitutions existed coterminously with Fifth Amendment's Double Jeopardy Clause. See *In re Ascher*, 130 Mich 540, 545; 90 NW 418 (1902) ("[T]he law of jeopardy is doubtless the same under both" the Michigan and United States constitutions.).

[14] 4 Blackstone, Commentaries on the Laws of England (19th ed), p 335.

[15] *Id*.

> put in jeopardy upon the same charge. One trial and verdict must, as a general rule, protect him against any subsequent accusation, whether the verdict be for or against him, and whether the courts are satisfied with the verdict or not.[16]

The United States Supreme Court has applied these principles to its double jeopardy jurisprudence for well over a century. In *Ball v United States*, the Court explained that the double jeopardy prohibition "is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[17]

Following *Ball*, several decisions of the United States Supreme Court have elaborated on the question central to the instant case: what constitutes an "acquittal" within the meaning of the Double Jeopardy Clause? In *United States v Martin Linen Supply Co*, the Court defined an acquittal for double jeopardy purposes as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged."[18]

An acquittal, defined as a resolution of the elements of the charged offense, remains a bar to retrial even if it is "based upon an egregiously erroneous foundation."[19] Thus, in *Sanabria v United States*, the Court determined that an acquittal is final even if it is based on an erroneous *evidentiary* ruling that precluded the pros-

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[16] Cooley, Constitutional Limitations (1st ed), pp 325-326.

[17] *Ball v United States*, 163 US 662, 669; 16 S Ct 1192; 41 L Ed 300 (1896).

[18] *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977) (emphasis added).

[19] *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962).

ecution from introducing evidence that would have been sufficient to convict the defendant.[20]

The United States Supreme Court has not directly considered a related, but distinct issue: whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial where the trial court erroneously *adds an element* to the charge.[21]

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[20] *Sanabria v United States*, 437 US 54, 68-69; 98 S Ct 2170; 57 L Ed 2d 43 (1978) ("[W]e believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error."). Similarly, the Court's decision in *Smith v Massachusetts*, 543 US 462; 125 S Ct 1129; 160 L Ed 2d 914 (2005), provided that, once it acquits the defendant of a crime, a trial court may not revisit its previous, erroneous ruling on what evidence may prove an element of that crime.

[21] The concurring justice's position notwithstanding, there is no controlling United States Supreme Court caselaw on the issue that this Court resolved in *Nix*, namely, whether a trial court's acquittal on a criminal charge due to insufficient evidence bars retrial where the trial court *adds an element* to the charge. Indeed, at least one federal appellate court has reached the *opposite* conclusion as the concurring justice. See *United States v Maker*, 751 F2d 614, 622 (CA 3, 1984), cert den 472 US 1017 (1985) (holding that a judicial ruling is an acquittal "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction"). Therefore, the concurring justice errs when he concludes that the United States Supreme Court has definitively resolved this issue.

Nevertheless, three cases the concurring justice cites in support of his position are worth examining in greater detail. Such examination also shows them to be readily distinguishable from the instant case because they involve evidentiary questions over *actual* elements in the crime.

Smith v Massachusetts involved a trial court's error regarding not *whether* a particular element to the crime existed, but rather *what evidence could prove that element*. The defendant in *Smith* was charged with unlawful possession of a firearm, among other charges, which "requires proof that the weapon had a barrel 'less than 16 inches' in length." *Smith*, 543 US at 464, citing Mass Gen Laws ch 140, § 121 (West 2002) (definition of "firearm"). The trial court granted an acquittal on defendant's motion because it determined that "there was 'not a scintilla

of evidence' that petitioner had possessed a weapon with a barrel length of less than 16 inches." *Id.* at 465. Subsequent to that ruling, but while defendant remained on trial for two other charges, the prosecutor "brought to the court's attention a Massachusetts precedent under which (he contended) the victim's testimony about the kind of gun sufficed to establish that the barrel was shorter than 16 inches." *Id.* The trial court agreed with the prosecutor, reversed its previous ruling, and allowed the firearm charge to go to the jury. Thus, the trial court determined that the prosecutor *did* provide sufficient evidence of the 16-inch element to convict defendant of the firearm charge. However, the United States Supreme Court's ruling concluded that the court's mid-trial ruling "meets the definition of acquittal that our double-jeopardy cases have consistently used: It 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' " *Id.* at 468, quoting *Martin Linen*, 430 US at 571.

Similarly, *Arizona v Rumsey*, 467 US 203; 104 S Ct 2305; 81 L Ed 2d 164 (1984), involved the trial court's error, regarding not *whether* a particular aggravating circumstance existed to allow a jury to impose a death penalty for first-degree murder, but *how the prosecutor must prove the occurrence of that circumstance in a particular case*. The aggravating circumstance at issue involved whether a murder occurred " 'as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.' " *Id.* at 205, quoting Ariz Rev Stat 13-703(F)(5). The trial court erroneously ruled that this aggravating circumstance only involved murders for hire, rather than *any* murder occurring during the course of a robbery, as the Arizona Supreme Court interpreted the statute. Nevertheless, the United States Supreme Court concluded that the trial court's decision operated as a verdict on whether defendant was eligible for the death penalty, and that therefore, defendant could not subsequently be placed in jeopardy of death for the same offense, notwithstanding the trial court's "misconstruction of the statute defining the pecuniary gain aggravating circumstance." *Id.* at 211.

Finally, *Smalis v Pennsylvania*, 476 US 140; 90 L Ed 2d 116; 106 S Ct 1745 (1986), involved whether a trial court's granting of a "demurrer" within the commonwealth of Pennsylvania's rules of criminal procedure involved an acquittal for double jeopardy purposes. The United States Supreme Court held that it did, notwithstanding an alleged error that the trial court committed in interpreting the "recklessness" element of Pennsylvania's third-degree murder statute. *Id.* at 144 n 7.

In this case, as discussed *infra*, there is simply *no* statutorily defined specific intent element to CSC-I. Accordingly, this case presents a different situation than those the United States Supreme Court resolved

This Court, however, has considered that question in *People v Nix*, and concluded that a finding of insufficient evidence constitutes an acquittal of that offense for double jeopardy purposes, even when "the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense."[22] In *Nix*, the defendant was on trial for first-degree premeditated murder and first-degree felony murder. The trial court ruled that the defendant "could not be convicted of either charge as a matter of law" because she "owed no legal duty to the victim," who died after the defendant's boyfriend locked the victim in her own trunk.[23] The majority of this Court in *Nix* concluded that "[t]he phrase 'correct or not' " in the United States Supreme Court's definition of "acquittal" in *Martin Linen* "refers to all aspects of the trial court's ultimate legal decision . . . ."[24]

The prosecution argued at oral argument in the instant case that *Nix* was wrongly decided and that a trial court's acquittal based on an erroneously included element of the charged offense does not bar a retrial based on the correct elements of the charged offense.

B. APPLICATION OF DOUBLE JEOPARDY PRINCIPLES

Under MCR 6.419(A), a defendant may move for a directed verdict following the close of the prosecution's

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in *Smith*, *Rumsey*, and *Smalis*. Nevertheless, whether the United States Supreme Court case law mandates the result in this case is immaterial because, as discussed *infra*, and as the concurring justice correctly concludes, this Court's decision in *Nix* clearly controls the outcome of this case.

[22] *Nix*, 453 Mich at 628.

[23] *Id.* at 622. The victim died six days later of dehydration and methanol poisoning, before which time, the prosecution alleged, the defendant was told of the victim's screams coming from the trunk. *Id.* at 630.

[24] *Id.* at 628, quoting *Martin Linen*, 430 US at 571.

proofs and, on that motion, is entitled to "a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction."[25] In deciding whether the evidence is sufficient to support conviction, the trial court must examine the evidence introduced at trial in the light most favorable to the prosecution.[26]

Whether a judgment of a lower court is an acquittal for purposes of double jeopardy "is not to be controlled by the form of the judge's action."[27] Rather, an appellate court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[28] Similarly, this Court's double jeopardy jurisprudence establishes that "[t]here is an acquittal and retrial is impermissible when the judge 'evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction'."[29]

However, notwithstanding *Nix*'s broad statement precluding retrial, this Court determined in *People v Mehall* that not all conclusions drawn in a finding of acquittal preclude a retrial. In *Mehall*, this Court held that a trial court's ruling on a defendant's motion for a directed verdict that "focuse[s] almost exclusively on the complainant's testimony, and on its conclusion that her testimony was not credible," is an impermissible

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[25] MCR 6.419(A).

[26] *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008).

[27] *Martin Linen*, 430 US at 571.

[28] *Id*.

[29] *People v Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), quoting *Martin Linen*, 430 US at 572, and citing *People v Hampton*, 407 Mich 354, 385-386; 285 NW2d 284 (1979) (RYAN, J., concurring in part and dissenting in part).

credibility judgment and not a "rul[ing] on the sufficiency of the prosecution's proofs."[30] Accordingly, the *Mehall* Court concluded that the trial court "failed altogether to rule on the sufficiency of the prosecution's proofs,"[31] and, as a result, the prosecution could retry the defendant without offending double jeopardy principles.

This case requires this Court to determine whether the trial court's ruling on defendant's MCR 6.419(A) motion involved an "impermissible credibility judgment" under *Mehall,* as the Court of Appeals ruled, or a "resolution, correct or not, of some or all of the factual elements of the offense charged,"[32] as defendant claims. We agree with defendant and hold that the trial court rendered a resolution on the merits of the charged offense and the trial court's ruling bars a retrial of defendant.

1. THE TRIAL COURT'S RULING

As stated, we must look to the substance of the trial court's ruling, not its outward form, to determine whether the ruling constitutes an acquittal for double jeopardy purposes.[33] A close review of the record leads inexorably to one conclusion: the trial court ruled that defendant could not be convicted of the offense as charged because no evidence existed in the record to prove that he penetrated the complainant's anus for the purpose of sexual gratification. Thus, this acquittal on the merits of the charged offense is final under the holding of *Nix*.

Before making its ruling, the trial court clarified the elements of the charged offense. Both defense counsel

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[30] *People v Mehall*, 454 Mich 1, 6-7; 557 NW2d 110 (1997).

[31] *Id.* at 7.

[32] *Martin Linen*, 430 US at 571.

[33] *Id*.

and the prosecution agreed that, for defendant to be convicted of the charged offense, the finder of fact had to conclude that defendant penetrated the complainant's anus for a "sexual purpose."

Similarly, the parties' arguments on the motion focused on whether sufficient evidence existed to prove that defendant acted with a sexual purpose. Defense counsel explained that "[t]here have been numerous other things that [the alleged penetration] could have been." The prosecution countered that "the testimony and the evidence brought forth indicates that it easily could be believed to be for a sexual purpose."

The most obvious explanation of the trial court's ruling is that it determined that the prosecution did not present sufficient evidence to prove the *agreed upon* elements of the offense. In accordance with its understanding of the elements of the charged offense, the trial court indicated that "[i]t would have to be logical on the record, that there would be something on the record to indicate that the Defendant, I guess, did this, in a criminal trial with that mind set, that it was for sexual purposes, that there is just not another just as logical explanation." The trial court then explained, "I'm not seeing that on this record," and granted defendant's motion for a directed verdict.

The Court of Appeals concluded that the trial court's ruling was based on its judgment of the complainant's credibility, rather than on the sufficiency of the evidence. We disagree. The trial court clearly indicated that it could not find any evidence that defendant committed the charged offense for a sexual purpose. Whether or not the trial court's conclusion is *factually* correct is immaterial.[34]

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[34] *Martin Linen*, 430 US at 571 (defining an acquittal as "a resolution, correct or not, of some or all of the factual elements of the offense charged").

Unlike the trial court in *Mehall*, the trial court in the instant case did not make an improper credibility determination in its ruling.[35] Rather, it examined *all* the evidence, including the complainant's testimony, the complainant's mother's testimony, the examining doctors' testimony, and the investigating officers' testimony, in the light most favorable to the prosecutor. The court also properly articulated the principle that the complainant's testimony can, by itself, be sufficient to support a conviction of CSC.[36] But the trial court noted that it was "hard to even say what [the complainant] says," and it did not find the complainant's testimony sufficient to prove all the elements of CSC. Thus, the trial court's determination that it was "not seeing" any evidence on the record to prove that the defendant penetrated the complainant with a sexual purpose *factually* resolved one of its articulated, but erroneous, elements of the offense.

2. EFFECT OF ERRONEOUS RULING OF LAW

At oral argument, the prosecution claimed that the trial court premised its ruling on an erroneous understanding of the elements required to prove CSC-I,

[35] To the contrary, the trial court seemed to accept the complainant's testimony as true, explaining that the complainant was "a very precious, dear child" and that the complainant's mother "made a very good impression, very likable, very engaging, [and] very polite when cross examined."

Moreover, the trial court explained that "even in the light most favorable to the nonmoving party, I don't find that a reasonable jury could find beyond a reasonable doubt that the crime was committed as charged."

Such observations compel the conclusion that the trial court considered this evidence in the light most favorable to the prosecution when ruling on defendant's motion for a directed verdict.

[36] MCL 750.520h provides: "The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b to 750.520g]."

namely, the requirement that the prosecutor prove that defendant committed a penetration with *a sexual purpose*. We agree, but the posture of this case under *People v Nix* makes our agreement unavailing. While it is true that the Legislature did not require any specific "sexual purpose" as an element of CSC-I, this Court's decision in *Nix* provides that a trial court's erroneously added element of a crime does not negate the finality of its directed verdict. Furthermore, we do not consider whether *Nix* was correctly decided because the prosecution conceded the underlying erroneous statement of the elements before the trial court ruled on the defendant's motion for a directed verdict.

MCL 750.520b(1) establishes the CSC-I offense and provides, in relevant part:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

The Legislature defined "sexual penetration," in relevant part, as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ."[37]

In *People v Langworthy*, this Court ruled that "[n]either the first-degree criminal sexual conduct statute nor the corresponding statutory definition of 'sexual penetration' contains any language whatsoever regarding [specific] intent."[38] Accordingly, the trial court erred

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[37] MCL 750.520a(r).

[38] *People v Langworthy*, 416 Mich 630, 643; 331 NW2d 171 (1982). Although the Legislature did not attach a specific intent to CSC-I, it *has* required any prohibited "sexual contact" with another person to be "reasonably . . . construed as being . . . done for a sexual purpose . . . ." MCL 750.520a(q). See also MCL 750.520c(1) (defining second-degree criminal sexual conduct as certain types of "sexual contact").

to the extent it believed that the prosecution was required to prove that defendant committed a penetration with a sexual purpose. Rather, as the *Langworthy* Court concluded, "the Legislature intended to maintain the general rule that 'no intent is requisite other than that evidenced by the doing of the acts constituting the offense', *i.e.*, general intent."[39] Consistent with *Langworthy*, therefore, in the instant case we only hold that "sexual purpose" is not an element of CSC-I. We do not hold that a general criminal intent is not an element of CSC-I.

Nevertheless, the trial court's legal error does not negate the effect of its directed verdict. This Court held in *People v Nix* that an acquittal retains its finality for double jeopardy purposes even when "the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense."[40] This very situation confronts this Court in the instant case. Accordingly, *Nix* bars retrial of defendant, and the Court of Appeals erred by ruling otherwise.

As stated, at oral argument in this case, the prosecutor argued that *Nix* was wrongly decided. However, because the prosecutor conceded the underlying legal error at trial by agreeing with defense counsel that sexual purpose was an element of the charged crime, the prosecution has, undoubtedly inadvertently, created the very error that it wishes to correct on appeal. Because a party may not harbor error at trial and then use that error as an appellate parachute,[41] we will not reach the question whether *Nix* was properly decided.

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[39] *Langworthy*, 416 Mich at 644, quoting 75 CJS, Rape, § 9, p 471.

[40] *Nix*, 453 Mich at 628.

[41] See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) ("Counsel may not harbor error as an appellate parachute."). The prosecutor's concession of the elements of CSC-I provides an " 'intentional relinquishment or abandonment' " of the right to claim this error on appeal. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999),

IV. CONCLUSION

The double jeopardy provisions of the United States and Michigan constitutions preclude retrial of a criminal defendant following an acquittal for insufficient evidence. The trial court's decision in the instant case, though premised on an erroneous understanding of the legal elements of the charged offense, nonetheless constituted just such a decision on the sufficiency of the evidence under *Nix*. We therefore reverse the judgment of the Court of Appeals and reinstate the trial court's directed verdict of acquittal.

WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*concurring*). I concur in the result only. I agree that retrial is barred by the double jeopardy clauses of the state and federal constitutions because the trial court's directed verdict of acquittal was based on its determination that there was insufficient evidence to support the charge. A court's "ruling that as a matter of law the State's evidence is insufficient to establish [the defendant's] factual guilt" is " 'a resolution, correct or not, of some or all of the factual elements of the offense charged,' " and, thus, constitutes an acquittal to which double jeopardy protections attach. *Smalis v Pennsylvania*, 476 US 140, 144, 144 n 6; 106 S Ct 1745; 90 L Ed 2d 116 (1986) (citation omitted). See also *People v Nix*, 453 Mich 619, 625; 556 NW2d 866 (1996). Whether the trial court erred in its interpretation of the elements of the crime is irrelevant; "[t]he status of the trial court's judgment as an acquittal is not affected" by a trial court's legal error in

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quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted).

interpreting the governing legal principles because " '[t]he fact that "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles" . . . affects the accuracy of that determination but it does not alter its essential character.' " *Smalis*, 476 US at 144 n 7, quoting *United States v Scott*, 437 US 82, 98, 106; 98 S Ct 2187; 57 L Ed 2d 65 (1978), and citing *Sanabria v United States*, 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978), and *Arizona v Rumsey*, 467 US 203; 104 S Ct 2305; 81 L Ed 2d 164 (1984).[1] See also *Nix*, 453 Mich at 624-632.[2] As the

[1] Although the United States Supreme Court has held that a trial court's legal error in a judgment notwithstanding a verdict, made after a jury trial, may be appealed because the jury verdict can be reinstated without subjecting the defendant to postacquittal factfinding proceeding, *Smalis*, 476 US at 145, and that retrial is permitted when the acquittal was based on a procedural error unrelated to the defendant's factual guilt or innocence, *Scott*, 437 US at 98-99, the Court has never held that a trial court's preverdict acquittal on the merits may be reversed because of a legal error. Indeed, as noted, it has repeatedly stated the opposite.

[2] I disagree with the majority's implication, in dicta, that *Nix* is not compelled by United States Supreme Court precedent. The majority fails to acknowledge or address that court's repeated statements that jeopardy attaches not only when an acquittal is based on an erroneous evidentiary ruling but also when it is based on "erroneous interpretations of governing legal principles." *Smalis*, *supra*, 476 US at 144 n 7 (citation and quotation marks omitted). An error in an interpretation of statutory requirements or elements necessary for a crime constitutes an erroneous interpretation of a governing legal principle. See, e.g., *Rumsey*, 467 US at 211. Thus, United States Supreme Court precedent does govern this case.

Further, the majority's discussion of whether the errors in certain cases should be characterized as evidentiary errors is irrelevant because, as discussed, the United States Supreme Court has repeatedly stated that jeopardy attaches to an acquittal on the merits regardless of *either* evidentiary errors *or* erroneous interpretations of governing legal principles. I note, however, that I disagree that the error in *Rumsey* was evidentiary because it clearly related to the proper interpretation of the statute's requirements and not the evidence required to satisfy that interpretation. Under the majority's expansive understanding of what constitutes an "evidentiary" error, the alleged error in this case is also

United States Supreme Court recently affirmed, "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law." *Smith v Massachusetts*, 543 US 462, 473; 125 S Ct 1129; 160 L Ed 2d 914 (2005). Therefore, I agree that the Court of Appeals should be reversed and the trial court's directed verdict of acquittal should be reinstated.

KELLY, C.J., concurred with CAVANAGH, J.

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evidentiary because it relates to whether the prosecution needed to present evidence of a sexual purpose to satisfy the statute.

PEOPLE v TENNYSON

Docket No. 137755. Argued November 4, 2009. Decided September 7, 2010.

George W. Tennyson was convicted in the Wayne Circuit Court, James A. Callahan, J., of contributing to the neglect or delinquency of a minor, MCL 750.145, in addition to other crimes, after a police search of the home he shared with his 10-year-old stepson revealed narcotics under defendant's bed and illegally possessed firearms in his dresser drawer. The Court of Appeals, METER, P.J., and TALBOT and MURRAY, JJ., affirmed defendant's convictions in an unpublished opinion per curiam, issued October 16, 2008 (Docket No. 278826). The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action, directing the parties to address whether the evidence was legally sufficient to sustain defendant's conviction under MCL 750.145. 483 Mich 963 (2009).

