Judge Helene N. White
Detroit, Michigan 48202

May 20, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Specter, Senator Hatch, Senator Grassley, Senator Kyl, Senator Sessions, Senator Brownback, and Senator Coburn.

Sincerely,

Helene N. White

cc:
The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Sam Brownback

1. **Do you believe there is a right to privacy in the U.S. Constitution? Where is it located? From what does it derive?**

   Response: Although not explicitly mention in the United States Constitution, various cases of the Supreme Court of the United States have recognized a right to privacy in the U.S. Constitution. Opinions have pointed to the Ninth, First, Third, Fourth and Fifth Amendments, and the Due Process Clause of the Fourteenth Amendment as foundations for this right. If confirmed, I would follow the decisions of the Supreme Court of the United States in any case involving the assertion of a constitutional right to privacy.

2. **What philosophical approach would you bring to bear on a case of first impression – in which there are no relevant precedents?**

   Response: If presented with a case of first impression, in which there are no relevant precedents, I would look to precedent that might be informative, although not directly on point. I would also look to see whether courts in other jurisdictions have considered the issue. If the issue concerns a statute, I would look to the plain language of the statute to determine the Legislature's intent. If no legislation is involved, and there are different possible resolutions to the case, I would seek to determine which resolution is most consistent with existing case law.

3. **Please name the current Supreme Court Justice whose approach to judging you believe is most similar to your own, and explain in detail the reasons for your answer.**

   Response: Two years ago, I would have found this question an easy one and identified Justice Sandra Day O'Connor as the justice whose approach to judging appeared most similar to my own, given her fact-specific and narrow approach to decision-making. I am certain that were a law professor to describe each current Supreme Court Justice and his or her approach to judging, I would say that aspects of each Justice's approach are most similar to my own, and that aspects of each Justice's approach differ from my own. With this caveat, I would say that Justice Kennedy's approach is most similar to mine in that he places great importance on stare decisis. Further, he often sees the merits of both sides of an issue, and has described himself as engaging in extensive study, reflection and deliberation before actually deciding a case.

4. **Judges in both federal and state courts have come under increasing criticism in recent years for overstepping their role as interpreters of the law, and for instead engaging in judicial activism. How would you define "judicial activism"? What assurances can you give the Committee that, if confirmed, you will not engage in improper "activist" judging?**

Response: Judicial activism can take a number of forms. The gravamen of the criticism is that the practice usurps the powers of other branches of government. The role of the judiciary is to decide individual cases representing concrete disputes between litigants. Judges should not view individual cases as opportunities or vehicles for solving perceived societal problems, for making sweeping declarations regarding a body of law, for imposing new duties or declaring new rights, for fixing perceived deficiencies in other branches of government, or for expanding the scope of statutes beyond their terms. Each of the foregoing activities is an example of judicial activism.

I have always been most comfortable deciding cases narrowly, focusing on the dispute presented by the case before me. If confirmed, I would continue to approach my role as a judge in this manner. I would be mindful of the separation of powers and the proper authority of the states and state courts. Because the judiciary is essentially self-regulating in the exercise of judicial power and the enforcement of constitutional limitations on that power, the Supreme Court has developed justiciability doctrines to safeguard the separation of powers and assure that the judiciary exercises, appropriately, only the jurisdiction granted to it. Federal judges at every level have an obligation to apply and enforce these doctrines. Similarly, the Constitution contemplates a division of power and authority between the federal government and the states. Furthermore, the states have a role in honoring and enforcing the Constitution. Thus, abstention doctrines play a crucial role in the decision of cases involving state issues or proceedings.