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

Evidence that a child was present in a home where a defendant conducted illegal activity is, by itself, insufficient to support a conviction for contributing to the neglect or delinquency of a minor under MCL 750.145.

1. MCL 750.145 requires proof beyond a reasonable doubt that a defendant by any act or word tended to cause any minor to become neglected or delinquent so as to tend to come under the jurisdiction of the family division of the circuit court. In this case, the jury was presented with no evidence relevant to the MCL 750.145 charge, other than the fact that the child was present in a home where criminal activity occurred. There was no evidence of the child's awareness that defendant was engaged in criminal behavior; there was no evidence of the child's awareness of any contraband in the home; there was no evidence of open use of heroin in the home; there was no evidence that the physical or other conditions of the home were unfit in any way for the child; there was no evidence that the educational, moral, physical, or psychological needs of the child were being neglected; and there was no evidence that defendant's conduct had any adverse impact

on the child. Taking the evidence in the light most favorable to the prosecutor, a rational juror could not have determined beyond a reasonable doubt that defendant's actions tended to cause the child in question to become delinquent or neglected.

2. MCL 750.145 requires a causal connection between a defendant's criminality and a finding that his or her home is unfit for a juvenile. Allowing a conviction for contributing to the delinquency or neglect of a minor based only on the fact that defendant committed a crime in a home where a child lived is inconsistent with the language of this statute and is incompatible with past judicial practice in this state.

3. To adopt the theory that a child's presence in the home, plus illegal activity in that home, automatically gives rise to an additional criminal charge for violating MCL 750.145 would transform this statute into an increasingly routine supplement to a broad array of other charges that could be brought for any crime that occurs in a home. This theory would also serve to establish the initiation of procedures for the termination of parental rights by the Department of Human Services as an increasingly routine consequence for the violation of criminal statutes, a result never before reached by the courts of this state.

Reversed in part, vacated in part, and remanded to the trial court for further proceedings.

Justice CORRIGAN, joined by Justice YOUNG, dissenting, would affirm defendant's conviction for contributing to the neglect or delinquency of a minor because a rational jury could—and did—conclude that defendant's commissions of drug- and weapons-related crimes in the home constituted acts that rendered his stepson susceptible to the court's jurisdiction under MCL 712A.2(b)(1) and (2) for abuse or neglect.

Justice YOUNG, joined by Justice CORRIGAN, dissenting, concluded that the open use of heroin in a home where a child is present or being a felon illegally in possession of a firearm that is easily accessible to any child in that home is the type of criminality that tends to cause a child to be neglected or delinquent under MCL 750.145 and that evidence of such conduct in this case was therefore sufficient to sustain defendant's conviction.

Justice DAVIS did not participate in this case, which the Court heard before he assumed office and in which his vote would not be result-determinative, in order to avoid unnecessary delay to the parties.

1. CRIMINAL LAW — CONTRIBUTING TO NEGLECT OR DELINQUENCY OF MINOR.

To support a conviction for contributing to the neglect or delinquency of a minor, the prosecution must prove beyond a reasonable doubt that a defendant by any act or word tended to cause any minor to become neglected or delinquent so as to tend to come under the jurisdiction of the family division of the circuit court (MCL 750.145).

2. CRIMINAL LAW — CONTRIBUTING TO NEGLECT OR DELINQUENCY OF MINOR.

Evidence that a child was present in a home where a defendant conducted illegal activity is, by itself, insufficient to support a conviction for contributing to the neglect or delinquency of a minor (MCL 750.145).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Lori Baughman Palmer*, Assistant Prosecuting Attorney, for the people.

Julie E. Gilfix for defendant.

MARKMAN, J. We granted oral argument to consider whether evidence that a child was present in a home in which defendant was in possession of drugs and firearms is, by itself, legally sufficient to support defendant's conviction under MCL 750.145 for doing an act that "tended to cause a minor child to become neglected or delinquent so as to tend to come under the jurisdiction of" the family division of the circuit court. We hold on the facts of this case—where there is no evidence that the child was aware of such drugs or firearms—that there is insufficient evidence to support defendant's conviction under this statute. To decide otherwise would render a conviction under MCL 750.145 an increasingly routine appendage to a broad array of other criminal charges in instances in which a child is merely present in a home where evidence of a crime has been uncovered. Moreover, to decide otherwise would

have considerable implications for the process by which parental rights are terminated in this state, for, as the facts of this case demonstrate, a conviction under MCL 750.145 would almost certainly constitute a trigger at least for the *initiation* of the termination process by the Department of Human Services. Because this result has never before been reached by courts of this state, and because we believe that such result was never intended by the Legislature, we reverse in part the judgment of the Court of Appeals, vacate defendant's conviction under MCL 750.145, and remand to the trial court for proceedings consistent with this opinion. Defendant's drug and firearms convictions, which the Court of Appeals has affirmed, are not affected by this decision.

I. FACTS AND HISTORY

On August 16, 2006, Detroit police executed a search warrant at defendant's home. They found defendant sitting on a bed in one of the home's two bedrooms. When one of the officers looked under the bed, he found a baggie of what he believed, based on his experience and training with narcotics, to be heroin on a plate with a razor blade and a coffee spoon. A second officer testified similarly, estimating that the amount recovered was approximately three grams, with a street value of about $700. The police also found two loaded firearms in a dresser drawer in the same bedroom. The bedroom contained both men's and women's clothing, while the other bedroom contained only children's clothing.

At the time of the raid, there was a woman seated on the front porch and a 10-year-old boy on a couch in the living room. A third officer, Kathy Singleton, testified that she observed that the child, who was defendant's stepson, was scared and crying when the officers entered. The woman, who was defendant's wife and the child's mother, was handcuffed and given a citation.

Defendant was charged with possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), being a felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and contributing to the neglect or delinquency of a minor, MCL 750.145. The information for the latter violation stated that defendant had contributed to the neglect or delinquency of the child by "exposing him to the use and sale of narcotics."

With respect to the latter charge, the prosecutor argued at trial that the child "being in that house is being subject to neglect and/or delinquency." In its instructions, the trial court stated:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: that the defendant acted or by any word, encouraged, contributed toward, caused or tended to cause any minor child under the age of 17 years to become neglected or delinquent.

The jury convicted defendant of all charges. At sentencing, the trial court imposed a suspended sentence of 45 days in jail for the misdemeanor of contributing to the delinquency of a minor. The court also told defendant that it would contact the Department of Human Services (DHS) to request that a petition be filed to terminate his parental rights, and that same day wrote to DHS requesting that it investigate possible child neglect and abuse by defendant.

The Court of Appeals affirmed defendant's convictions and sentences. *People v Tennyson*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 278826). Regarding defendant's conviction under MCL 750.145, the Court noted that the statute "was aimed at prevent-

ing conduct 'which would *tend to cause* delinquency and neglect as well as that conduct which obviously *has caused* delinquency and neglect.' " *Id*. at 4, quoting *People v Owens*, 13 Mich App 469, 479; 164 NW2d 712 (1968) (emphasis in original).

> Here, defendant's actions, at the very least, placed [the child] directly in a home where illegal activity was occurring. It would be reasonable for the jury to infer that defendant knew [the child] was living in a house where heroin and loaded firearms were unlawfully kept. When considering the evidence in the light most favorable to the prosecutor, there was sufficient evidence for the jury to infer that defendant's illegal activities could have subjected his son to the jurisdiction of the courts. Therefore, there was sufficient evidence to convict defendant of contributing to the neglect or delinquency of a minor. [*Tennyson*, unpub op at 4.]

This Court directed that oral argument be heard on the application for leave to appeal and specified that the parties must address whether the evidence was legally sufficient to sustain defendant's conviction under MCL 750.145, *People v Tennyson*, 483 Mich 963 (2009), and argument was heard on November 4, 2009.

II. STANDARD OF REVIEW

This case presents an issue of statutory interpretation, which we review de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor. "[T]he question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

III. ANALYSIS

A. MCL 750.145

We are called upon to construe MCL 750.145, which provides:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, as defined in [MCL 712A.2], whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

This statute requires that the prosecutor prove beyond a reasonable doubt that defendant (1) by any act or word (2) "tend[ed] to cause" any minor[1] (3) to "become neglected or delinquent" (4) so as to "tend to come" under what was then probate court jurisdiction, which has since been transferred to the family division of circuit court, or "family court."[2]

The statute also makes clear that "neglect" and "delinquency" are specifically defined by MCL 712A.2, and that an adjudication that the child is, in fact, a ward of the court is not a prerequisite to a conviction. These conclusions are compelled by the statute and were articulated by the Court of Appeals

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[1] Alternatively, this element can be satisfied with proof that defendant "encourage[d], contribute[d] toward, [or] cause[d]" a minor to become neglected or delinquent. Like the prosecutor, we focus our analysis on the "tend[ed] to cause" alternative because it requires the lowest threshold of proof.

[2] Alternatively, this element can be satisfied with proof that the minor child did, in fact, "come . . . under the jurisdiction of the probate court." The instant analysis focuses on the "tend to come" alternative again because it requires the lowest threshold of proof.

over 40 years ago in *People v Owens*, 13 Mich App at 475-476, 479.[3]

Although it is clear that a prior adjudication of neglect or delinquency is not required for a conviction under MCL 750.145, the open question, which goes to the heart of this appeal, is what *level of certainty* is required in order for the fact-finder to determine that a defendant "tend[ed] to cause" a minor to become delinquent or neglected so as to "tend to come" under family court jurisdiction. The focal point in this inquiry is, of course, the statute's twice-repeated use of the word "tend." When reviewing a statute, " 'a word or phrase is given meaning by its context or setting.' " *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (citation omitted). This "tend" language provides an alternative ground for satisfying two of the statute's critical elements—a person must "cause or *tend* to cause" a minor to "come or *tend* to come" under family court jurisdiction. The verbs "cause" and "come," which immediately precede "tend" in each instance, require it to be shown that a person did *in fact* do something that caused a minor to fall within family court jurisdiction. However, "tend to cause" and "tend to come" require a lesser showing; each formulation lowers the threshold of proof required by "cause" and "come," respectively, and each does not require the actual exercise of family court jurisdiction.

When reviewing a statute, all undefined "words and phrases shall be construed and understood according to the common and approved usage of the language[.]"

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[3] Contrary to the assertions of the dissents, the fact that the violation of this statute constitutes a misdemeanor has no obvious bearing on this Court's application of the "sufficiency of the evidence" standard, which is the same for a misdemeanor as for a felony. Both require evidence that would allow a reasonable fact-finder to find defendant guilty beyond a reasonable doubt.

MCL 8.3a. To determine the ordinary meaning of undefined words in the statute, a court may consult a dictionary. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). "Tend" is a non-technical word that is not defined by the statute, which according to the dictionary's first entry for the word means "to be disposed or inclined . . . to do something."[4] *Random House Webster's College Dictionary* (1997). As this definition indicates, "tend" is a forward-looking word that assesses possibilities and does not pertain to the absolute certainty of things that are past and completed.

However, the fact that "tend" pertains to matters that cannot be assessed with absolute certainty, unlike matters that have already occurred, does not mean that the determination that a person is "disposed or inclined" toward something can be made arbitrarily. Instead, logic suggests that "tend" is commonly understood to express *some* level or gradation of certainty, for if a person is "disposed or inclined" to do one thing, he is obviously not "disposed or inclined" to do its opposite. Stated another way, although "tend" conveys possibilities along a continuum, logically, a person can only "tend" toward one end of that continuum at any given time. The term thus implies a level of certainty greater than 50 percent, to wit, that it is possible to conclude from the available information and circumstances that something is "more likely than not" to occur.[5]

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[4] This definition is similar to that relied upon by the prosecutor, which defines "tend" as meaning "to be apt or inclined." *Oxford Dictionary & Thesaurus, American Edition* (1996).

[5] This common understanding of "tend" is taken for granted in everyday speech. Thus, the statement "I tend to be an early riser" conveys that I tend *not* to be a late riser; and the statement "My son tends to be a well-behaved child" conveys that he tends *not* to be a poorly behaved child. From these statements, it can be said that, more likely than not, I will get up early and my son will behave well.

However, "tend" is not always used to convey gradations of certainty. The last dictionary entry for "tend" defines it as "to lead or be directed in a particular direction." *Random House Webster's College Dictionary* (1997). While this definition is also consistent with the word's forward-looking quality, in this purely directional sense, it does not compel the conclusion that a person is closer to one end of a continuum than the other. Instead, in this sense, "tend" can mean that a person has, perhaps for just an instant, been turned "toward" a "particular direction." Thus, a determination that a person "tends" toward something in this sense could be made where there is only a 5 percent or 1 percent or 0.3 percent chance that a particular result will occur. That is, even though a person remains far closer to one end of the "good behavior-bad behavior" spectrum, if he is turned "toward" the other end even momentarily, it can be said by the purely directional understanding of the term that such person "tends" toward that direction. Because this understanding does not necessitate a comparison of possible outcomes or alternatives, a determination that a person "tends" toward something in this directional sense can be based on what is merely a snapshot of information from a single or discrete moment in time.

For several reasons, we believe that the purely directional meaning of "tend" is not what was intended by the drafters of MCL 750.145. First, the dictionary entry for "tend" emphasizes that when used in this sense, "tend" is often followed by "toward." That is, "tend" *tends* to be followed by "toward." However, the latter "companion" word is absent from MCL 750.145.

Second, the directional sense of "tend" does not accurately reflect the word's specific placement in this statute. The statute pairs "tend to cause" and "tend to

come" with "cause" and "come," respectively. The difference between each of these pairings is essentially one of degree, not kind. However, an interpretation of "tend" that is based merely on direction bears no conceptual connection to actually "causing" neglect or delinquency or actually "com[ing] under" family court jurisdiction, the alternative violations with which the "tend" violations are paired. Thus, instead of establishing pairings of violations in which apples are compared with apples—in which the magnitude of the *certainty* or *likelihood* of the harm is what distinguishes the violations—the directional understanding establishes pairings of violations in which apples are compared with oranges—in which there is no coherent relationship within each pairing.

Third, construing "tend" in its directional sense in this statute would result in a highly unreasonable and unworkable, if not potentially absurd, interpretation. If all that is required by "tend" is a determination that a child had been turned in the "direction" of neglect or delinquency—"toward" the "bad behavior" rather than "toward" the "good behavior" end of the spectrum, and without regard to whether the child had been moved *closer* to the "bad behavior" outcome than to the "good behavior" outcome, what other than prosecutorial discretion would prevent a parent from being charged with "contributing to the neglect and delinquency of their children" whenever they tell their children a lie, exceed the speed limit while children are in the car, nick another car in a parking lot where children are present and fail to take responsibility, use coarse language in front of their children, or engage in any other such behavior into which imperfect parents sometimes lapse? Each of these forms of less-than-admirable, but hardly extraordinary, behavior on the part of the parent might well "tend" to cause harm to a child in the purely

directional sense of the term because each such dereliction in parental behavior could hardly be expected to have a positive impact upon the child, and therefore could only be understood to have a negative impact. This reasoning would be particularly applicable with regard to a younger child. That is, rather than being pointed in a positive direction along the continuum of bad to good behavior, such parental breaches could only, however slightly or imperceptibly, point the child toward the wrong end of the behavioral continuum. Because we cannot imagine that it was within the Legislature's contemplation that violations of MCL 750.145 be predicated on what might be momentary lapses in parental conduct rather than on an overall assessment of the child and his or her circumstances, and because we cannot imagine that the only check upon such prosecutions would be the good judgment of the prosecutor, we believe that "tend" is far more appropriately defined by its primary definition, which focuses on whether a particular result, in this case a minor coming under the jurisdiction of the family court for reasons of neglect and delinquency, is "more likely than not" to occur. "[S]tatutes must be construed to prevent absurd results . . . ." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).[6]

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[6] The absurd results rule "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Pub Citizen v United States Dep't of Justice*, 491 US 440, 470; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring); "[I]t 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); see also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 79; 718 NW2d 784 (2006) (MARKMAN, J., concurring) ("The 'absurd results' rule underscores that the ultimate purpose of the interpretative process is to accord respect to the judgments of the lawmakers.").

By applying the more reasonable and appropriate definition of "tend" in this context as being "disposed or inclined . . . to do something," everyday lapses in parental behavior would not ordinarily suffice to lay a foundation for criminal charges that would trigger at least the *initiation* of the parental rights termination process, just as they have never before sufficed in this state to establish criminal charges under MCL 750.145.[7] Rather, "tend" properly takes into consideration the totality of the parent's conduct, and the overall impact of that conduct upon the child. While sociologists can

[7] We consider termination to be a potentially serious consequence of a conviction for contributing to a child's delinquency or neglect under MCL 750.145, as is evidenced by the facts of this case in which the trial court in sentencing defendant for this crime expressly stated that defendant's parental rights should be terminated, and initiated the process to do so by referring defendant to the Department of Human Services. Indeed, how could any trial court react differently to a criminal conviction for "delinquency or neglect" of a minor? And indeed how could the DHS react differently than by devoting its fullest resources to the investigation of such a referral? Our point, of course, is not to suggest that termination of parental rights might not constitute an appropriate response in individual cases involving parental criminality, but only that MCL 750.145 should not be radically transformed, and broadened, so as routinely to encompass criminal conduct in which a minor is merely present, and in which there is *no* evidence that the parent's conduct actually "cause[d] or tend[ed] to cause" his or her child "to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court . . . ." Criminal punishment should be the only routine consequence of criminal conduct, not the termination of parental rights.

Contrary to the repeated criticisms of the dissent, our consideration of the relationship between a MCL 750.145 conviction and the termination of parental rights does not misapprehend family court jurisdiction. We fully recognize that the termination of parental rights is only *one* of the outcomes that may result from the initial exercise of family court jurisdiction. Still, the fact that the termination of parental rights is not inevitable in every such case hardly makes it any less important for this Court to consider that when a petition alleging abuse or neglect is filed because of a conviction under MCL 750.145, the likelihood of termination becomes a serious and very real possibility.

debate the impact of countless types of parental behavior upon the child, and doubtless many such types of behavior can be characterized as either beneficial or detrimental to the child's upbringing, those debates do not define the proper judicial inquiry under the statute. Once again, it is not whether the parent has engaged in behavior that can be described as "tending" *toward* the wrong end of the behavioral spectrum, but whether the parent's overall behavior has made the harm that the statute was intended to prevent more likely than not to occur.

Accordingly, the statute's first use of "tend" requires a determination that a defendant's conduct has caused it to be more likely than not that a minor would "become neglected or delinquent." Similarly, the statute's second use of "tend" requires a determination that a defendant's conduct caused it to be more likely than not that a minor would come under family court jurisdiction.[8]

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[8] Notwithstanding the dissenting justices' characterization of this discussion as "confusing," we do not think that lower courts will be confused by this standard, which requires only that courts apply a "more likely than not" analysis. Indeed, applying this standard should hardly be more difficult than applying the " 'more probable than not' " standard supported by each of the presently dissenting justices in *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999).

The dissenting justices also consider this discussion "unnecessary," and instead would employ their "straightforward approach" to discerning the proper meaning of "tend," which basically consists of listing the word's multiple definitions and then more or less arbitrarily inserting language found in one of these definitions into the statute with no explanation of *why* this particular definition is appropriate. As is evident to others who have considered MCL 750.145, including the prosecutor here and the Court of Appeals in *Owens*, 13 Mich App at 479, "tend" is the critical term in this statute. Depending on the meaning given to "tend," the statute can produce widely varying interpretations, some reasonable, some not. Thus, we believe our discussion concerning the proper meaning of "tend" in the context of this statute to be quite necessary, and its absence in the dissents to be quite significant.

B. MCL 712A.2

With this understanding of MCL 750.145, we next follow that statute's directive and turn to MCL 712A.2, which sets forth the authority and jurisdiction of the family division of the circuit court. A minor may come under family court jurisdiction for either neglect or delinquency. MCL 712A.2(a) and (b).[9] Because the prosecutor's theory of this case at trial was that the child "being in [the] house [was] being subject to neglect and/or delinquency," we must consider whether any of the definitions of "neglect" and "delinquency" set forth in MCL 712A.2 are pertinent here.

The jurisdiction of the family division of the circuit court over a minor for delinquency is discussed in MCL 712A.2(a)(1), which grants that court "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who . . . has violated any municipal ordinance or law of the state or of the United States." This is a broad grant of jurisdiction, which notably may be exercised over a juvenile who "has violated *any* municipal ordinance or law of the state or of the United States." (Emphasis added.)

The jurisdiction of the family court over a minor for neglect is discussed in MCL 712A.2(b). The first relevant basis for a finding of neglect is detailed in § 2(b)(1), which provides that the court has jurisdiction over a juvenile under 18

[9] Justice CORRIGAN correctly notes that a "probable cause" standard is used to authorize jurisdiction under MCL 712A.13a(2). However, the standard applicable to a petition before a *family court* cannot transform, and should not distract from, the "beyond a reasonable doubt" standard that *jurors* are compelled to apply in this or any other criminal matter.

> [w]hose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

This provision sets forth multiple potential grounds for a finding of neglect. The most egregious form of neglect occurs where the child has been "abandoned by his or her parents" or is "without proper custody or guardianship." Other grounds for a finding of neglect occur where the parent "neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals," or where a child's "mental well-being" is subject to a "substantial risk of harm . . . ."

The other relevant basis for a finding of neglect under MCL 712A.2 is set forth in § 2(b)(2), which provides that the court has jurisdiction over a juvenile under 18

> [w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

For purposes of the instant case, this provision requires a finding that the home at issue constitutes an unfit place for the juvenile to live "because of" a parent's criminal act. Criminality per se, or even criminality in a home per se, is insufficient to support a finding of neglect under § 2(b)(2).

C. STATUTES *IN PARI MATERIA*

Pursuant to the express terms of MCL 750.145, it is only through the application of the definitions of "ne-

glect" and "delinquency" found in MCL 712A.2 that it is possible to determine whether a child "tend[s] to come" under the jurisdiction of the court. As *Owens* recognized, MCL 750.145 and MCL 712A.2 must be construed *in pari materia*. *Owens*, 13 Mich App at 475. The foregoing analyses of these statutes allow us to do just that—to read these in tandem in order to arrive at a reasonable construction of the law.

1. "DELINQUENCY"

When MCL 712A.2(a)(1)'s definition of "delinquency" is incorporated into MCL 750.145, conviction under MCL 750.145 requires proof that (1) a person's "words or acts" (2) "tend[ed] to cause" any minor (3) to "become [a child who] violates *any* municipal ordinance or *any* state or federal law" (4) so as to "tend to come" under family court jurisdiction for delinquency.[10] Thus, conviction under MCL 750.145 for contributing to a child's delinquency requires proof that would allow the fact-finder to determine that a person's "words or acts" caused it to be more likely that a minor would become a child who breaks the law than that he would remain law-abiding.

These standards—and the interpretation of "tend" from which they derive—are consistent with those used by Michigan courts for almost a half-century where they have been asked to construe MCL 750.145. When *Owens* first addressed this statute, although it recognized that a prior adjudication is unnecessary to sustain a conviction under MCL 750.145, the Court nonetheless focused on the particular minor at issue and identified a particular act of delinquency that the defendant

[10] The trial court did not provide the jury with the statutory definition of "neglect" or "delinquency" found in MCL 712A.2, as MCL 750.145 requires.

"tended to cause." In affirming the defendant's conviction, *Owens* reasoned that his actions "tended to cause" the minor at issue to commit the alleged act of delinquency, even though "she had not yet been adjudged delinquent by the probate court prior to defendant's trial." *Owens*, 13 Mich App at 479.

Since *Owens*, there have been few cases addressing "sufficiency of the evidence" challenges to convictions under MCL 750.145 based on grounds of delinquency—a fact that suggests that the state's justice system has arrived at a generally accepted equilibrium for prosecuting this crime.[11] However, the appellate decisions that *have* specifically analyzed sufficiency of the evidence challenges to convictions under MCL 750.145 employ a common approach. As with *Owens*, these courts identify a *particular* child and a *particular* act of delinquency as defined by MCL 712A.2(a). They then have assessed whether, because of the defendant's actions, the child committed, or was at risk of committing, a specific act of delinquency. See, e.g., *People v Antjuan Owens*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2007 (Docket No. 271064), lv den 480 Mich 1012 (2008) (sustaining the defendant's conviction, based on finding that the "[d]efendant's actions placed [the minor at issue] in danger of, at the least, being charged with loitering in a place of illegal business under MCL 750.167[1][j]");

[11] From the available caselaw, it appears that most convictions under MCL 750.145 have been unchallenged, and have arisen in cases in which the defendant has provided alcohol or drugs to a minor-victim, often as a prelude to the defendant's criminal sexual conduct. See, e.g., *People v Stokes*, unpublished opinion per curiam of the Court of Appeals issued July 22, 2008 (Docket No. 276839); *People v Bursler*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2008 (Docket No. 277473); *People v Latta*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2009 (Docket No. 281297).

People v Jackson, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 275908) (sustaining the defendant's conviction, based on finding that the defendant's actions caused the minors at issue to be charged with the crime of attending a dog fight).

These decisions reflect the existing, and proper, approach to understanding MCL 750.145 construed *in pari materia* with MCL 712A.2. The children at issue were at risk of committing identifiable acts of delinquency, and it was possible to conclude that they were more likely than not to become delinquent, and consequently more likely than not to come within family court jurisdiction.

2. "NEGLECT"

As noted above, MCL 712A.2(b) provides multiple definitions of "neglect," which all must be read in conjunction with, and incorporated into, MCL 750.145. When this is done, conviction under MCL 750.145 requires proof that (1) a person's "words or acts" (2) "tend[ed] to cause" any minor (3) to become a child: (i) who is abandoned by both parents or lacks proper custody; (ii) whose parents fail to provide the necessary care for his or her physical, educational, and moral needs; (iii) whose "mental well-being" is subject to a "substantial" risk of harm; or (iv) whose home is "unfit" "because of" a parent's "criminality" (4) so as to "tend to come" under family court jurisdiction for neglect. Thus, a conviction based on for neglect requires proof allowing the fact-finder to conclude that, more likely than not, the child will fall under one of the definitions of "neglect" in MCL 712A.2(b), and thus, more likely than not, will fall within family court jurisdiction.

There are no reported Michigan cases that address a conviction under MCL 750.145 on grounds of neglect. At oral argument, the prosecutor suggested that the closest Michigan case to the case at bar was the Court of Appeals unpublished decision in *Antjuan Owens*. Although *Antjuan Owens* rested its holding sustaining the defendant's conviction on grounds of delinquency, and in doing so followed established Michigan law, we agree that this case also affords insight into what evidence is sufficient to sustain a conviction based on neglect. There, the police raided a home and found only the defendant and his 13-year-old nephew inside. When the police entered, the defendant immediately ran to the basement and tried to dispose of cocaine he had in a plastic bag, leaving a revolver in plain view on the dining room table. Although the house had electricity and heat, it had no food or furniture, and was full of trash and animal feces. These facts would clearly enable a fact-finder to find grounds for neglect, either under MCL 712A.2(b)(2), because the "criminality" of a nonparent adult rendered the home an "unfit place" for a juvenile to live, or under MCL 712A.2(b)(1), because the child was not receiving the necessary care for his health, education or morals, or because his "mental well-being" was subject to a "substantial" risk of harm.

D. APPLICATION

The essential elements derived from construing MCL 750.145 *in pari materia* with MCL 712A.2 require us to determine whether, taking the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that defendant's actions "tended to cause" the child to become delinquent or neglected, such that the child "tended to come" under family court jurisdiction.

1. "DELINQUENCY"

The prosecutor contends that defendant's conviction can be sustained on grounds of delinquency.[12] Referencing statutes that prohibit the possession and use of a controlled substance, the prosecutor argues that defendant's actions "tend[ed] to cause" the child to violate these statutes and, thus, become a delinquent so as to "tend to come" under family court jurisdiction. The prosecutor supports this argument with social science research that suggests that children of parents who abuse drugs are more likely to abuse drugs themselves.

As a threshold matter, we note this research was not part of the proofs considered by the jury. However, even if it had been, we find the prosecutor's argument inapt under MCL 750.145. First, while this argument is purportedly focused on the child involved in this case, the research is based on the life experiences of *other* children.[13] Second, this argument does not properly

[12] Similarly, the trial court focused on delinquency as its rationale for how the child would "tend to come" under family court jurisdiction, stating at sentencing:

> [W]e've got a situation where someone who's committing criminal activity and has a young child in the house and that young child thinks, well, daddy does it, I can do it, too. You know, good grief. And it just gets—it just goes on and on and on and on. So that your life is not the only one that's ruined, but all the people that you love as well.

Although both the prosecutor and the trial court concentrated on delinquency as the applicable grounds for defendant's conviction, the dissents do not discuss this ground at all.

[13] If, for example, social science research further suggested some correlation between exposure to violent video games and aggressiveness in children, or between divorce and behavioral problems, or even between poverty and delinquency, then could anything on the part of the parent contributing to these circumstances "tend" to contribute to a child's delinquency?

construe "tend." As explained, the word is commonly understood to require a level of certainty that would allow the fact-finder to determine that defendant's actions "tended to cause" this particular child to become delinquent. Whatever the social science research cited by the prosecutor may reveal about the children who were the studies' subjects, or even about similarly situated children in general, it is not focused on *this* child and *his* particular life experience, such that it provides proof beyond a reasonable doubt that defendant's actions "tended to cause" *this* child—the "such child" expressly referenced in MCL 750.145—to violate a controlled substance statute. Defendant, as with any other criminal defendant, is entitled to have his particular circumstances assessed, not those of persons collected together to participate in a university research project.

While this Court is ill-equipped to assess the merits of the research cited by the prosecutor, as a reviewing court with the full record before us, we *do* possess the tools, and *are* charged with the duty, to ensure that the "sufficiency of the evidence" standard is met. Taking the evidence in the light most favorable to the prosecutor, we are unable to conclude that a rational juror could have determined that defendant's actions "tended to cause" the child to become delinquent. By his presence in the home, the child did not violate, nor was he in danger of violating, any "municipal ordinance or law of the state or of the United States." Nor does the record contain any evidence whatsoever that the child was "disposed or inclined" to abuse drugs, engage in criminality, or become a delinquent for any other reason. Quite simply, the prosecutor presented *no* evidence regarding the child's education, behavioral history, relationships with his peers, or any other relevant fact that could support the conclusion that defendant's

actions "tended to cause" *this* child, to become delinquent. Therefore, no matter how favorably we interpret the evidence in the prosecutor's favor, as we are required to do, defendant's conviction cannot be sustained under MCL 750.145 on the grounds of delinquency. There simply was no evidence of any kind to sustain such a conviction.

2. "NEGLECT"

The prosecutor also argues that defendant's conviction can be sustained on grounds of neglect. Specifically, the prosecutor argued to the jury that the child "being in that house is being subject to neglect and/or delinquency." Again, we conclude that the evidence is insufficient to allow a rational fact-finder to make such a finding. There was simply no evidence presented that the illegal drugs or firearms at issue had any impact on the child's "mental well-being" or his "health and morals," as there was no evidence at all that he was even *aware* of these items, much less of their illegality. The child's awareness of the illegal items is critical, if not dispositive, in this case because the overall evidence is so very sparse. To review, the evidence indicated that the child was found on the couch in the living room; he had his own bedroom; drugs were found under the bed in the parents' bedroom; the firearms were found in a dresser drawer in the parents' bedroom; he started crying when the police entered his home; and his mother was handcuffed and given a citation. *Everything* the jury knew about this child was in relation to his presence in the home at the moment of the raid; the jury knew these facts and it knew nothing more. By resting her case on a theory that the child's presence in the home plus illegal activity in the home amounts to a violation of MCL 750.145, the prosecutor made the

child's awareness of the illegal activity critical to sustaining defendant's conviction. How else could a rational juror conclude that the child's "mental well-being" was placed at "substantial risk" unless the child was aware of the firearms and drugs? How else could a rational juror conclude that defendant "refuse[d] to provide proper . . . care necessary for [the child's] health or morals" where no evidence was presented concerning the care defendant did, or did not, provide the child? There is nothing here *beyond* the child's awareness that could even conceivably establish that he had been affected by his parent's criminal activity, much less caused to become delinquent as a result, and there is no evidence of awareness.[14]

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[14] Absent any evidence of the child's awareness, the dissenting justices offer two largely irrelevant and distracting facts to sustain defendant's conviction: (1) that the child's mother was "arrested"; and (2) that the child started crying when the police raided defendant's home. In doing this, the dissents do nothing more than reiterate their theory that the child's presence plus illegal activity in the home amounts to a separate criminal violation. Concerning the "arrest," while one officer testified that the mother was "arrested," it appears that the officer used this phrase to explain only that the mother had been "forcibly restrained," not that she was taken into custody. This is consistent with the testimony of another officer who, when asked if the mother was "arrested," clarified that she had been written a "ticket." That the officers ticketed the mother at the scene is confirmed by the police activity log. That neither officer indicated the mother was ever removed from the home explains why the prosecutor, unlike the dissenting justices, never pursued the argument that the child was ever left "without proper custody."

Concerning the child's crying, while Justice CORRIGAN is undoubtedly correct that an in-home arrest is "traumatic" to all concerned, especially to children, we do not believe that this evidence sustains a conviction under MCL 750.145. Raids, arrests, and incarcerations are unavoidable aspects of the criminal justice process, and for these to suffice to establish a separate criminal conviction would render an MCL 750.145 prosecution a nearly automatic appendage of every criminal offense in which a child is merely present in a home. Indeed, under the theory of the dissents, it would seem that MCL 750.145 could be triggered even where there is no contraband in the home and an arrest occurs there, even where the

The other relevant ground for a finding of neglect is under MCL 712A.2(b)(2), which requires a causal connection between defendant's "criminality" and a finding that his home "as a result" constitutes an "unfit" place for the child to live. Although two criminal acts form the basis of defendant's convictions—the illegal possession of drugs and firearms—the charging information for the MCL 750.145 violation did not even refer to the firearms. It stated only that defendant had contributed to the neglect or delinquency of the child by "exposing him to the use and sale of narcotics." Arguably, then, defendant's criminal act of illegally possessing firearms is immaterial to his MCL 750.145 conviction. However, because the prosecutor argued on appeal that the presence of firearms in defendant's home put the child at risk for neglect or delinquency, and the Court of Appeals agreed, we will consider the impact of both criminal acts on the child's home.

Here also, the absence of evidence that the child was aware of the possession of the drugs and firearms is largely dispositive.[15] On the record, no rational fact-

arrested person is not a parent, and even where the parent is arrested elsewhere and the police come to a home in order to communicate this information or to search for evidence. There can hardly be any doubt that the impact of a loved one becoming entangled in the criminal justice process may be devastating to a child, even permanently so. However, precisely because this impact is manifest in every case in which a parent or other person important in a child's life has been charged with a crime, we do not believe that the consequences that inexorably flow from a person's involvement in the criminal justice process are what is contemplated by a "substantial risk of harm" to a child's "mental well-being." Rather, MCL 750.145 is focused on the impact upon the child of the "acts" themselves, not that of the criminal justice process itself.

[15] Moreover, defendant's criminality surrounding the firearms is predicated upon his *status* as a convicted felon. Absent this status, the firearms found in defendant's bedroom are indistinguishable from those found in hundreds of thousands of homes in Michigan. A firearm is a firearm, and

finder could find beyond a reasonable doubt that the home was rendered "unfit" "by reason of" the presence of these illegal possessions because the record does not establish that this criminality had *any* impact on the child's home.

Nor, in contrast to the home in *Antjuan Owens*, was there any indication that defendant's home was a "drug-house," subject to an influx of drug purchasers, or otherwise unsanitary or uninhabitable. Rather, the record established only that the house was a furnished two-bedroom home. There is nothing from the evidence that suggests that the physical condition of the home made it in any way "unfit" for a juvenile to live in. Taking this evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could not reasonably find that defendant's home was rendered an "unfit place" for the child to live "by reason of" defendant's criminal conduct where there was no evidence at all that the child was even aware of this criminality.

Therefore, once again, no matter how favorably we interpret the evidence in the prosecutor's favor, defendant's conviction cannot be sustained under MCL

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unless a child is aware that a firearm is possessed unlawfully, it is hard to understand what distinction there could be in that child's mind between a legal and an illegal firearm, and what difference there could be in causing him to become delinquent or neglected. Furthermore, although the dissenters decry the fact that the firearms found in a drawer in defendant's bedroom were "unsecured" and "loaded," it is not illegal in this state to store firearms in this manner. Indeed, such storage would not be uncommon in the case of persons who rely upon these for personal and family self-defense. We point this out not to minimize defendant's criminal conduct, for his drug and firearms convictions are not altered in any way by this case, but to indicate why something more than mere awareness of, or exposure to, a firearm is required before it can be considered as contributing to the delinquency of a child or as evidence of neglect. At the same time, we reiterate that there is not even evidence that the child was aware of, or exposed to, a firearm in this case.

750.145 on the ground of neglect. We are not prepared to accept the dissents' syllogism that the child's presence in the home plus illegal activity in the home equates to a violation of MCL 750.145.

IV. SLIPPERY SLOPE

In deciding this case, like all cases, we are conscious that our judicial duty is "to declare what the law is . . . ." *Wilson v Arnold*, 5 Mich 98, 104 (1858). In attempting to discharge this duty, we have relied on traditional tools of interpretation to determine what constitutes the most reasonable meaning of relevant statutory provisions. Accordingly, our holding rests on the conclusion that defendant's conviction cannot be sustained in accordance with the most reasonable interpretation of MCL 750.145 construed *in pari materia* with MCL 712A.2.

However, we would be derelict if we did not comment further on the very steep slippery slope down which our legal system would be headed if this statute were to be given the interpretation urged by the prosecutor and the dissents, and adopted by the lower courts. We have already commented upon the extraordinarily broad, and arguably absurd, applications of MCL 750.145 resulting from an unreasonable interpretation of "tend." However, it is also incumbent on us to point out that another, equally steep, slippery slope would be created if we were to find that a criminal conviction, *by itself*, constitutes a basis for a neglect or delinquency conviction under MCL 750.145. And that is what is involved in this case: a "by itself" criminal conviction serving as a basis for a neglect or delinquency conviction. Although the dissents disagree, they do not identify any relevant evidence that was presented to the jury other than the fact of the child's presence in a

home where the illegal activity occurred. Indeed, the dissents *cannot* point to such evidence because the prosecutor presented nothing more. There is no evidence of the child's awareness that defendant was engaged in criminal behavior; there is no evidence of the child's awareness of any contraband in his home; there is no evidence that the physical or other conditions of the home were unfit in any way for the child; there is no evidence that the educational, moral, physical, or psychological needs of the child were being neglected; and there is no evidence that defendant's conduct had any adverse impact on the child. There is simply the fact that defendant was convicted of crimes that occurred in a home in which a child lived.

The prosecutor and the dissents would also effectively read out of the statute language requiring a *causal connection* between a defendant's "criminality" and a finding that his home is "unfit" for a juvenile. No further showing would be required in order to establish a violation of MCL 750.145 than that a crime occurred in a home and that a child was present. Such a predicate for a violation of this statute has never before been thought sufficient. Presumably, prescription drug abuse, tax fraud, unlicensed work, possession of illegal "numbers" tickets or gambling paraphernalia, computer "hacking," check kiting, illegal possession of music downloads or "pirated" DVDs, the possession of unlawful fireworks, allowing the illegal consumption of alcohol at family gatherings, and countless other criminal offenses that occur within, or have an impact upon, the home could all serve as grounds for supplemental criminal charges of "neglect and delinquency," if not, as occurred here, as a basis for triggering an inquiry into whether parental rights should be terminated.

At oral argument, the prosecutor appeared to recognize this slippery slope. When asked whether a hypothetical case involving a parent's possession of an illegally scalped sporting or entertainment event ticket would fall within the statute, the prosecutor responded, "I don't know. I don't think I would feel comfortable arguing to a jury that going to a football game with some tickets bought from a scalper produces the substantial risk [to] mental well-being. I don't think that does fall within the statute." When asked if she was suggesting that this Court rely exclusively on the good judgment of the prosecutor not to bring such a case rather than on the law itself, the prosecutor answered, "Well, and if the prosecutor misuses their judgment you would deal with it in the appropriate case as well." However, this Court does not review the discretionary charging judgments of the prosecutor, but rather the prosecutor's compliance with the law. And despite the prosecutor's initial assertion in this case that ticket scalping "does [not] fall within the statute," it is clear that there is no basis whatsoever in the prosecutor's own interpretation of the law that would allow for a ticket-scalping exception or that would distinguish between criminal offenses.[16]

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[16] Although Justice CORRIGAN attempts to limit the potentially sweeping scope of the rule she would adopt, in the end, under her interpretation, the only thing standing athwart a judicially created crime wave for "delinquency or neglect" will be the good judgment of prosecutors, and that cannot be the exclusive safeguard of the people. Despite the focus of MCL 712A.2(b)(1) on harm being done to a child's "health *or morals*," her dissent imposes its own limitation on the statute, whereby only crimes that involve "inherently dangerous items unsecured in the home" could act as the basis for a conviction under MCL 750.145. Under this self-created limitation, which has no basis in the statute, defendant's illegal possession of unsecured firearms will invariably support a conviction.