When a federal court does entertain the merits of a case involving another branch of government, the court must be mindful that it has no authority to substitute its own notion of good policy. If confirmed, I would steadfastly observe all doctrines intended to curb judicial activism, and be ever mindful of my proper role as judge.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Tom Coburn

1. **You were nominated by President Clinton on January 7, 1997. While your nomination was pending, you gave $2,000 to Senator Levin's brother, Sander Levin, for his congressional campaign ($1000 on 5/5/98 and $1000 on 8/27/98). You also gave $1000 to Al Gore for his presidential campaign on June 30, 1999. Your then-husband, Charles Levin, gave $300 to Senator Levin on 7/9/99 and $500 to Senator Levin on 6/8/00. You were renominated on January 3, 2001, by President Clinton, but the Senate failed to act on your nomination.**

   Canon 7 of the Code of Conduct for United States Judges states "A judge should not: "make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions." And, Canon 2A of the Code of Conduct for United States Judges states: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny."

   As a state appellate court judge, these federal rules did not apply to you; however, do you feel these contributions by you and your husband were appropriate once your nomination was pending before the Senate?

   a) **Why or why not?**

   Response: Michigan's Code of Judicial Conduct does not prohibit these contributions. Because of the restrictions on a judge's public political activities, I have availed myself, over the years, of this permissible, private avenue of participation in our country's election process, as has my ex-husband. Congressman Sander Levin faced a particularly difficult race in 1998, hence the size of my contribution to his campaign. I did not believe that my contributions to Congressman Levin's or Al Gore's campaigns, or my then-husband's contributions to Senator Levin's campaign, would have any impact on my nomination. Because the Michigan Code of Judicial Conduct does not prohibit these contributions, and the contributions were consistent with our past practices, I did not think they were inappropriate.

   b) **Do you believe there was at least an appearance of impropriety?**

   Response: Respectfully, I do not. However, if confirmed, I will steadfastly adhere to all provisions the Code of Conduct for United States Judges.

   c) **On June 26, 2007, you contributed $2,300 – the maximum amount an individual may give to a candidate – to Senator Hillary Clinton. Four days later, on June 30, 2007, you gave the same amount to Barak Obama. Has anyone discussed with you the possibility of you being nominated to a federal**

judicial position under a subsequent administration, if your nomination is not confirmed during the 110th Congress?

Response: No one has discussed with me the possibility of my being nominated to a federal judicial position under a subsequent administration.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Charles E. Grassley

1. **As a judge on a state court, you are often called on to construe statutes. Can you please tell us your views on statutory construction? What do you look to for guidance in interpreting statutes?**

   Response: I first look to the plain language of the statute, giving the words their plain and ordinary meanings. If the language of the specific statutory provision is not clear, I look to the statute as a whole to see if the Legislature's intent is manifested in the remainder of the statute. If it is still not clear, I look to statutes *in para materia.* I apply established rules of statutory construction, such as the presumption that every word has some meaning, and avoid any construction that would render a part of the statute surplusage or nugatory. The paramount task in construing statutes is to discern the Legislature's intent. The rules of statutory construction are simply aids to determine that intent. If necessary, I look to legislative history, but I am mindful of the limits of legislative history as a tool to discern legislative intent.

2. **In the confirmation hearings for Chief Justice Roberts and Justice Alito, there was extensive discussion about the amount to which judges are bound by stare decisis. What is your opinion as to how strongly judges should be guided by the doctrine of stare decisis?**

   Response: Stare decisis, the rule that prior court decisions are recognized as precedent to be followed and not disturbed, is at the bedrock of our judicial system. When applied to decisions of a higher court, the rule is absolute. When applied to decisions of the same court, the doctrine, while not absolute, is presumptive. Where the doctrine is presumptive, courts should follow the doctrine, except where the analysis set forth by the Supreme Court of the United States in *Agostini v Felton*, 521 US 203 (1997), and other cases, leads to the conclusion that the prior decision should be overruled.