Even more remarkably, Justice CORRIGAN expresses "no opinion concerning the circumstances under which a jury could convict a *law-*

Although we do not question in any way the sound judgment of Michigan prosecutors, including, and especially, the prosecutors in this case, the decisions of this Court cannot in the end rest on confidence in the judgment of prosecutors. Rather, these decisions must rely on the law. We respectfully reject the prosecutor's reading of MCL 750.145, because we believe it is wrong and reads out of that statute the requirement that there be a *causal connection* between defendant's criminal conduct and a child's neglect or delinquency. However, to the extent that there is any concern about the slippery slope that has been identified, we are not

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abiding gun owner of a misdemeanor under MCL 750.145 because he maintained multiple loaded, accessible guns in a manner that posed significant harm to a child." Her silence on this subject is pregnant and significant in suggesting the even-more-remarkable proposition that, under the rule of the dissent, the hundreds of thousands of people in this state who keep "unsecured" firearms in their homes in the interest of their and their family's self-defense, *could* be susceptible to criminal charges under MCL 750.145 at the discretion of the prosecutor, even where such possession is lawful and no crime has been committed that pertains to the home. It appears that the dissent is forced into this remarkable statement of "no opinion," because, under its logic, there is no principled way to distinguish between defendant's firearm and that of a law-abiding gun owner. That is, an illegal, unsecured firearm is no more or less "inherently dangerous," or likely to cause "neglect or delinquency," than a legal firearm. Moreover, given the dissent's lack of concern with the fact that the prosecutor presented absolutely no evidence that the child was even aware of, or exposed to, the firearms, it is apparently the fact that contraband exists in a home alone that sustains a "delinquency or neglect" conviction.

Moreover, if, as the dissents necessarily argue, the mere presence of contraband is "inherently dangerous" to the child's *health*, there is no principled reason why the mere presence of other contraband, such as false tax returns, would not be "inherently dangerous" to the child's *morals*. Finally, by suggesting that this case would be different "if defendant had been arrested on the street and had kept his guns and drugs outside the home," Justice CORRIGAN merely underscores the validity of our criticism that where contraband is *not* located "outside" the home, but "inside," and a child is merely present, a criminal violation will routinely be established under her interpretation of MCL 750.145.

assuaged by the assurance that this problem can be ameliorated by the exercise of prosecutorial discretion.

V. RESPONSE TO DISSENTS

In their dissents, Justices CORRIGAN and YOUNG take issue with our interpretation of the relevant statutes, our application of the law, and, most insistently, with the result that we reach. While we have addressed discrete points of disagreement throughout this opinion, it is necessary to respond more generally to our differing perspectives.

First, we respectfully disagree that this case is as "simple" as the dissenters would have it.[17] Rather, this case requires consideration of two statutes, each of which employs language with multiple definitions that could produce varying interpretations. Moreover, the propriety of a conviction under MCL 750.145 based on the kind of facts that exist here constitutes not only a matter of first impression but would, in our judgment, lead to the increasingly routine use of MCL 750.145 as a supplemental charge in cases in which contraband is located in a home and there is also a child present in that home. Thus, it is entirely appropriate for this Court to thoroughly consider this statute before it is applied in ways never before contemplated in the stat-

[17] The dissenting justices criticize the analysis in this opinion as "lengthy," "unnecessary," and "confusing," and avoid their own lengthiness, unnecessariness, and confusion largely by avoiding analysis at all. Concerning the critical term in question, "tend," the dissents manage not to address the various meanings of this term, not to select among these meanings, and not to justify a preferred meaning. If it is the avoidance of a "lengthy" analysis that the dissents desire, they succeed with flying colors. When Justice YOUNG states that "[o]nly a lawyer" could produce the result reached in this opinion, this appears to be shorthand for the promise that there will be no serious analysis of the law in *his* opinion, and he lives up to this promise.

ute's more than six-decade history. In doing so, we have used traditional tools of interpretation to discern the intent of the Legislature, an approach to statutory interpretation that we would not expect the authors of the dissents to find objectionable. In particular, we fail to see how this opinion is "disloyal to the plain text" of the relevant statutes, or that it is based on a "speculative belief about the Legislature's intent," whatever the latter phrase means. We find these characterizations especially ironic in view of the fact that the dissenting opinions barely engage at all in the threshold task of statutory interpretation. Thus, it is difficult to point to specific areas of disagreement concerning our respective analyses; rather, the principal difference between our approaches seems to be whether the statute is or is not so "simple" that it requires any analysis at all.

Second, unlike the dissents, we find it significant that a conviction under MCL 750.145 based on neglect—the only ground that the dissents discuss at all—is unprecedented in this state.[18] The dissents cite no caselaw to support the result they reach because no such caselaw exists. Further, unlike the dissents, we find it significant that the facts of this case are substantially far afield from the case the prosecutor offered as its closest factual analogue. Yet despite the dissents' apparent recognition that there is no evidence to sustain defendant's conviction on grounds of delinquency, despite the fact that there is *no* caselaw in Michigan to support their argument based on neglect, and despite the fact that the case the prosecutor offered is factually inapposite, the dissents would apply this statute in a way that has never before been contemplated in the

[18] From the absence of discussion of delinquency, we assume that the dissents recognize that there is no evidence in this record to sustain defendant's conviction on this ground.

statute's over 60-year history, without even taking notice of the absence of authority for their position. We believe that the prudent exercise of our judicial responsibilities at least requires us to consider relevant authority, or the lack thereof, before taking the law of this state into uncharted territory.

Third, we disagree with the dissents that it is we who misconstrue the "sufficiency of the evidence" standard. This standard makes clear that a reviewing court is required to take the *evidence produced at trial* in a light favorable to the prosecutor.[19] As such, this standard does *not*, and never has, require the affirmance of every criminal conviction, as might be the case if a reviewing court were instead to view the prosecutor's preferred *outcome* in a light favorable to the prosecutor. As already discussed, the prosecutor here produced *no evidence* at trial relevant to the MCL 750.145 charge, other than the fact that the child was present in the home when the contraband was found. We agree with the dissents that this statute is designed to capture behavior injurious to children, and thus find it highly significant that the record is so bereft of evidence concerning the *child*. The dissents have been more diligent than the prosecutor herself in seeking to sustain this charge, with the latter having barely mentioned the charge in closing argument and having chosen not even to address the elements of the crime, or define the operative statutory language, for the jury. However, it is the arguments of the *prosecutor* that this

[19] "One of the rightful boasts of Western civilization is that the (prosecution) has the burden of establishing guilt solely *on the basis of evidence produced in court* and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v Dowd*, 366 US 717, 729; 81 S Ct 1639; 6 L Ed 2d 751 (1961) (Frankfurter, J., concurring) (emphasis added).

Court assesses, not those of dissenting justices.[20] The prosecutor did not satisfy even her minimal burden of presenting *some* evidence at trial that would allow a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. Sustaining defendant's conviction on this record would simply eviscerate the "sufficiency of the evidence" requirement that is " 'part of every criminal defendant's due process rights.' " *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted).[21]

VI. CONCLUSION

We recognize that the facts here engender no sympathy for defendant. It is easy to understand, and even applaud, the admonition delivered by the trial court to defendant at sentencing, when it stated, "I'm not going to tolerate this kind of behavior by a parent of a child in this state." As with the trial court and the dissents, we desire more for the children of this state than a parent who keeps contraband in the home. The fact remains that the evidence presented in this case cannot sustain

[20] Again, the prosecutor argued that the child's "being in that house is being subject to neglect and/or delinquency."

[21] Because of lack of evidence produced at trial, the dissents turn to evidence that was not presented at trial to sustain defendant's conviction. In doing so, they forget that the prosecutor "has the burden of establishing guilt solely *on the basis of evidence produced in court*. . . ." *Irvin*, 366 US at 729 (Frankfurter, J., concurring) (emphasis added). For instance, Justice YOUNG's dissent places great weight on the fact that "the trial court did, in fact, recommend to the Department of Human Services that the court exercise jurisdiction over the child," albeit on the basis of the same failure to assess the applicable law as the dissenting justices. Nonetheless, this fact was not in evidence because the trial court did not make this recommendation *until sentencing*. Likewise, the jury was not presented with evidence of defendant's "open use of heroin," as Justice YOUNG suggests, or that defendant was a "repeat drug-offender," as noted by Justice CORRIGAN. And, as already noted, the jury did not consider the social science research offered by the prosecutor on appeal.

defendant's conviction under MCL 750.145, and, if it could, we could expect to see this statute increasingly employed in ways that have not been contemplated in its long history and in situations that go far beyond what we believe was intended by the Legislature.

On the facts of this case, where the jury was presented with no evidence other than that a child was present in a home where criminal activity occurred, we hold that a rational fact-finder could not conclude beyond a reasonable doubt that defendant "tend[ed] to cause" the child to become delinquent or neglected so as to "tend to come" under family court jurisdiction, as those terms are defined by MCL 712A.2. To adopt the theory that a child's presence in the home plus illegal activity in the home amounts to a violation of MCL 750.145 is inconsistent with the language of this statute, and incompatible with past judicial practice in this state. Moreover, it would transform MCL 750.145 into an increasingly routine appendage to other criminal charges, serving thereby as an increasingly routine trigger for the initiation of proceedings by the Department of Human Services for the termination of parental rights. We reverse in part the judgment of the Court of Appeals, vacate defendant's conviction under MCL 750.145, and remand to the trial court for further proceedings. Defendant's convictions for drug and firearm possession remain intact.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with MARKMAN, J.

CORRIGAN, J. (*dissenting*). I would affirm defendant's misdemeanor conviction for contributing to the neglect or delinquency of a minor under MCL 750.145. The Court of Appeals correctly concluded that "there was sufficient evidence for the jury to infer that defendant's

illegal activities could have subjected his [step]son to the jurisdiction of the courts."[1] At a minimum, defendant's commission of drug- and weapons-related crimes in the 10-year-old child's home constituted "act[s]" that "encourage[d], contribute[d] toward, cause[d] or tend[ed] to cause" the child to become "neglected . . . so as to come or tend to come under the jurisdiction of the juvenile division of the probate court . . . ." MCL 750.145. Defendant kept heroin and loaded weapons unsecured in the family home. Further, his acts precipitated a police raid on the home in the child's presence. As a result of the raid, both of the child's caregivers—defendant and his wife, the child's mother—were arrested. This evidence was sufficient for a jury to conclude that defendant's crimes contributed toward or tended to cause the child to come under the jurisdiction of the probate court because the crimes deprived the child of "care necessary for his . . . health or morals," created a "substantial risk of harm to his . . . mental well-being," or resulted in an "unfit" home by reason of "neglect" or "criminality." MCL 712A.2(b)(1) and (2). Indeed, as a result of the crimes, the trial court formally requested an investigation of possible neglect or abuse by the Department of Human Services.

I. FACTS AND PROCEEDINGS

Defendant is a repeat drug offender. On August 16, 2006, officers with the Narcotics Section of the Detroit Police Department executed a warrant to search for drugs in defendant's home. They knocked on defendant's door and ultimately forced it open and entered the home. They found a small boy—defendant's 10-

[1] *People v Tennyson*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 278826), p 4.

year-old stepson—sitting alone on the living room couch. The boy was scared and crying. He was dressed only in his underwear.

The officers discovered defendant sitting on a bed in one of the home's two bedrooms. They observed a plastic bag filled with heroin on a plate under the bed. They also found a digital scale used for weighing narcotics and two loaded handguns in the drawer of his bedroom dresser. Finally, the officers confiscated cash that they believed was proceeds from narcotics sales. Both defendant and his wife, the boy's mother, were arrested and handcuffed at the scene. A jury convicted defendant, as charged, of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), possession of a firearm during the commission of a felony, MCL 750.227b, unlawful possession of a firearm by a felon, MCL 750.224f, and contributing to the neglect or delinquency of a minor, MCL 750.145.

II. STANDARD OF REVIEW

When considering whether the evidence presented at trial was sufficient to support a conviction, a reviewing court must view the evidence in the light most favorable to the prosecution. *People v Wright*, 477 Mich 1121, 1122 (2007). "A reviewing court need not 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Id.*, quoting *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979) (additional quotation marks and citation omitted). "Rather, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Wright*, 477 Mich at 1122, quoting *Jackson*, 443 US at 319 (emphasis omitted).

III. ANALYSIS

A. MCL 750.145

MCL 750.145 provides:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the [family] division of the [circuit] court, as defined in [MCL 712A.2], whether or not such child shall in fact be adjudicated a ward of the . . . court, shall be guilty of a misdemeanor.[2]

Significantly, the statute does not require the evidence to show that a defendant's acts *actually* caused the child to come under the court's jurisdiction. Rather, the text establishes a fairly low threshold, asking whether a defendant's acts *encouraged, contributed toward,* caused, *or tended to cause* a child to come *or tend to come* under the court's jurisdiction. And, crucially, the statute applies "whether or not such child shall in fact be adjudicated a ward" of the court.

First, as the majority opinion observes, the statute twice employs the word "tend." "Tend" is a commonly used word that needs little explanation.[3] According to

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[2] The statutory language has been altered to reflect the transfer of jurisdiction from the probate court to the family division of circuit court. See MCL 600.1021(1)(e); MCL 712A.1(1)(c). See also MCL 600.1009.

[3] I find the majority's lengthy discussion of "tend" unnecessary and confusing. The majority accuses me of "avoiding analysis at all" and failing "to address the various meanings of this term . . . ." But this Court's duty is to ascertain the plain, everyday meaning of non-technical statutory words. MCL 8.3a; *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000) ("[C]ommon words must be understood to have their everyday, plain meaning . . . ."). Justice MARKMAN himself has observed that "[t]he 'common understanding' of most words is that they possess their plain and ordinary meanings." *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 397-398; 630 NW2d 297 (2001)

Random House Webster's College Dictionary (2d ed), "tend" means in relevant part:

> 1. to be disposed or inclined in action, operation, of effect to do something . . . . 3. to lead or conduce, as to some result or condition . . . . 4. to be inclined to or have a tendency toward a particular quality, state or degree . . . . 5. (of a course, road, etc.) to lead or be directed in a particular direction . . . .

Webster's defines "tendency" in relevant part as follows: "1. a natural or prevailing disposition to move, proceed, or act in some direction or toward some point, end, or result. 2. an inclination, bent, or predisposition to something." *Id.* Finally, *Webster's* states that to "predispose" is "1. to make susceptible or liable: *genetic factors predisposing us to disease*. 2. to dispose beforehand; incline; bias." Thus, MCL 750.145 essentially requires a jury to conclude that a defendant's acts would naturally lead to, or make a child susceptible to, court jurisdiction.

(MARKMAN, J., concurring). As the author of the majority opinion here, he opines that "tend" conveys that "something is 'more likely than not' to occur" and he candidly states: "This common understanding of 'tend,' I believe, is taken for granted in everyday speech." Indeed, the majority ultimately settles on this definition which, incidentally, I believe largely complements the definitions I list and would lead to my result if applied under the proper standard of review while taking full account of the record facts. Under such circumstances, I fail to see how my straightforward approach avoids any necessary analysis. Compare *Burlington N & S F R Co v United States*, 556 US 599, ___; 129 S Ct 1870, 1879; 173 L Ed 2d 812, 823 (2009) (using two brief sentences to define "arrange" as it appears in 42 USC 9607(a)(3) according to "common parlance," two relevant dictionary definitions, and a case citation); *Sington v Chrysler Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002) (defining "capacity" as used in MCL 418.301(4) by reference only to the single, most pertinent definition in a common dictionary); *Grievance Administrator*, 462 Mich at 194 (defining "guidelines" as used in MCR 9.118(A)(3) by reference to a single dictionary definition); *People, ex rel Simmons v Anderson*, 198 Mich 38, 45; 164 NW 481 (1917) ("[W]ords used by the Legislature should be understood in their common rather than in a technical *or a related sense not plainly apparent*.") (emphasis added).

Second, a defendant's acts need not actually cause, or be the sole cause of, a tendency toward the court having jurisdiction over the child. Rather, it is sufficient for a jury to conclude that the acts "encourage[d]" or "contribute[d] toward" such a tendency.[4] MCL 750.145. The only relevant definition of "encourage" found in *Webster's* is "to promote; foster." *Random House Webster's College Dictionary* (2001). *Webster's* further states that to "contribute to" means "to be an important factor in." *Id*. Thus, to find a defendant guilty of this misdemeanor, a jury need only conclude that the defendant's acts promoted, or were an important factor in, a child's susceptibility to the court's jurisdiction.

Finally, the statute not only lacks any requirement that *actual* court jurisdiction be realized, it also does not require that the child become a ward of the court if the court does actually assume jurisdiction as the result of alleged abuse or neglect. As I explain further below, an order assuming court jurisdiction over a child is distinct from an order rendering the child a court ward. The court may take initial jurisdiction in order to ensure that a child is protected, but the child may never become a court ward; that is, he may not be removed from his parents' care although conditions justifying initial jurisdiction are present. Further, even if the child becomes a court ward, this status does not necessarily lead to termination of parental rights; the child may simply become a temporary ward. MCL 712A.20. Because MCL 750.145 applies although the child may never even become a *temporary* ward of the court, the Legislature has signified that a misdemeanor conviction

[4] The majority focuses on the Legislature's use of the word "tend" in MCL 750.145 "because it requires the lowest threshold of proof." It is not immediately obvious to me that acts *tending* to cause delinquency or neglect require less proof than do acts *encouraging* or *contributing toward* delinquency or neglect.

under MCL 750.145 is appropriate although a child is susceptible only to the beginning stages of court jurisdiction. A conviction is not predicated on the child's susceptibility to being removed from his parents' care, let alone on termination of their parental rights.

B. MCL 712A.2

Because a jury must be able to conclude that a defendant's acts affected a child's tendency to come under the court's jurisdiction as defined in MCL 712A.2, we must also address MCL 712A.2. The prosecutor here argued that defendant's acts tended to cause court jurisdiction as a result of both delinquency and neglect. I focus on neglect because the evidence on this point is particularly strong.[5] Pursuant to MCL 712A.2(b), the family division of the circuit court may take jurisdiction over a child:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . . [or]

* * *

[5] A conviction under MCL 750.145 may be based on a defendant's act or word that encourages, contributes toward, causes or tends to cause a child *either* to become "neglected *or* delinquent" so as to come or tend to come under court jurisdiction. MCL 750.145 (emphasis added). Accordingly, defendant's conviction should be affirmed if there is sufficient evidence with regard to neglect *or* delinquency; proof related to only one of these potential grounds for court jurisdiction is adequate for conviction.

> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. [MCL 712A.2(b).]

A court may authorize a petition for jurisdiction under MCL 712A.2(b) "upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of [MCL 712A.2(b)]." MCL 712A.13a(2). The probable cause standard "requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' " that the fact asserted is true. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). Thus, the court takes jurisdiction on the basis of a reasonable belief that a child is subject to neglect at the time jurisdiction is sought. Significantly, this less rigorous standard permits protection of children in emergency situations but by no means automatically leads to the initiation of proceedings to terminate parental rights.

Indeed, an initial exercise of court jurisdiction may result in a wide array of outcomes. For example, the court may permit the child to remain with his parents "under reasonable terms and conditions necessary for either the juvenile's physical health or mental well-being." MCL 712A.13a(3). The court may also "order a parent, guardian, custodian, nonparent adult, or other person residing in a child's home to leave the home and, except as the court orders, not to subsequently return to the home" under some circumstances. MCL 712A.13a(4). Finally, the court may place a child temporarily with relatives or foster care providers. See MCL 712A.13a(8) to (10), (13), and (14). This last option requires that the child be made a temporary court ward. See MCL 712A.19b(1); MCL 712A.19(3). As noted

above, temporary court custody is distinct from permanent custody, MCL 712A.20; temporary custody does not entail termination of parental rights but enables parents to regain custody in the future by complying with a service plan designed to "facilitate the child's return to his or her home . . . ." MCL 712A.18f(3)(d); see also MCL 712A.13a(8)(a). Thus, again, it is significant that the threshold for a misdemeanor conviction under MCL 750.145 rests on rendering a child susceptible to the court's jurisdiction "whether or not such child shall in fact be adjudicated a ward" of the court. In other words, MCL 750.145 applies when a child is susceptible even to the very beginning stages of a child protective proceeding, when a court takes jurisdiction for his protection under a probable cause standard, even though he may never be removed from his parents' care.

This discussion highlights the normal threshold necessary for the court to establish jurisdiction over a child. However, important for my analysis here, I reiterate that the prosecution need not establish that there was *actual* jurisdiction over the child or that there was *actual* probable cause for such jurisdiction. The prosecution need only show that defendant's actions were of such a kind or sort that they contributed to or tended to cause the child's susceptibility to the court's jurisdiction.

C. APPLICATION

Here the police found heroin[6] under defendant's bed and two loaded guns in an unlocked dresser drawer of

[6] Heroin is classified in the highest, most harmful category of drugs; it is a schedule 1 controlled substance, MCL 333.7212(1)(b), with a "high potential for abuse" and no safe medical use, MCL 333.7211. Possession of any amount of heroin constitutes a felony. MCL 333.7401(2)(a).

the bedroom that defendant shared with the child's mother. As a result of the raid, defendant and the child's mother were arrested. The raid thus revealed that, as a result of defendant's crimes, the child lived in an unsafe home where heroin and loaded weapons were easily accessible to the child. One could certainly entertain a reasonable belief that the accessible guns and extremely dangerous drugs—kept not in a safe or other locked area, but under a bed and in a dresser drawer—posed a significant danger to a 10-year-old child.[7] It would take moments for a child to walk into a bedroom and discover heroin under a bed or open a dresser drawer to discover loaded weapons. I disagree with the majority's assertion that the child's *awareness* of the heroin and weapons is decisive. A jury could conclude that the unsecured heroin and weapons posed a significant danger to the child without regard to whether the child had *yet* discovered these items. I similarly disagree with the majority's assertion that "[*e*]*verything* the jury knew about this child was in relation to his presence in the home at the moment of the raid; the jury knew these facts and it knew nothing more." To the contrary, the jury learned that both defendant and the child lived in the home. From this fact, the jury was entitled to draw reasonable inferences concerning the child's likely discovery of unsecured, dangerous items.

Accordingly, the evidence of unsecured drugs and two unsecured, loaded weapons was sufficient for a rational jury to conclude that defendant's acts posed a danger to the child that would tend to result in or contribute toward court jurisdiction, particularly under MCL

[7] Because the facts revealed multiple unsecured, loaded weapons within a child's reach combined with similarly accessible heroin, defendant's acts cannot be directly compared to those of a law-abiding gun owner. I address the majority's fears concerning law-abiding gun owners later in this opinion.

712A.2(b)(2) which creates jurisdiction over a child "[w]hose home or environment, by reason of *neglect*, cruelty, drunkenness, *criminality*, or depravity on the part of a parent, guardian, *nonparent adult*, or other custodian, is an unfit place for the juvenile to live in."[8] (Emphasis added.) Defendant's decision to keep guns and drugs unsecured and easily accessible in the child's home could also form the basis of a reasonable belief that defendant "neglect[ed] or refuse[d] to provide proper . . . care necessary for [the child's] health or morals," or created "a substantial risk of harm to [the child's] mental well-being" justifying jurisdiction under MCL 712A.2(b)(1).[9]

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[8] This is to say nothing of the danger posed by defendant's apparent drug-dealing, particularly if he engaged in drug transactions in the child's home. The jury was not asked to decide whether the evidence showed that defendant engaged in drug sales although testimony by police officers at trial established that, during the raid, they confiscated a digital scale and money they believed was attributable to drug dealing. Arguably this evidence could cause a probate court to form a reasonable belief that defendant's drug-dealing posed an additional danger to the child worthy of investigation.

[9] Further, particularly with regard to the child's mental well-being, the evidence shows that the child was scared and crying during the police raid. Defendant's criminal acts were the direct cause of the police raid that traumatized the child. I express no opinion concerning whether a police raid caused by a defendant's criminality could alone justify a conviction under MCL 750.145 as a result of the trauma suffered by a child during the raid, as discussed by the majority. But here defendant's criminality compromised the child's well-being and proper custody in multiple ways that the jury or a probate court could consider in aggregate.

I also note that, if both of the child's caregivers were detained as a result of the police raid, the jury could have reached the alternative conclusion that the child was susceptible to the court's jurisdiction because he was "without proper custody or guardianship." MCL 712A.2(b)(1). Under this criterion for jurisdiction, even if the child was simply temporarily without proper custody because of the arrest of his caretakers, the court could take jurisdiction until the child's return to his mother was appropriate or until other arrangements for his care were

In sum, defendant's criminal acts resulted in the presence of dangerous items in the child's home and a traumatic police raid. Because of these combined facts, the evidence was sufficient for a jury to conclude that defendant's acts tended to cause, encouraged, or contributed to neglect—of the child's health or morals, of his mental wellness, *or* by creating an unfit home—to such an extent that a court was likely to find probable cause to believe that there was neglect and thus that the child was susceptible to the court's jurisdiction. Accordingly, the Court of Appeals correctly affirmed defendant's conviction under MCL 750.145. By concluding otherwise, the majority effectively fails to view the evidence in the light most favorable to the prosecution as required by the proper standard of review. The majority focuses on the lack of direct proof that the child was certainly aware of—or already had been directly harmed by—the drugs and weapons. In doing so, it fails to account for the jury's power to draw fair inferences from the evidence in favor of the prosecution's view of the case. Viewed in a light most favorable to the prosecution, a rational jury *could*—and, more importantly, *did*—conclude that the record revealed beyond a reasonable doubt that the child faced trauma (from the police raid) and/or lived among sufficient potential dangers to render him susceptible to probate court jurisdiction for his protection.

IV. ADDITIONAL RESPONSES TO THE MAJORITY

I respectfully suggest that the majority's analysis is underpinned, to some degree, by a misunderstanding of

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made. Although a police officer testified that the child's mother was arrested at the scene, the majority correctly observes that the record does not clearly establish whether she was then detained or simply released after the police ticketed her. Accordingly, I concede that the prosecutor's evidence did not show beyond a reasonable doubt that the child was susceptible to the court's jurisdiction for this alternative reason.

family division jurisdiction and conflation of the potential assertion of jurisdiction with termination of parental rights. As explained above, and contrary to the majority's fears, initial court jurisdiction over a child is not akin to a termination proceeding and by no means must lead to termination of parental rights.

Here, for example, the court could have assumed initial jurisdiction because of the unsafe conditions discovered by the police at the time of the raid. But the court may well have immediately returned the child home conditioned on proof of the removal of all guns and drugs—and, indeed, perhaps on removal of defendant himself—from the home. My point is that the court *still* could have obtained jurisdiction over the child as an initial matter because of defendant's criminal acts even if there were no grounds for termination and the child never became a court ward but was simply returned to his mother.

I further note, in response to the majority's fears, that the low thresholds established by MCL 750.145 are arguably consistent with the nature of the crime. Contributing to the delinquency or neglect of a minor is a misdemeanor, MCL 750.145, and thus is not punishable by a prison sentence, MCL 750.6; MCL 750.7; MCL 750.8.[10] Indeed, here defendant was sentenced to 45 days' jail time served as a result of this conviction. The majority fears that permitting a conviction in this case would "render a conviction under MCL 750.145 an increasingly routine appendage to a broad array of

[10] See also *People v Beasley*, 370 Mich 242, 246; 121 NW2d 457 (1963) (observing that a felony in Michigan is distinguishable from a misdemeanor "by reason of the place and severity of punishment"); 1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1:2, p 9 ("Misdemeanors . . . include all crimes for which punishment is provided that do not amount to felonies, and all acts prohibited by statute where the statute imposes no penalty for the violation.").

other criminal charges" in which a defendant has been charged with committing a criminal act in a home in which a child is present and it believes that this is not a result the Legislature intended. But this speculative belief about the Legislature's intent is irrelevant where the text of the statutes is clear. Even if the majority is correct that convictions under MCL 750.145 could be routinely obtained, there would be nothing unconstitutional about such a result and, therefore, we must enforce the statutes as written. Moreover, when a parent actively commits criminal acts within a home inhabited by children, it would be an *entirely rational* thing for the Legislature to be concerned about the welfare of the children.

In any event, I disagree with the majority's assertion that this case involves "a 'by itself' criminal conviction serving as a basis for a neglect or delinquency conviction." To the contrary, as discussed above, defendant's specific acts—keeping unsecured drugs and loaded weapons in the home and necessitating a police raid—were a sufficient basis on which to find probable cause justifying the court's jurisdiction because the acts compromised the child's health, morals, and mental well-being or rendered the home unfit for the child as a result of criminality. Therefore, this case is not comparable to the majority's hypothetical cases in which, for example, a parent *merely* commits tax fraud, performs unlicensed work, or possesses items such as pirated DVDs or "scalped" football tickets in a home where a child is present. First, most of these supposed crimes do not involve keeping inherently dangerous items unsecured in the home. Second, the effect to a child of a parent's unlawful activity cannot be ascertained without the surrounding facts of a particular case. For instance, the majority refers to parents who possess unlawful

fireworks. Whether such possession could ever form the basis for a court taking jurisdiction over a child would clearly depend on numerous factors including the dangerousness and location of the fireworks and the age of the child. With regard to the majority's aforementioned fears for lawful gun owners, I express no opinion concerning the circumstances under which a jury could convict a law-abiding gun owner of a misdemeanor under MCL 750.145 because he maintained multiple loaded, accessible guns in a manner that posed significant harm to a child.[11] But, as with the fireworks, the number and the accessibility of the guns as well as the child's age would be significant. Finally, even under the facts of this case, defendant's drug- and weapons-related convictions would not necessarily support a charge under MCL 750.145. For instance, if defendant had been arrested on the street and had kept his guns and drugs outside the home—or, at a minimum, in an area less obviously accessible to young children—the evidence may well have been insufficient to support a conviction under MCL 750.145.

In closing, a conviction under MCL 750.145 is proper if a jury can conclude beyond a reasonable doubt that the defendant's acts tended to cause or contributed toward a child's tendency to come under the court's jurisdiction. A jury's affirmative findings on these issues result only in a misdemeanor conviction. These findings do not *cause* court jurisdiction; indeed, the child need not necessarily come under the court's jurisdiction at all. These findings also do not alter the significant protections afforded to parents appearing

[11] Clearly, mere gun ownership does not endanger children and will not lead to the court taking jurisdiction over a child. Further, *legal* gun ownership may not be said to render a home unfit for a child under MCL 712A.2(b)(2) due, as here, to *criminality*.

before the court in child protective proceedings.[12] Although a petition for jurisdiction may be filed in the family division of circuit court as a result of perceived dangers, the court must consider at a preliminary hearing whether jurisdiction is appropriate. MCL 712A.11(1); MCL 712A.13a(2). Perhaps most significant to the majority's concerns, even if the court takes jurisdiction on the basis of a reasonable belief that the child is in danger, the child need not be removed from his home, and by no means must the court initiate proceedings to terminate parental rights. Indeed, the state is generally required to make affirmative efforts to return the child to his parents; termination proceedings generally are a last resort resulting only after parents have been given time to rectify the initial conditions that led to jurisdiction over the child.[13] MCL 712A.19a(2). Further, where the parents are able to immediately remedy the dangers by taking precautions for the child's safety, the child may simply be returned home. See MCL 712A.13a(3) ("[T]he court may release the juvenile in the custody of . . . the juvenile's parents . . . under reasonable terms and conditions necessary for either the juvenile's physical health or mental well-being.").

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[12] It is irrelevant that the judge who presided over defendant's criminal trial stated at sentencing that he would contact the Department of Human Services to request that a petition be filed to "terminate" defendant's parental rights. The judge actually—and properly—requested an *investigation* into possible neglect or abuse. Any resulting child protective proceedings against defendant would take place according the mandates and protections of the juvenile code; the criminal judge's mention of "termination" is of no moment.

[13] In 2009, for example, 6,975 child protection petitions alleging abuse or neglect were filed. Only 2,618 termination petitions were filed that year. See Michigan Supreme Court Annual Report 2009, p 45 <http://courts.michigan.gov/scao/resources/publications/statistics/2009/2009execsum.pdf> (accessed May 21, 2010).

V. CONCLUSION

For each of these reasons, I would affirm defendant's misdemeanor conviction for contributing to the neglect or delinquency of a minor under MCL 750.145. A rational jury could—and, most importantly, *did*—conclude that defendant's acts rendered his 10-year-old stepson susceptible to the court's jurisdiction. The majority's decision to the contrary—which I believe is motivated by unjustified fears and a misunderstanding of initial court jurisdiction—is disloyal to the plain text of MCL 750.145, MCL 712A.2(b), and MCL 712A.13a(2).

YOUNG, J., concurred with CORRIGAN, J.

YOUNG, J. (*dissenting*). This is really a very simple case. Defendant shared a home with his 10-year-old stepson. In that home, defendant used heroin and stored it on a plate under his bed; he also kept loaded firearms in an unlocked bedroom dresser. These acts precipitated a raid by the police and the arrest of defendant while the child was present.

Only a lawyer could come to the conclusion that defendant's conduct does not constitute "criminality" that, in theory, allows the family division of the circuit court to take jurisdiction over defendant's stepchild. And here we need not even engage in theoretical or fanciful speculation because the trial court did, in fact, recommend to the Department of Human Services that the court exercise jurisdiction over the child. Yet four justices of this Court have held that keeping heroin and illegal, loaded handguns in easily accessible locations in a home occupied by a 10-year-old boy were insufficient predicates for a jury to find defendant guilty of the misdemeanor of contributing to the delinquency or neglect of a minor.

I concur in Justice CORRIGAN's analysis that the evidence in this case is sufficient to sustain defendant's conviction. In particular, I fully support Justice CORRIGAN's straightforward analysis regarding the use of "tend" in the statute: the phrase "tend to cause" is clearly directional and it certainly does not require "but for" causation as the majority opinion holds. I simply cannot subscribe to the majority's herculean effort to create a heightened standard of causation out of a common and well understood term—"tend." The majority notes that the use of "tend" in MCL 750.145 was designed to "*lower*[] the threshold of proof required,"[1] yet the majority inexplicably *raises* the level of causation far beyond what a plain and ordinary understanding of the statute's terms require. I do not believe that the majority's justification for imposing a heightened quantum of proof for a statute that requires the opposite is in keeping with a fidelity to the language contained in the statute.[2]

The majority concludes that it would be "unreasonable" and "potentially absurd"[3] for the Legislature to have created criminal liability on these facts. I do not believe that the legislative protection of children in homes where heroin is used and where loaded guns are easily accessible is either unreasonable or absurd. Simply put, the open use of heroin or being a felon illegally in possession of a firearm is the type of "criminality" contemplated by the statute, which criminality "tend[s]

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[1] *Ante* at 737 (emphasis added).

[2] The causation language of MCL 750.145 provides: "Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause . . . ." It is hard to imagine how the Legislature could have chosen more expansive language of general application to capture conduct injurious to children.

[3] *Ante* at 740.

to cause" a child in its presence to become neglected or delinquent. Accordingly, I dissent.

CORRIGAN, J., concurred with YOUNG, J.

DAVIS, J., did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before he assumed office by following the practice of previous justices in transition and participating only in those cases for which his vote would be result-determinative. His nonparticipation in this decision does not affect his eligibility to participate in deciding a motion for rehearing.

PEOPLE v JACKSON

Docket No. 138988. Decided September 7, 2010.

Leonard L. Jackson was charged in the Wayne Circuit Court with armed robbery, two counts of felonious assault, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. Following a bench trial, defendant was acquitted of the felon-in-possession and felony-firearm charges after the court, Daniel P. Ryan, J., determined that the prosecution had failed to prove that defendant actually had a firearm when he demanded money from the victim. The court convicted defendant of armed robbery and, despite the lack of proof that defendant had a weapon, both counts of felonious assault. The calculation of defendant's recommended minimum sentence range under the sentencing guidelines included the assessment of 20 points under prior record variable 7 (PRV 7) (subsequent or concurrent felony convictions) for the two felonious-assault convictions. The calculated minimum sentence range for the armed-robbery conviction was 108 to 270 months. Had the points not been assessed for PRV 7, defendant's minimum sentence range would have been 81 to 202 months. The court sentenced defendant to a prison term of 108 to 240 months for the armed-robbery conviction, indicating its intent to sentence defendant at the lower end of the range. Defendant appealed, arguing that the trial court had erred by convicting him of felonious assault while at the same time finding that he did not have a gun during the armed robbery. As part of his appeal, defendant requested that the case be remanded for resentencing on the armed-robbery conviction because of the error. The Court of Appeals, JANSEN, P.J., and METER and FORT HOOD, JJ., agreed that the trial court had erred by convicting defendant of felonious assault and vacated his felonious-assault convictions in an unpublished opinion per curiam, issued March 26, 2009 (Docket No. 281380). The Court concluded, however, that MCL 769.34(10) required it to affirm defendant's sentence for armed robbery because he had not "raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in" the Court of Appeals. Defendant applied for leave to appeal. The

Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 485 Mich 968 (2009).

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

Defendant's sentence was based on inaccurate information after the Court of Appeals vacated his felonious-assault convictions, and he was entitled under MCL 769.34(10) to resentencing. A request to remand for resentencing made as part of a defendant's appeal to vacate a conviction satisfies the requirement of MCL 769.34(10) that a defendant file a proper motion to remand in the Court of Appeals.

1. MCL 769.34(10) governs remands for resentencing. It provides that if a minimum sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence and may not remand for resentencing unless there was an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the defendant's sentence. The Court of Appeals, however, must remand the case for resentencing when one of these circumstances is present and may not ignore these criteria for remanding merely because the minimum sentence is within the appropriate guidelines range.

2. Had zero points correctly been assessed for PRV 7, defendant's minimum sentence range would have been lower. The score for PRV 7 based on the subsequently vacated convictions resulted in a sentence based on inaccurate information. Since MCL 769.34(10) requires a remand for resentencing in that situation, the Court of Appeals erred by concluding that it was barred from remanding the case because the minimum sentence imposed was still within the appropriate guidelines range.

3. MCL 769.34(10) also provides that a party may not appeal an issue challenging the scoring of the guidelines or the accuracy of the information relied on to determine a sentence that is within the appropriate guidelines range unless the party raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals. Given that the Court of Appeals vacated defendant's convictions, the issue is whether defendant made a proper motion to remand in that Court. What constitutes a proper motion is not within the Legislature's purview because defining the procedures for filing a motion presents a procedural issue that is within the purview of the judiciary.

4. MCR 7.211(C)(1) generally governs motions to remand in the Court of Appeals. In this case, however, defendant could not have filed a proper motion to remand for resentencing under MCR 7.211(C)(1) because neither of the grounds enumerated in that court rule applied. Interpreting the phrase "proper motion to remand" in MCL 769.34(1) as being limited to a motion filed under MCR 7.211(C)(1) would not serve the purpose of requiring a proper motion. The purpose of a motion is to request a court to rule on an issue on a timely basis when the issue is ripe for adjudication. Defendant's request as part of his brief on appeal served that purpose and provided the Court of Appeals with all the information necessary to make a decision. Requiring a separate pleading would elevate form over substance. This construction of the statute impairs no substantial right of the prosecution. Under the circumstances of this case, defendant filed a proper motion to remand in the Court of Appeals.

Justice CORRIGAN, joined by Justice YOUNG, concurred in the majority's result, but would decide the case on different grounds. The Court of Appeals vacated defendant's felonious-assault convictions for legal insufficiency, and he is entitled to resentencing because those convictions were used as a factor in his sentencing. MCL 769.34(10) addresses specific types of nonconstitutional sentencing errors, not constitutional error in an underlying conviction. MCL 769.34(10) concerns the accuracy of factual information used in sentencing and does not apply in this case involving the legal validity of defendant's convictions.

Reversed in part; sentence vacated and case remanded for resentencing.

Justice DAVIS did not participate in this case, which the Court heard before he assumed office and in which his vote would not be result-determinative, in order to avoid unnecessary delay to the parties.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kim McGinnis*) for the defendant.

HATHAWAY, J. We heard oral argument on whether to grant defendant's application for leave to appeal. At issue is whether defendant is entitled to resentencing for an armed-robbery conviction when the Court of Appeals vacated his concurrent convictions for felonious assault that had been used as a factor in calculating his sentence for armed robbery. Court of Appeals remands for resentencing are governed by MCL 769.34, which requires that cases be remanded when the sentence is based on inaccurate information. We conclude that defendant is entitled to resentencing because defendant's sentence is now based on inaccurate information. We further conclude that because defendant requested a remand for resentencing as part of his appeal to vacate the felonious-assault convictions, he complied with the requirement of MCL 769.34(10), which mandates that a request for remand be made in a proper motion filed in the Court of Appeals.

Accordingly, the Court of Appeals erred by failing to remand for resentencing. In lieu of granting leave to appeal, we reverse the portion of the Court of Appeals' decision that concluded that the Court could not remand for resentencing. We therefore vacate defendant's sentence and remand for resentencing.

I. FACTS AND PROCEEDINGS

On the evening of January 12, 2007, Sherry Taylor was leaving a store with her two young children. As she was helping her children into her car, she noticed a man, who was later identified as defendant, running toward her. Taylor claimed that defendant approached her, pointed a gun at her children, and threatened to shoot them unless Taylor gave him all her money. Taylor gave defendant $120 and some other items, and

then defendant ran away. He was apprehended several months later when Taylor happened to recognize him in public and called the police. The gun that Taylor claimed to have seen was never recovered.

Defendant was charged with armed robbery,[1] two counts of felonious assault,[2] felon in possession of a firearm,[3] and possession of a firearm during the commission of a felony.[4] At a bench trial, defendant was acquitted of the charges of felon in possession of a firearm and possession of a firearm during the commission of a felony after the court determined that the prosecution had failed to prove defendant actually had a gun when he demanded Taylor's money. Defendant was convicted of armed robbery. Additionally, despite the lack of proof that defendant had a weapon, defendant was also convicted of two counts of felonious assault.

During the calculation of defendant's recommended minimum sentence range for armed robbery under the sentencing guidelines, defendant was assessed 20 points under prior record variable 7 (PRV 7) as a result of the two felonious-assault convictions.[5] Consequently, his minimum sentence range was 108 to 270 months. Had defendant not been assessed 20 points under PRV 7, his minimum sentence range would have been 81 to 202

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[1] MCL 750.529.

[2] MCL 750.82. " 'The elements of felonious assault are (1) an assault, (2) *with a dangerous weapon*, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.' " *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (citation omitted; emphasis added).

[3] MCL 750.224f.

[4] MCL 750.227b.

[5] See MCL 777.57(1)(a) (stating that 20 points should be assessed if "[t]he offender has 2 or more subsequent or concurrent convictions").

months.[6] The trial court stated its intention to sentence defendant at the lower end of the guidelines range and sentenced defendant as a third-offense habitual offender[7] to concurrent prison terms of 108 to 240 months for armed robbery and 24 to 96 months for each felonious-assault conviction.

Defendant appealed in the Court of Appeals and argued that the trial court erred by convicting him of two counts of felonious assault while simultaneously finding that he did not have a gun during the commission of the armed robbery. Defendant argued that felonious assault requires the prosecution to prove that a dangerous weapon was used in the commission of the crime as an element of the crime, thus making the convictions inconsistent with the trial court's factual findings. As part of his appeal, defendant also requested that his case be remanded for resentencing on his armed-robbery conviction because of this error.

The Court of Appeals agreed that it was error to convict defendant of felonious assault when defendant did not have a dangerous weapon at the time of the crime. The Court opined that while an armed robbery can be committed without the use of a dangerous weapon, a felonious assault cannot.[8] In light of this

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[6] Our opinion only addresses defendant's guidelines range with respect to the PRV 7 assessed points, and not the two additional errors that were made in scoring offense variable (OV) 1 and OV 2, as discussed by the Court of Appeals, because defendant did not raise the two OV scoring errors in the appeal in this Court. However, as recognized in the concurrence, defendant's correct guidelines range with the two additional scoring errors removed is 51 to 127 months. Nothing in this opinion precludes the trial court from reviewing and correcting the OV scoring errors, as found by the Court of Appeals, on remand for resentencing.

[7] MCL 769.11.

[8] *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2009 (Docket No. 281380), pp 2-3, citing *Chambers*, 277 Mich App at 9.

error, the Court vacated defendant's felonious-assault convictions. However, the Court rejected defendant's request for resentencing on the armed-robbery conviction, concluding that it was required by MCL 769.34(10) to affirm defendant's sentence because the sentence remained "within the appropriate guidelines range" and defendant had not raised the issue " 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand' . . . ."[9]

Defendant applied for leave to appeal in this Court, and we heard oral argument on whether to grant the application or take other preemptory action. At issue is whether defendant was entitled to resentencing under these circumstances.[10]

II. STANDARD OF REVIEW

The issues in this case involve the proper interpretation and application of the statutory sentencing guidelines, which are both legal issues that this Court reviews de novo.[11]

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[9] *Jackson*, unpub op at 5, quoting MCL 769.34(10).

[10] *People v Jackson*, 485 Mich 968 (2009). The order provided:

> We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the defendant is entitled to resentencing, where the Court of Appeals vacated two of the defendant's three convictions, resulting in a reduction of the guidelines sentence range, but where the defendant's minimum sentence is within the corrected guidelines sentence range. MCL 769.34(10); *People v Francisco*, 474 Mich 82 [711 NW2d 44] (2006). The parties should avoid submitting a mere restatement of the arguments made in their application papers. [*Id*. at 968-969.]

[11] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

III. ANALYSIS

At issue in this case is whether defendant is entitled to resentencing for his armed-robbery conviction when the Court of Appeals vacated his concurrent convictions for felonious assault that were used as a factor in calculating the sentence for armed robbery. The Court of Appeals vacated defendant's felonious-assault convictions; however, the Court refused to remand the case for resentencing, concluding:

> Although we conclude that these variables [PRV 7, OV 1, and OV 2] were improperly scored, as discussed below, we must affirm defendant's sentence because it "is within the appropriate guidelines sentence range" and defendant failed to raise this issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand" filed with this Court.[12]

The Court of Appeals focused on two specific provisions within MCL 769.34(10): whether the sentence was "within the appropriate guidelines" range and whether defendant raised the issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand . . . ." Thus, the proper interpretation of MCL 769.34(10) governs the result in this case.[13]

In interpreting statutes, we follow established rules of statutory construction. Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[14] Accordingly, the Court must interpret the language of a statute in a

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[12] *Jackson*, unpub op at 4, quoting MCL 769.34(10).

[13] We recently addressed the proper application of MCL 769.34(10) in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006); however, the case before us presents additional issues not addressed in *Francisco*.

[14] *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

manner that is consistent with the legislative intent.[15] In determining the legislative intent, we must first look to the actual language of the statute.[16] As far as possible, effect should be given to every phrase, clause, and word in the statute.[17] Moreover, the statutory language must be read and understood in its grammatical context.[18] When considering the correct interpretation, the statute must be read as a whole.[19] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[20] In defining particular words within a statute, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme.[21]

MCL 769.34(10) specifically governs remands for resentencing. This subsection provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and *shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence*. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range *unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals*. [Emphasis added.]

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[15] *Potter*, 484 Mich at 410-411.

[16] *Id.* at 410.

[17] *Sun Valley*, 460 Mich at 237.

[18] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[19] *Sun Valley*, 460 Mich at 237.

[20] *Herman*, 481 Mich at 366.

[21] *Id.*

A

We first review whether a remand for resentencing was barred because defendant's minimum sentence was *within the appropriate guidelines range*. The first sentence of MCL 769.34(10) governs when the Court shall or shall not remand for resentencing: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and *shall not remand* for resentencing *absent an error in scoring the sentencing guidelines or inaccurate information* relied upon in determining the defendant's sentence." (Emphasis added.) The clear meaning of this sentence is that the Court shall not remand for resentencing *unless* there was either an error in scoring or defendant's sentence was based on inaccurate information.[22] Conversely, this means that the Court is required to remand whenever one of these two circumstances is present.[23] Thus, the Court may not ignore the two criteria for when a case should be remanded merely because the sentence is within the appropriate guidelines range. When the defendant's sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required.[24]

In this case, the trial court had assessed points for convictions that were vacated on appeal. Before the felonious-assault convictions were vacated, defendant was assessed 20 points under PRV 7 for his armed-robbery conviction because the felonious assaults were

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[22] See *Francisco*, 474 Mich at 88-89.

[23] See *id.* at 90-91.

[24] We emphasize that this does not mean that the trial court is required to change the sentence on remand. See *id.* at 91. However, a remand to the trial court is required in these circumstances so that the issue of resentencing can be considered by the trial court in light of the new information.

concurrent convictions. Consequently, his minimum sentence range for the armed robbery was 108 to 270 months. Had defendant been correctly assessed zero points instead of 20 under PRV 7, his minimum sentence range would have been 81 to 202 months. Thus, assessing defendant 20 points under PRV 7 resulted in a sentence based on inaccurate information. Because the clear and unambiguous language of MCL 769.34(10) requires a remand for resentencing when the sentence is based on inaccurate information, the Court of Appeals erred by concluding that it was barred from remanding the case for resentencing based on the plain language of the statute.

Moreover, this is the same analysis and conclusion that we arrived at in *People v Francisco*. In *Francisco*, this Court held that a defendant is entitled to resentencing when the trial court erred in scoring an offense variable, and the error affected the statutory sentencing guidelines range. The trial court had sentenced the defendant to a minimum of 102 months imprisonment under the mistaken belief that the proper guidelines range was 87 to 217 months, when the correct range was actually 78 to 195 months.[25] Although the defendant's minimum sentence was still within the guidelines range, we held that a remand for resentencing was required[26] because the statutory phrase at issue—"absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence"—"makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information . . . ."[27] As a result, we held that when

[25] *Id*. at 91.

[26] *Id*. at 92.

[27] *Id*. at 89.

"appellate correction of an erroneously calculated guidelines range" results in a sentence that "stands differently in relationship to the correct guidelines range," a defendant is "entitled to be resentenced."[28] As we stated in *Francisco*, this interpretation of MCL 769.34(10) is consistent with the clearly expressed legislative intent and prior caselaw:

> MCL 769.34(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information (although this Court might have presumed the same even absent such express language). Moreover, we have held that "a sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant preserved the issue at sentencing. It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information. A defendant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law.[29]

In the present case defendant's sentence was based on inaccurate information, and he is entitled to resentencing.[30] Accordingly, we conclude that that the Court

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[28] *Id*. at 91-92.

[29] *Id.* at 89-91.

[30] We note that the trial court in this case stated that it intended to sentence defendant at the lower end of the guidelines range and that defendant's minimum sentence for armed robbery is no longer at that lower end as a result of the scoring adjustment. While such an expression of intent is not outcome determinative for purposes of deciding whether resentencing should occur, it indeed illustrates one of the several reasons why fairness dictates this result. As we stated in *Francisco*,

> [w]hile the difference between the mistaken and the correct guidelines ranges is relatively small, the fundamental problem

of Appeals erred by holding that it was barred from remanding for resentencing because the minimum sentence was within the appropriate sentencing guidelines range.

B

We next consider whether defendant was barred from requesting resentencing by the second sentence of MCL 769.34(10), which states:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has *raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals*. [Emphasis added.]

The prosecution argues that this language limits requests for resentencing to those made by one of three specific procedural processes: either *at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals*. The prosecution

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nonetheless is illustrated. The actual sentence suggests an intention by the trial court to sentence defendant near the bottom of the appropriate guidelines range—specifically, fifteen months or 17 percent above the 87-month minimum. Had the trial court been acting on the basis of the correct guidelines range, however, we simply do not know whether it would have been prepared to sentence defendant to a term 24 months or 30 percent above the new 78-month minimum. Indeed, appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention. Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends. [*Id*. at 91-92.]

further argues that because defendant made his request for a remand for resentencing in his brief on appeal, rather than in a separate motion for remand in the Court of Appeals, the Court was precluded from granting his request. The Court of Appeals agreed with this argument. We, however, do not agree with such a narrow interpretation of this statute because this interpretation disregards the plain language of the statute and our court rules.

The prosecution is correct that the statute limits the processes and timing of a request by a defendant to request resentencing. According to the statute, there are two ways for the defendant to make this request at the trial court level: either by making the request at sentencing or in a proper motion for resentencing. In cases on appeal, the request must be made in a *proper motion to remand filed in the Court of Appeals*. In this case, we need not address whether defendant followed the procedures to request relief in the trial court for the scoring based on the felonious-assault convictions because either procedure would have been futile until such time as the Court of Appeals affirmed or reversed the felonious-assault convictions. Nor would we expect a trial court to anticipate that its rulings might be found incorrect or force it to entertain such a motion. Accordingly, given the circumstances in this case, the only issue presented is whether defendant made a proper motion to remand in the Court of Appeals.

To determine whether defendant complied with this section of the statute, we must first determine what constitutes a *proper motion* to remand in the Court of Appeals. What constitutes a proper motion in any court is not within the purview of the Legislature because defining the procedures for filing a motion presents a

procedural issue.[31] Nor will we assume that the Legislature intended to impose any particular method by which such a filing must be undertaken. Accordingly, it is entirely within this Court's purview to determine what constitutes a *proper motion* and what procedures and timing best suit our appellate courts practices.

Unfortunately, the Court of Appeals failed to explain why it determined that a *proper motion* had not been filed. We can only presume that the Court determined that the statute requires a separate motion be filed pursuant to MCR 7.211. However, we do not agree because this rule does not provide grounds for a motion given the circumstances presented in this case. MCR 7.211(C)(1) governs the general category of motions to remand in the Court of Appeals and provides:

> (a) Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion *must* identify an issue sought to be reviewed on appeal and show:
>
> (i) that the issue is one that is of record and that *must be initially decided by the trial court*; or

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[31] It is well established that the rules of procedure in judicial matters rest exclusively with the judiciary and this Court. This rule-making authority can be traced from our earlier constitutions to its current form, which states: "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." Const 1963, art 6, § 5.

In *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), overruled in part on other grounds by *McDougall v Schanz*, 461 Mich 15, 32; 597 NW2d 148 (1999), this Court opined that the "function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will." (Citations omitted.)

(ii) that *development of a factual record is required* for appellate consideration of the issue. [Emphasis added.]

In order to file a proper motion to remand under MCR 7.211(C)(1), a defendant must file the motion within the time provided for filing his brief on appeal, which could have been done by defendant. However, the allowable grounds for maintaining such a motion are limited. Under this rule, the motion must articulate that a remand is necessary because the issue is either (i) one that is "of record and . . . *must be initially decided by the trial court*" or (ii) one in which "*development of a factual record is required* for appellate consideration of the issue." MCR 7.211(C)(1)(a)(i) and (ii). Subsection (i) clearly requires that remand be necessary because the underlying issue is one that the trial court must resolve before appellate adjudication. Subsection (ii) clearly requires that remand be necessary because further factual development is needed before the case is ripe for appellate adjudication. In this case, filing a motion under subsection (i) would not have been proper because the trial court could not have initially decided this issue. Filing a motion under subsection (ii) would also not have been proper because the issue was not one that required further factual development before the case was ripe for appellate review. To the contrary, in this case, the issue was not ripe for remand to the trial court until the appellate court completed its review. Thus, a *proper motion to remand* for resentencing could not have been filed under MCR 7.211(C)(1) because neither of these two grounds enumerated in the court rule applied to this circumstance.[32] We find that it would

[32] This case presents unique circumstances. Defendant is seeking a remand because his sentence for armed robbery is now based on inaccurate information. However, this sentence was not based on inaccurate information until the Court of Appeals determined that the

have been impossible for defendant to have filed *a proper motion to remand* in the Court of Appeals if we narrowly interpret the phrase *a proper motion* in MCL 769.34(10) to mean only a motion filed under 7.211(C)(1).

We next examine what purpose is served by the requirement of a *proper motion* in order to determine if an adequate mechanism exists in our court rules to satisfy this statutory mandate. The purpose of a motion is to request a court to rule on an issue on a timely basis when the issue is ripe for adjudication. Given that defendant made his request as part of his brief on appeal, his request served this purpose. It was presented on a timely basis and provided the Court of Appeals with all necessary information to make a decision. The only possible defect in this process is that his request was not made in a separate pleading. However, we cannot assume that the Legislature necessarily intended that a proper motion to remand be done in a separate filing.

"Motion" is defined as a "written or oral application requesting a court to make a specified ruling or order."[33] "Application" is defined as a "request or petition."[34] Under this broad definition of a motion, a separate pleading was not required because defendant made a written request for the court "to make a specified ruling or order." Nothing further was required given these circumstances. Requiring a defendant to file a separate pleading would necessitate a party to request review of an issue that is not ripe for review. We

felonious-assault convictions were erroneous. The issue of a remand for resentencing was not ripe for adjudication until the Court of Appeals rendered its decision.

[33] Black's Law Dictionary (8th ed).

[34] *Id.*

conclude that when the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his appellate brief.

The Michigan Court Rules allow for this broad construction. MCR 1.105 permits construction of the court rules "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." A just, speedy, and economical determination is served by not requiring that futile motions be filed, which only present issues to the court that are not yet ripe for review. Further, our construction of the statute avoids the consequences of error that would result from imposing a dubious technical requirement that serves no purpose other than elevating form over substance. Given that the prosecution had notice and the ability to present its counter arguments, no substantial right of the prosecution was impaired by imposing a broader construction of the statute.

Moreover, "[i]t is difficult to imagine something more 'inconsistent with substantial justice' than requiring a defendant to serve a sentence that is based upon inaccurate information."[35] For these reasons, we decline to read MCL 769.34(10) as requiring that a defendant do the impossible in order to receive the relief that

[35] *Francisco*, 474 Mich at 89 n 6. Further, MCR 7.216(A)(7) allows the Court of Appeals to grant further or different relief as the case may require at any time on the terms it deems just. Thus, the Court of Appeals has the *discretion* to remand for resentencing when it vacates a conviction as justice demands.

substantial justice requires.[36] Clearly the circumstances before us mandate such a conclusion, and we accordingly hold that defendant filed a proper motion to remand in the Court of Appeals, as required by MCL 769.34(10).

Finally, we decline to address defendant's constitutional arguments, as we find it unnecessary to do so under these circumstances. This Court has long held that courts should not grapple with finding a constitutional question when the case can be decided on other grounds. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); see also *Ashwander v Tennessee Valley Auth*, 297 US 288, 341, 345-356; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring); *United States v Lovett*, 328 US 303, 320; 66 S Ct 1073; 90 L Ed 1252 (1946) (Frankfurter, J., concurring). Since the case before us can be decided on other grounds, we will not opine on the constitutional arguments presented.

IV. CONCLUSION

We heard oral argument on whether to grant defendant's application for leave to appeal. At issue is whether defendant is entitled to resentencing for an armed-robbery conviction when the Court of Appeals vacated his concurrent convictions for felonious assault that were used as a factor in calculating his sentence for armed robbery. Court of Appeals remands for resentencing are governed by MCL 769.34(10), which requires that cases be remanded when the sentence is based on inaccurate information. We therefore conclude that defendant is entitled to resentencing because his

[36] See MCR 2.613(A) (stating that an error does not justify disturbing a judgment "unless refusal to take this action appears to the court inconsistent with substantial justice"); *Francisco*, 474 Mich at 89 n 6.

sentence is now based on inaccurate information. We further conclude that because defendant requested a remand for resentencing as part of his appeal to vacate the felonious-assault convictions, he complied with the requirement of MCL 769.34(10) that a request to remand be made in a proper motion filed in the Court of Appeals.

Accordingly, the Court of Appeals erred by failing to remand for resentencing, and in lieu of granting leave to appeal, we reverse that portion of the judgment of the Court of Appeals in which it concluded that it could not remand for resentencing. We therefore vacate defendant's sentence and remand defendant's case for resentencing.

KELLY, C.J., and CAVANAGH and MARKMAN, JJ., concurred with HATHAWAY, J.

CORRIGAN, J. (*concurring*). I concur in the majority's result, but would decide this case on different grounds. I would hold that defendant is entitled to resentencing because the Court of Appeals vacated for legal insufficiency his felonious assault convictions, which were used as a factor in calculating his sentence. I do not believe that MCL 769.34(10) governs defendant's entitlement to relief in this case when his request for resentencing is based on the Court of Appeals' ruling, rather than any error in scoring the sentencing guidelines or inaccurate information relied on by the circuit court in determining his sentence.

MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate

> information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

As the majority properly notes, the circuit court in this case assessed 20 points under prior record variable 7 (PRV 7)[1] for the two felonious assault convictions that the Court of Appeals later vacated.[2] The resulting minimum sentence range under the sentencing guidelines was 108 to 270 months. Noting specifically that it was imposing a sentence at the lower end of the guidelines range, the circuit court sentenced defendant to a prison term of 108 to 240 months for the armed robbery conviction. Without the two subsequently vacated felonious assault convictions, PRV 7 would have been scored at zero points, rather than 20 points. Defendant also challenged the scoring of offense variable (OV) 1 (aggravated use of a weapon)[3] and OV 2 (lethal potential of the weapon possessed or used)[4] in the Court of Appeals. The Court of Appeals held that OV 1 should have been scored at 5 points instead of 15 points and that OV 2 should have been scored at zero points instead of 5 points.[5] These corrections result in a corrected guidelines range of 51 to 127 months when

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[1] MCL 777.57(1)(a) provides that 20 points should be assessed if "[t]he offender has 2 or more subsequent or concurrent convictions[.]"

[2] The prosecution did not appeal the Court of Appeals' decision to vacate the two felonious assault convictions.

[3] MCL 777.31(1).

[4] MCL 777.32(1).

[5] The prosecution did not appeal the Court of Appeals' decision concerning OV 1 and OV 2, nor did defendant address it in this Court.

adjusted for defendant's third-offense habitual offender enhancement.[6] Defendant's minimum sentence of 108 months is within the corrected guidelines range of 51 to 127 months.

The majority concludes that MCL 769.34(10), as interpreted in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006),[7] requires a remand for resentencing because defendant's sentence "is now based on inaccurate information."

While I agree that defendant is entitled to resentencing, I respectfully disagree with the majority that MCL 769.34(10) governs under the circumstances of this appeal. Because defendant's minimum sentence of 108 months is within the corrected guidelines range of 51 to 127 months, MCL 769.34(10), if applied here, would dictate that the Court of Appeals "shall affirm" defendant's sentence and "shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." For purposes of this appeal, there is no claim of an "error in scoring the sentencing guidelines."[8] Thus, the relevant inquiry under MCL

[6] The Court of Appeals incorrectly stated that the corrected guidelines range is 51 to 127½ months.

[7] The majority in *Francisco* concluded that the defendant was entitled to resentencing under MCL 769.34(10) because although the defendant's minimum sentence was within the appropriate guidelines sentencing range, a scoring error altered the appropriate guidelines range and the defendant had preserved the issue at sentencing.

Francisco involved a claim of error in scoring the defendant's guidelines sentencing range, a sentencing challenge that clearly falls under MCL 769.34(10). For the reasons explained in this opinion, I would hold that MCL 769.34(10) does not apply here, where the Court of Appeals has vacated convictions used as a factor in defendant's sentencing. Accordingly, I do not believe that *Francisco* governs this case.

[8] As noted, the scoring of OV 1 and OV 2 was at issue in the Court of Appeals but has not been raised here.

769.34(10) is whether the circuit court "relied upon" "inaccurate information . . . in determining the defendant's sentence."

When interpreting statutes, "our primary task . . . 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). In interpreting a statute, "we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id*. at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Sun Valley*, 460 Mich at 237. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*.

I disagree with the majority's interpretation of "inaccurate information relied upon in determining the defendant's sentence" as encompassing the circumstances of this case. In my view, a plain reading of this language suggests that it refers to *factual* information,[9] and this is consistent with our past understanding of the term.[10] When the circuit court determined defen-

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[9] *Random House Webster's College Dictionary* (2005) defines "information," in relevant part, as follows: "1. knowledge communicated or received concerning a particular fact or circumstance. 2. knowledge gained through study, communication, research, etc.; data. 3. the act or fact of informing." "Inaccurate" is defined as "not accurate; incorrect, or untrue." *Id*.

[10] See *People v Miles*, 454 Mich 90, 96-97; 559 NW2d 299 (1997):

> A line of Michigan cases hold that sentences based on inaccurate information are invalid. *People v Lauzon*, 84 Mich App 201; 269 NW2d 524 (1978) (the trial court erred when it sentenced the defendant under the mistaken belief that he had committed a burglary while out on bond); *People v Corlin*, 95 Mich App 740; 291

dant's sentence, the relevant information—the fact of defendant's two felonious assault convictions—was accurate. The *information* concerning the two convictions is a different question than the *legal validity* of those convictions. Because there was no inaccuracy in the information the circuit court relied on in determining defendant's sentence, MCL 769.34(10) applied here dictated that that the Court of Appeals "shall affirm" defendant's sentence and "shall not remand for resentencing."

I would hold, however, that MCL 769.34(10) does not apply here, where defendant seeks resentencing on the basis of the constitutional error in the felonious assault convictions used as a factor in his sentencing.[11] The placement of MCL 769.34(10) in the statutory scheme suggests that it addresses specific types of nonconstitutional sentencing errors, not a constitutional error in an underlying conviction. The provisions of MCL 769.34 address the application of the sentencing guidelines, when a court may depart from the appropriate sentencing guidelines range, when intermediate sanctions are

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NW2d 188 (1980) (the presentence report erroneously stated that the defendant had pleaded guilty of possession, which carried a maximum penalty of two years, rather than delivery, which carried a maximum penalty of seven years); *People v Hale (After Remand)*, 106 Mich App 306; 308 NW2d 174 (1981) (error was found because the defendant's cooperation with the police was not made known to the court at the time of sentencing); *People v Hildabridle*, 45 Mich App 93; 206 NW2d 216 (1973) (it was error for the court to sentence the defendant on the basis of inaccurate information regarding the value of the stolen property).

[11] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Legal insufficiency is a failure by the prosecution to prove each element of the charged crime beyond a reasonable doubt. See also *People v Johnson*, 460 Mich 720, 722; 597 NW2d 73 (1999) (" 'The sufficient evidence requirement is a part of every criminal defendant's due process rights.' ") (citation omitted).

to be imposed, and the like. Reading in context, I see no indication that the Legislature intended MCL 769.34(10) to preclude resentencing when a court has vacated for insufficiency of evidence convictions used as a factor in sentencing. I would hold that defendant is entitled to resentencing on the basis of the reversal of his felonious assault convictions and that MCL 769.34(10) does not apply. See *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006).[12]

For these reasons, I concur in the result reached by the majority but would hold that defendant is entitled to a remand for resentencing because convictions used as a factor in his sentencing were later vacated for insufficiency of evidence. I respectfully disagree with

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[12] In *Conley*, the circuit court improperly considered the defendant's refusal to admit his guilt when imposing the defendant's sentence. The Court of Appeals observed that

> [r]ead literally in isolation, [MCL 769.34(10)] might seem to preclude this Court from granting relief on the basis of the trial court's error in considering Conley's refusal to admit guilt because it is undisputed that Conley was sentenced within the sentencing guidelines range and this error does not involve the scoring of the guidelines or the consideration of inaccurate information.
>
> But the erroneous consideration of Conley's refusal to admit guilt was a constitutional error because it violated his constitutional right against self-incrimination. It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions. Accordingly, we conclude that MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude. We do not hold MCL 769.34(10) to be unconstitutional. Rather, we construe MCL 769.34(10) as simply being inapplicable to claims of constitutional error. [*Conley*, 270 Mich App at 316.]

See also *United States v Tucker*, 404 US 443, 447-449; 92 S Ct 589; 30 L Ed 2d 592 (1972) (holding that when the sentencing court specifically considered convictions later deemed unconstitutional under *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 [1963], in imposing the defendant's sentence, remand for resentencing was necessary in order to prevent "[e]rosion of the *Gideon* principle").

the majority because I do not believe that MCL 769.34(10) governs defendant's entitlement to resentencing. It is the Court of Appeals' subsequent determination that there was insufficient evidence to support defendant's felonious assault convictions,[13] rather than any error in scoring the guidelines or inaccurate information relied on by the trial court, that entitles defendant to resentencing.

YOUNG, J., concurred with CORRIGAN, J.

DAVIS, J., did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before he assumed office by following the practice of previous justices in transition and participating only in those cases for which his vote would be result-determinative. His nonparticipation in this decision does not affect his eligibility to participate in deciding a motion for rehearing.

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[13] As the prosecution never filed an appeal, the propriety of the Court of Appeals' ruling regarding the vacation of defendant's felonious assault convictions is not before the Court.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Disposition July 26, 2010:

PEOPLE v MELTON, No. 140797; Court of Appeals No. 294434. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Monroe Circuit Court for the ministerial task of correcting the presentence investigation report as agreed to by the trial court. The circuit court shall forward a copy of the corrected report to the Department of Corrections, MCL 771.14(6) and MCR 6.425(E)(2). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v WEAVER, No. 141060; Court of Appeals No. 296601. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 26, 2010:

PEOPLE v STOCKMAN, No. 138233; Court of Appeals No. 278901.

PEOPLE v GOTCHER, No. 139746; Court of Appeals No. 290738.

PORTER v PORTER, Nos. 139800 and 139801; reported below: 285 Mich App 450.

POWERS v PIONEER RESOURCES, INCORPORATED, No. 139973; Court of Appeals No. 291961.

PEOPLE v JAMES POWELL, No. 140062; Court of Appeals No. 293213.

PEOPLE v CONLEY, No. 140115; Court of Appeals No. 293389. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MARSHALL, No. 140262; Court of Appeals No. 292841. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KALAK, No. 140270; Court of Appeals No. 293673. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v PALMER, No. 140276; Court of Appeals No. 294275.

PEOPLE v HANKINS, No. 140310; Court of Appeals No. 291461. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SLUSSER, No. 140314; Court of Appeals No. 293493. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KREGEAR, No. 140332; Court of Appeals No. 293770. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WHORTON, No. 140354; Court of Appeals No. 294629. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KETOLA, No. 140377; Court of Appeals No. 284363.

PEOPLE v ALEXANDER, No. 140378; Court of Appeals No. 294378. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CISNEROS, No. 140389; Court of Appeals No. 293258. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GOODWILL, No. 140404; Court of Appeals No. 293664. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WILSON, No. 140416; Court of Appeals No. 294595.

PEOPLE v SMITH-BEY, No. 140419; Court of Appeals No. 294052. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JAMES, No. 140424; Court of Appeals No. 292411. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRICKEY, No. 140448; Court of Appeals No. 294598. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KLEIN, No. 140453; Court of Appeals No. 294390. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HICKERSON, No. 140462; Court of Appeals No. 292206. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CRIMES, No. 140471; Court of Appeals No. 294526. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BROWNLEE, No. 140474; Court of Appeals No. 293769.

PEOPLE v TAYLOR, No. 140486; Court of Appeals No. 294443.

GRAVES v DEPARTMENT OF CORRECTIONS, No. 140488; Court of Appeals No. 293749.

PEOPLE v SIRVAN MARTIN, No. 140499; Court of Appeals No. 279338.

PEOPLE v BANKS, No. 140534; Court of Appeals No. 289989.

PEOPLE v BURREL, No. 140539; Court of Appeals No. 23901. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MOORE, No. 140540; Court of Appeals No. 295002.

GRANGER LAND DEVELOPMENT COMPANY v DEPARTMENT OF TREASURY, No. 140543; reported below: 286 Mich App 601.

PEOPLE v WILLIAMS, No. 140550; Court of Appeals No. 294389. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RALPH, No. 140608; Court of Appeals No. 295632, Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HINES, No. 140612; Court of Appeals No. 294215. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CORRIGAN, J., not participating for the reasons stated in *People v Parsons*, order of the Supreme Court, entered March 6, 2007 (Docket No. 132975).

PEOPLE v HOLZER, No. 140621; Court of Appeals No. 295247. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JAMIL, No. 140623; Court of Appeals No. 294257. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

BLANTON v DEPARTMENT OF CORRECTIONS, No. 140635; Court of Appeals No. 294668.

PEOPLE v GONZALES, No. 140650; Court of Appeals No. 294876. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ELLIS, No. 140660; Court of Appeals No. 295296. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v KATAJA, No. 140673; Court of Appeals No. 282053.

DAIMLER CHRYSLER SERVICES OF NORTH AMERICA v DEPARTMENT OF TREASURY, No. 140677; Court of Appeals No. 288347.

PEOPLE v FREEMAN JONES, No. 140687; Court of Appeals No. 287183.

PEOPLE v JAMES HARDY, No. 140715; Court of Appeals No. 294638. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BALLINGER, No. 140718; Court of Appeals No. 294073. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CLIFTON, No. 140730; Court of Appeals No. 294818. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LOCKWOOD, No. 140731; Court of Appeals No. 287085.

PEOPLE v NEUHARDT, No. 140733; Court of Appeals No. 295214. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v DANIELS, No. 140740; Court of Appeals No. 295844. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MENDOZA, No. 140741; Court of Appeals No. 288509.

HILL v PAROLE BOARD, No. 140749; Court of Appeals No. 294520.

PEOPLE v WALTER ROBINSON, No. 140760; Court of Appeals No. 296116.

PEOPLE v ASHBY, No. 140763; Court of Appeals No. 287848.

PEOPLE v SHAWN DAILEY, No. 140766; Court of Appeals No. 295476. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FLANAGAN, No. 140773; Court of Appeals No. 296210.

PEOPLE v LEHMAN, No. 140774; Court of Appeals No. 287844.

PEOPLE v GIPSON, No. 140776; reported below: 287 Mich App 261.

PEOPLE v LAQUAN JONES, No. 140779; Court of Appeals No. 295437.

PEOPLE v MILJKOVIC, No. 140783; Court of Appeals No. 285102.

TROBAUGH v ELIASON, No. 140798; Court of Appeals No. 294586.

BUNDAY v HAEHNEL, No. 140805; Court of Appeals No. 288994.

BYERS v HONEYTREE II LIMITED PARTNERSHIP, No. 140812; Court of Appeals No. 288907.

PEOPLE v FRANKLIN, No. 140850; Court of Appeals No. 294637. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DELAVERN, No. 140851; Court of Appeals No. 295542. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

MICHIGAN DEFERRED PRESENTMENT SERVICES ASSOCIATION, INCORPORATED v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION, No. 140863; reported below: 287 Mich App 326.

PEOPLE v DAVID MARTIN, No. 140864; Court of Appeals No. 295898. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v ANDRE BELL, No. 140865; Court of Appeals No. 295068. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DOTHARD, No. 140866; Court of Appeals No. 287581.

PEOPLE v ROBERTO, No. 140867; Court of Appeals No. 296168. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v TOLSON, No. 140868; Court of Appeals No. 294935. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v HENDRIX, No. 140873; Court of Appeals No. 277919.

PEOPLE v NETTLES, No. 140875; Court of Appeals No. 293867. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

VANDYKE v LEELANAU COUNTY, No. 140882; Court of Appeals No. 286775.

PAGURA v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 140885 and 140886; Court of Appeals Nos. 286574 and 291265.

PEOPLE v DAVID HARDY, No. 140887; Court of Appeals No. 287181.

PEOPLE v COLLINS, No. 140890; Court of Appeals No. 295874.

PEOPLE v BOLDEN, No. 140891; Court of Appeals No. 288255.

PEOPLE v THREET, No. 140892; Court of Appeals No. 295136. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HOLLMON, No. 140893; Court of Appeals No. 294969. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

RILEY v ENNIS, No. 140896; Court of Appeals No. 290510.

GRAVES v STATE FARM MUTUAL INSURANCE COMPANY, No. 140897; Court of Appeals No. 289822.

PEOPLE v SANFORD, No. 140899; Court of Appeals No. 289887.

PEOPLE v FRENCH, No. 140900; Court of Appeals No. 288798.

PEOPLE v WILLIAM GRAY, No. 140901; Court of Appeals No. 296364.

PEOPLE v GORDON, No. 140902; Court of Appeals No. 296101. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRADSHAW, No. 140903; Court of Appeals No. 288638.

PEOPLE v DARRYL JOHNSON, No. 140904; Court of Appeals No. 295185. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DAVID MITCHELL, No. 140908; Court of Appeals No. 289209.

PEOPLE v RODGERS, No. 140910; Court of Appeals No. 295295. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SMITH, No. 140912; Court of Appeals No. 289688.

PEOPLE v REED, No. 140913; Court of Appeals No. 294253. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ROBERT BAKER, No. 140914; Court of Appeals No. 289056.

PEOPLE v MCDANIEL, No. 140915; Court of Appeals No. 290297.

PEOPLE v CLARK, No. 140917; Court of Appeals No. 287663.

PEOPLE v GOSHAY, No. 140919; Court of Appeals No. 296342.

PEOPLE v CHRISTOPHER JOHNSON, No. 140920; Court of Appeals No. 290279.

PEOPLE v FOX, No. 140923; Court of Appeals No. 289734.

PEOPLE v GEBOKOFF, No. 140924; Court of Appeals No 288242.

PEOPLE v DAVIS, No. 140925; Court of Appeals No. 287476.

PEOPLE v WHITE, No. 140928; Court of Appeals No. 290518.

PEOPLE v FLEMING, No. 140930; Court of Appeals No. 295951.

WAGNER v MISENER, No. 140936; Court of Appeals No. 289144.

PEOPLE v NEUMAN, No. 140943; Court of Appeals No. 289128.

PEOPLE v HAWKINS, No. 140944; Court of Appeals No. 289181.

PEOPLE v BROSS, No. 140948; Court of Appeals No. 296121. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BARRY JACKSON, No. 140953; Court of Appeals No. 290475.

PEOPLE v GRANT, No. 140954; Court of Appeals No. 295821.

PEOPLE v CHRISTOPHER JONES, No. 140959; Court of Appeals No. 296119.

PEOPLE v CORRION, No. 140964; Court of Appeals No. 292158.

PEOPLE v POLK, No. 140966; Court of Appeals No. 286772.

PEOPLE v MONTGOMERY, No. 140967; Court of Appeals No. 287913.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

NEWTON v GENERAL MOTORS CORPORATION, No. 140968; Court of Appeals No. 295796.

PEOPLE v RALSTON, No. 140970; Court of Appeals No. 290378.

PEOPLE v BRETT DAILEY, No. 140972; Court of Appeals No. 296220.

PEOPLE v PARHAM, No. 140974; Court of Appeals No. 296385.

PEOPLE v MCARTHUR POWELL, No. 140976; Court of Appeals No. 290525.

PEOPLE v STRONG, No. 140977; Court of Appeals No. 290588.

BOSS v LOOMIS EWERT PARSLEY DAVIS & GOTTING PC, Nos. 140984 and 140985; Court of Appeals Nos. 287578 and 289438.

PEOPLE v RUDOLPH, No. 140987; Court of Appeals No. 287418.

BROWN v JONES, No. 140995; Court of Appeals No. 295017.

PEOPLE v TOVAR, No. 140996; Court of Appeals No. 288972.

PEOPLE v MONACO, No. 141003; Court of Appeals No. 296166.

OTTAWA COUNTY v SHAFFER, No. 141005; Court of Appeals No. 288167.

PEOPLE v WALTHERS, No. 141010; Court of Appeals No. 295988.

PEOPLE v GOLDEN BELL, No. 141016; Court of Appeals No. 296674.

PEOPLE v EPINGER, No. 141022; Court of Appeals No. 295598.

PEOPLE v MICHAEL JACKSON, No. 141026; Court of Appeals No. 289417.

PEOPLE v HOUCK, No. 141029; Court of Appeals No. 296616.

PEOPLE v WASHINGTON, No. 141032; Court of Appeals No. 296465.

PEOPLE v COMMIRE, No. 141034; Court of Appeals No. 285696.

PEOPLE v HEMPHILL, No. 141036; Court of Appeals No. 287620.

PEOPLE v GREGORY GRAY, No. 141039; Court of Appeals No. 296658.

PEOPLE v SPROWLS, No. 141040; Court of Appeals No. 296514.

PEOPLE v JEFFREY BAKER, No. 141044; Court of Appeals No. 285028.

PEOPLE v COSEY, No. 141056; Court of Appeals No. 297035.

PEOPLE v CURRIE, No. 141063; Court of Appeals No. 284159.

PEOPLE v OLIVER, No. 141072; Court of Appeals No. 288630.

PEOPLE v HOWARD, No. 141073; Court of Appeals No. 296656.

PEOPLE v LAMAR JONES, No. 141077; Court of Appeals No. 284884.

PEOPLE v MORRISON, No. 141079; Court of Appeals No. 285662.

PEOPLE v WHIPPLE, No. 141086; Court of Appeals No. 288591.

PEOPLE v VANZANT, No. 141087; Court of Appeals No. 288874.

PEOPLE v RUSSELL MITCHELL, No. 141095; Court of Appeals No. 286416.

SMITH v ALCONA CIRCUIT JUDGE, No. 141111; Court of Appeals No. 294724.

VILLAGE OF MONTGOMERY v ROBEY, No. 141113; Court of Appeals No. 290927.

PEOPLE v CORTEZ ROBINSON, No. 141127; Court of Appeals No. 297296.

LABRECK v OAKLAND CIRCUIT COURT, No. 141269; Court of Appeals No. 298196.

Superintending Control Denied July 26, 2010:

BURWELL v ATTORNEY GRIEVANCE COMMISSION, No. 140993.

WEAVER, J., not participating. I abstain from voting on any items dealing with the Judicial Tenure Commission (JTC) and/or the Attorney Grievance Commission (AGC) to avoid any appearance that I could be trying to affect the outcome of the referrals of me to the JTC and AGC by Justices CORRIGAN, YOUNG and MARKMAN.

Leave to Appeal Prior to Decision by the Court of Appeals Denied July 26, 2010:

In re APPLICATION OF CONSUMERS ENERGY COMPANY (ABATE v MPSC), No. 140787; Court of Appeals No. 296625.

In re APPLICATION OF CONSUMERS ENERGY COMPANY (ATTORNEY GENERAL v MPSC), No. 140894; Court of Appeals No. 296635.

Reconsideration Denied July 26, 2010:

PEOPLE v LYLE, No. 139848; Court of Appeals No. 291892. Leave to appeal denied at 486 Mich 925.

PEOPLE v DEKEYZER, No. 140144; Court of Appeals No. 281207. Leave to appeal denied at 486 Mich 900.

Leave to Appeal Denied July 28, 2010:

DAVIS v CHATMAN, No. 141432; Court of Appeals No. 299021.

Application for Leave to Appeal Dismissed on Stipulation July 30, 2010:

CAMPBELL v DEPARTMENT OF HUMAN SERVICES, No. 140319; reported below: 286 Mich App 230.

Reconsideration Denied July 30, 2010:

LEE v DETROIT MEDICAL CENTER CHILDREN'S HOSPITAL, Nos. 139807 and 139814; Leave to appeal denied at 485 Mich 1121. Reported below: 285 Mich App 51.

CORRIGAN, J., would grant the motion for reconsideration and states as follows: The defendants raise jurisprudentially significant questions concerning the correctness of the Court of Appeals decision in this case, as I explained in my dissent to this Court's March 26, 2010 order denying the application for leave to appeal.

YOUNG, J., would grant the motion for reconsideration for the reasons set forth in Justice CORRIGAN's dissenting statement in this case, 485 Mich 1121, 1121-1122 (2010).

MARKMAN, J., would grant the motion for reconsideration, and grant leave to appeal, for the reasons set forth in his dissenting statement in this case, 485 Mich 1121, 1122 (2010).

Rehearing Denied August 2, 2010:

SHEPHERD MONTESSORI CENTER MILAN v ANN ARBOR CHARTER TOWNSHIP, No. 137443. Opinion at 486 Mich 311. Reported below: 280 Mich App 449.

Leave to Appeal Denied August 6, 2010:

In re RUPERT MINORS (DEPARTMENT OF HUMAN SERVICES v RUPERT), No. 141294; Court of Appeals No. 294873.

In re PARTEE MINORS (DEPARTMENT OF HUMAN SERVICES v SALDANA), No. 141396; Court of Appeals No. 295184.

ROGERS v GENESEE COUNTY FRIEND OF THE COURT, No. 141397; Court of Appeals No. 298162.

Rehearing Denied August 20, 2010:

PELLEGRINO v AMPCO SYSTEM PARKING, No. 137111; opinion at 486 Mich 330; Court of Appeals No. 274743.

WEAVER and HATHAWAY, JJ., would grant rehearing.

Leave to Appeal Denied September 3, 2010:

THE TEA PARTY v BOARD OF STATE CANVASSERS, No. 141694; Court of Appeals No. 299805.

DAVIS, J. (*concurring*). I concur in the order denying plaintiff's application for leave to appeal. My vote is dictated by the application of commonsense principles to this situation.

Plaintiff in this case seeks a writ of mandamus. Mandamus is an extraordinary remedy that is to be used only under the following circumstances: (1) the plaintiff has a clear legal right to the performance of something, (2) the defendant has a clear legal duty to perform that thing, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492 (2004). Therefore, plaintiff in this case must have a clear legal right to the performance of a specific duty that the Board of State Canvassers has a clear legal duty to perform.

In this case the clear legal duty is found in MCL 168.685(2), which states, in relevant part, "An official declaration of the sufficiency or insufficiency of a petition filed under this section shall be made by the board of state canvassers not later than 60 days before the general November election."

Plaintiff therefore does not necessarily have a right to have the petition certified as sufficient, but plaintiff does have a clear legal right to an official declaration from the board one way or another. In this case, because the board deadlocked, the "motion failed." The board did not issue an "official declaration," and thus this Court has no decision from the board to review and the board failed to carry out its duty to plaintiff. Plaintiff does not necessarily have a right to a particular decision, but plaintiff does have a right to receive an official declaration from the board on the sufficiency or insufficiency of the petition. However, as a practical matter, this Court is without a mechanism to enforce any order requiring the board to do its job. The process needs to be corrected, but that is not within the power of this Court. Accordingly, I concur in the order denying leave to appeal.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

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.

Order Entered July 27, 2010:

PROPOSED AMENDMENTS OF RULES 7.212 AND 7.215 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.212 and 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website: http://courts.michigan.gov.supremecourt/Resources/Administrative/index.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated in underlining and deletions are indicated in strikeover.]

RULE 7.212. BRIEFS.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(6) [Unchanged.]

(7) The arguments, each portion of which must be prefaced by the principal point stated in capital letters or boldface type. As to each issue, the argument must include a statement of the applicable standard or standards of review and supporting authorities. Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court. Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means. If determination of the issues presented requires the study of a constitution, statute, ordinance, administrative rule, court rule, rule of evidence, judgment, order, written instrument, or document, or relevant part thereof, this material must be reproduced in the brief or in an addendum to the brief. If an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presen-

tence report to the court at the time the brief is filed. Any unpublished judicial opinion, order, or other written disposition must be attached to the brief unless it is an unpublished decision of this court released after July 1, 1996 (the date after which all Court of Appeals opinions are available on the Court of Appeals website), and the citation in the brief includes the Court of Appeals case number;

(8)-(9) [Unchanged.]

(D)-(I) [Unchanged.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears, except that unpublished decisions of this court released after July 1, 1996 (the date after which all Court of Appeals opinions are available on the Court of Appeals website), need not be provided if the citation includes the Court of Appeals case number.

(2) [Unchanged.]

(D)-(J) [Unchanged.]

Staff Comment: These proposed amendments of MCR 7.212 and MCR 7.215, submitted by the State Bar of Michigan Appellate Practice Section, would eliminate the requirement to provide a copy of an unpublished Court of Appeals decision if that decision was issued after July 1, 1996, and a case number is provided.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-22. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, J. (*concurring*). I support the publication of this amendment to Rules 7.212 and 7.215, which would remove the requirement that parties citing an unpublished Court of Appeals opinion provide copies of the opinion to the court and other parties if the opinion is available online. However, I write separately to note that this proposed modification should not be construed as a change representing support for the authority to rely on unpublished opinions.

Our court rules explicitly provide that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR

7.215(C)(1). This standing admonition should serve generally to *discourage* the citation of unpublished opinions, which often do little more than tell the parties to a particular case why they win or lose on the facts and circumstances of that case without offering an extensive examination of the law typically found in published Court of Appeals decisions. Unpublished opinions simply are not intended to be applied beyond the facts raised in the case. This point is made more emphatic by virtue of the fact that this Court has provided a mechanism for requesting that a decision initially issued as an unpublished decision be reissued as a published opinion. See MCR 7.215(D). Under this rule, the panel that issued the unpublished decision can determine whether its original decision is worthy of being reissued as a published opinion.

Simply because technology has made access to unpublished opinions easier does not make reliance on them as authority more justifiable. I do not consider relaxing the obligation to attach physical copies of such opinions to a party's court filings as a relaxation of the caution against using nonprecedential decisions in court practice.

Order Entered August 11, 2010:

PROPOSED AMENDMENT OF RULE 6.1 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.1 of the Michigan Rules of Professional Conduct. Before determining whether either of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either of the proposals in its present form.

[Additions are indicated by underline, and deletions by strikethrough.]

ALTERNATIVE A

(Supreme Court proposal)

RULE 6.1. PRO BONO PUBLICO SERVICE.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The responsibilities set forth above are voluntary and shall not be enforced through disciplinary process or any other means.

Comment: The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This rule expresses that policy, but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

ALTERNATIVE B

(State Bar of Michigan Representative Assembly proposal, as revised by the Supreme Court)

RULE 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE.

~~A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.~~

~~Comment: The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially~~

~~reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This rule expresses that policy, but is not intended to be enforced through disciplinary process.~~

~~The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.~~

~~The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.~~

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 30 hours or 3 cases of pro bono legal services per year, and/or to make a financial contribution to a legal services agency that provides free legal services to the poor or to traditionally underrepresented groups each year. The recommended minimum contribution level is $300 per attorney per year for all attorneys and $500 per year for those lawyers whose income allows a higher contribution. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 30 hours (or 3 cases) of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition to providing pro bono services, a lawyer should voluntarily contribute financial support to organizations that provide free legal services to persons of limited means.

The responsibilities set forth above are voluntary and shall not be enforced through disciplinary process or any other means.

Comment:

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as postconviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and governmental offices or agencies that provide direct services to persons of limited means.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public

sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be a minimum of $300 per lawyer, per year or $500 for those lawyers whose income allows. While law practice economies vary throughout Michigan, nonetheless, there are a considerable number of lawyers in large law firms or other successful practices for whom an annual contribution greater than $300 is warranted. A donation can be made to the Access to Justice (ATJ) Fund administered by the Michigan State Bar Foundation. In addition, it is acceptable for firms to satisfy the pro bono responsibility collectively, as by a firm's aggregate donations or pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Where possible every lawyer should financially support such programs in addition to providing direct pro bono services whenever such service is feasible. The ATJ Fund raises funds for the provision of legal services to the poor in all areas of the state. The ATJ Fund also supports the work of a number of statewide, regional, and local legal services programs. This rule recognizes a financial donation to the ATJ Fund as one method of satisfying a lawyer's

pro bono responsibilities. The State Bar of Michigan and the Michigan State Bar Foundation will annually publish a list of programs eligible to receive attorney financial pro bono donations.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule.

Staff Comment: Alternative A is the current version of MRPC 6.1 with the addition of proposed language that would clarify that lawyers would not be subject to disciplinary action or any other process to enforce their responsibility to provide pro bono services. Alternative B, modified slightly by the Court for publication, was submitted by the State Bar of Michigan's Representative Assembly, and is based largely on the American Bar Association's Model Rule of Professional Conduct 6.1. The proposed amendments would clarify that each lawyer has a responsibility to provide pro bono legal services, and would establish in the Michigan Rules of Professional Conduct an aspirational goal for a lawyer to donate 30 hours or handle 3 cases per year, and/or make a financial donation of $300 or $500 per year. The requirements are similar to the existing standard adopted by the SBM's representative assembly in 1990, which recommends Michigan lawyers provide civil legal services to three clients, provide 30 hours of service, or contribute $300 to programs providing civil legal services to the poor. The proposal would create a professional responsibility for lawyers that would require them to provide legal services to those of limited means, but would state in the rule that the responsibility to do so is voluntary and not intended to be enforced through a disciplinary process or by any other means.

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

A copy of this order will be given to the Secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by December 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, J. The proposed amendment of MRPC 6.1 is unnecessary. The current rule properly encourages public service as an aspirational goal for all members of the profession. Moreover, I would eliminate the current Staff Comment that focuses unnecessarily on ABA "policy" goals, in favor of a general statement that broadly encourages lawyers to provide pro bono legal services to their communities as an integral component of the concept of "professionalism."

One of the more disturbing aspects of the state bar proposal (Alternative B) is its enumeration of particular categories of groups that it considers worthy of attorneys' support. To the extent that the state bar exhorts its members to contribute specific amounts of time and/or money to particular causes, its proposal runs the risk of politicizing the concept of pro bono service and enshrining such politicization into the Rules of Professional Conduct. Justice MARKMAN aptly notes alternative charitable groups worthy of lawyers' time and contributions. It is unnecessary—and

potentially divisive—to enshrine into the Rules of Professional Conduct specific types of groups "worthy" of pro bono service and financial support, at the expense of other groups no less worthy. There are better ways of encouraging pro bono service than Alternative B.

Indeed, I question the need to encourage pro bono service beyond the provision that already exists in our Rules of Professional Conduct. There are many avenues for the bench and bar to encourage members of the profession to engage in *voluntary* service than in prolix and controversial amendments to the Rules of Professional Conduct.

The fact that members of this Court felt obligated to add a disclaimer to the state bar proposal to make clear that the rule remains only aspirational is a clue that the rule seems overly prescriptive as well as conscriptive. I support retaining the present aspirational language as it stands.

CORRIGAN, J., concurs with YOUNG, J.

MARKMAN, J. I oppose the State Bar of Michigan's pro bono proposal (Alternative B) because it would: (a) narrow the definition of pro bono public service; (b) render this concept increasingly ideological and political; and (c) thus undermine the consensus that has always existed on this Court, and within the legal profession, in support of pro bono public service. There is no reason why this Court should be divided, as it now is, over the encouragement of pro bono public service within our rules of professional conduct.

Rule 6.1 of the Michigan Rules of Professional Conduct currently provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means, or to public service or charitable groups or organizations. A lawyer may also discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The state bar now recommends modifying this rule to provide that "every lawyer" has a responsibility to provide pro bono services to "persons of limited means;" and that a "substantial majority" of a lawyer's pro bono service must go to "persons of limited means" or to charitable, religious, civic, community, governmental, and educational organizations that are "designed primarily to address the needs of persons of limited means." Additional pro bono services may be provided to "groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations," but only where such services are "in furtherance of their organizational purposes" and "where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate." Comments to the state bar proposal further specify that work on "First

Amendment claims, Title VII claims and environmental protection claims," and "death penalty appeal" cases, would satisfy the new rule.

Thus, the state bar's proposed rule and comments single out for special attention *certain* classes of organizations, it makes explicit reference only to *certain* pro bono activities, and it refocuses the concept of pro bono public service to encompass principally *certain* categories of beneficiaries. If, for example, this Court is going to specifically identify as qualifying pro bono service, lawyer efforts on "death penalty appeals," and in support of "civil liberties" causes, then we should also specifically identify as qualifying pro bono service, lawyer efforts on behalf of victim's rights causes, veteran's organizations, and police benevolent groups. If we are going to specifically identify as qualifying pro bono service, lawyer efforts on behalf of "public rights" groups and "civil rights" organizations, then we should also specifically identify as qualifying pro bono service, lawyer efforts on behalf of "scouting groups," "service clubs," "hospices," and "rescue missions." If we are going to define as qualifying pro bono service, lawyer efforts on behalf of "First Amendment claims," "civil rights laws," and "environmental protection," then we should also specifically define as qualifying pro bono service, lawyer efforts on behalf of "Second Amendment claims," "property rights laws," "religious liberty," "election fraud," and the scope of the "Commerce Clause." And if we are going to explicitly and repetitively focus upon lawyer efforts on behalf of "persons of limited means" as qualifying pro bono service, then we should also explicitly and repetitively focus upon lawyer efforts on behalf of "persons who are handicapped," "persons who are elderly or infirm," "persons who are mentally impaired," "persons who are the victims of child and domestic abuse," and "persons who suffer from diseases and disasters." Lawyer efforts on behalf of each of these additional forms of public service fairly qualify as pro bono service, and should not be relegated to a lesser position in the rules of professional conduct.

It is not so much what is *included* in the state bar's proposal that is objectionable, as it is what is *not* included. It is not so much what is *singled out* in their proposal that is objectionable, as it is the fact that *no* cause should be singled out. In a free society, in which most charitable works are carried out by nongovernmental organizations, in which there is a vital private sector that helps to sustain the needs of neighborhoods and communities, and in which millions of men and women gather each week at meetings of the Rotary Club, the Optimists, the Lion's Club, the Elks, the Kiwanis Club, the American Legion, the Knights of Columbus, and countless other organizations that perform good works, I strongly oppose the idea of singling out just a few of these that might be preferred by the leadership of the state bar. This misguided attempt at a specific definition altogether fails to reflect the full range, and the genuine diversity, of the charitable and public service interests of the nearly 40,000 lawyers of this state.

I am also uncertain as to what the state bar intends by its new language redefining qualifying pro bono service to encompass lawyer efforts on behalf of "governmental organizations" and "public rights." If by this language, the state bar intends to make clear that legal aid

organizations fall within their new rule, that is one thing, although such activities are already well covered under the present rule. If, on the other hand, the state bar intends that any lawyer efforts on behalf of any governmental agency constitutes qualifying pro bono service, then I am concerned that the concept of charitable and pro bono service may be in the process of subtle redefinition. Is lobbying a qualifying pro bono service where it is conducted on behalf of "public rights" asserted in proposed federal or state bills? Is assisting a public agency to carry out regulatory, investigative, or enforcement functions invariably a pro bono service? Is there anything at all carried out by any government agency that does not involve "public rights," or that does not constitute qualifying pro bono service? Is a lawyer who assists the EPA in identifying endangered species on private property upholding a "public interest," and thereby performing pro bono service, whereas a lawyer who assists the property owner in defending his land-use rights serving merely a "private interest," and thereby not performing pro bono service?

There is no need to transform the focus of Michigan's pro bono rules in the manner proposed by Alternative B, and the state bar has offered no justification for its proposal. There is no need to alter the current rule that recognizes, and respects, that pro bono service on behalf of terminally-ill children, Alzheimer sufferers, drug education, AIDS prevention, alcohol rehabilitation and MADD, culture and the arts, tree planting, literacy assistance, 4-H clubs, nature centers, runaway teenagers, orphans and foster children, the blind and the deaf, animal rights, neighborhood watch activities, mental health, pregnancy services and abstinence counseling, religious charities, the Special Olympics and Habitat for Humanity—to name a few—can be just as critical to the well-being of a community as the specific pro bono activities now elevated in the state bar's proposal to first-among-equals status. The state bar's proposal is unfortunate and shortsighted in creating controversy and divisiveness in a realm in which there should be none, and in which thus far there has been none.

I strongly support Alternative A, which reflects the status quo in this state concerning pro bono public service on the part of the bar, and which would maintain the consensus in support of such service that currently exists on this Court and within the profession. For the reasons stated, I equally strongly oppose Alternative B.

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

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LIBEL AND SLANDER

ACTUAL MALICE

1. The failure to investigate the accuracy of a communication before publishing it, even when a reasonably prudent person might have done so, is not sufficient to establish actual malice, but a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of a publication is. *Smith v Anonymous Joint Enterprise*, 487 Mich 102.
2. When a defendant has reported a third party's allegations, actual malice may be found if there were obvious reasons to doubt the veracity of the informant or the accuracy of the allegations. *Smith v Anonymous Joint Enterprise*, 487 Mich 102.

PUBLIC OFFICIALS

3. A public official may only prevail in a defamation action by establishing by clear and convincing proof that the allegedly defamatory statement was made with actual malice, which exists when a defendant published a statement knowing it to be false or with reckless disregard of whether it was false. *Smith v Anonymous Joint Enterprise*, 487 Mich 102.

STANDARD OF PROOF

4. To establish that a defendant published a statement with reckless disregard for its truth, a plaintiff must present sufficient evidence, circumstantial or otherwise, to justify a conclusion that the defendant did so with a high degree of awareness of the publication's probable falsity or that the defendant entertained serious doubts regarding the publication's truth. *Smith v Anonymous Joint Enterprise*, 487 Mich 102.

STATEMENTS OF OPINION

4. Statements of opinion are not automatically shielded from actions for defamation. *Smith v Anonymous Joint Enterprise*, 487 Mich 102.

occurred before the date Karaczewski was decided, as long as the claim has not already reached final resolution in the court system (MCL 418.845). *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455.