3. **Judges in both federal and state courts have come under criticism for engaging in "judicial activism." How would you define "judicial activism?" What assurances can you give the Committee that, if confirmed, you will not engage in judicial activism?**

   Response: Judicial activism can take a number of forms. The gravamen of the criticism is that the practice usurps the powers of other branches of government. The role of the judiciary is to decide individual cases representing concrete disputes between litigants. Judges should not view individual cases as opportunities or vehicles for solving perceived societal problems, for making sweeping declarations regarding a body of law, for imposing new duties or declaring new rights, for fixing perceived deficiencies in other branches of government, or for expanding the scope of statutes beyond their terms. Each of the foregoing activities is an example of judicial activism.

I have always been most comfortable deciding cases narrowly, focusing on the dispute presented by the case before me. If confirmed, I would continue to approach my role as a judge in this manner. I would be mindful of the separation of powers and the proper authority of the states and state courts. Because the judiciary is essentially self-regulating in the exercise of judicial power and the enforcement of constitutional limitations on that power, the Supreme Court has developed justiciability doctrines to safeguard the separation of powers and assure that the judiciary exercises, appropriately, only the jurisdiction granted to it. Federal judges at every level have an obligation to apply and enforce these doctrines. Similarly, the Constitution contemplates a division of power and authority between the federal government and the states. Furthermore, the states have a role in honoring and enforcing the Constitution. Thus, abstention doctrines play a crucial role in the decision of cases involving state issues or proceedings.

When a federal court does entertain the merits of a case involving another branch of government, the court must be mindful that it has no authority to substitute its own notion of good policy. If confirmed, I would steadfastly observe all doctrines intended to curb judicial activism, and be ever mindful of my proper role as judge.

4. **Given your service on the bench, you no doubt have some insights about the role judges play in society. Will you please share your thoughts with us about the role of the judiciary?**

   Response: The Legislature makes the laws and the Executive branch enforces the laws. When individuals or entities, or individuals and entities and the government, have disagreements concerning the application of the laws, they turn to the Judiciary. The primacy of the rule of law as a system of rules governing society, and the willingness of citizens to be bound by the rule of law, rests on the Judiciary's ability to fairly, promptly and transparently adjudicate these disputes. Citizens expect members of the other branches of government to have particular views and take particular positions, and they vote for them accordingly. However, they expect, rightly, that judges will be blind to all considerations other than those legally relevant to the issues before the court, will treat every litigant the same, and will decide each individual case on the facts presented, without regard to generalities. They also expect that judges will confine themselves to deciding individual cases, and will not usurp the role of other branches of government. Over the years, I have observed that the Michigan judiciary has been its strongest, and has been held in the highest esteem by citizens, during those periods in which it has been most removed from political considerations and controversies.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Orrin G. Hatch

1. **In your answer to question 15e on your Senate questionnaire you state that you "wrote a significant number of concurrences and dissents," yet at your hearing you stated that in 95% of your cases, there was unanimity. Can you explain this apparent inconsistency?**

   Response: I do believe that there is unanimity in 95% of our cases. The number of separate opinions I have written over the years is significant in numbers, as reflecting additional work, but not in percentages, as compared to the total number of cases in which I have sat (upwards of 4500).

   a. **Do you believe that courts should strive to achieve unanimity in their opinions?**

      Response: I believe unanimity is desirable, and I am always willing to make and accept suggestions toward that end. I tend to write narrowly in part to achieve consensus. When I concur it is generally because I find the lead opinion too broad, or because I cannot agree with the reasoning.

   b. **Isn't it true that divided opinions, especially concurrences, fail to promote clarity in the law?**

      Response: I believe this is especially true of opinions of the state supreme courts and the Supreme Court of the United States, or en banc opinions of the courts of appeal, where multiple opinions can lead to no majority opinion and an inability to discern a clear rule of law. It is less true in cases where there is a three-judge panel and a majority decision. As a trial judge, I often lamented the lack of clarity resulting from divided opinions, but I also lamented the breadth of other decisions, in which the panel clearly had not contemplated the implications of their broad statements. There is tension between the need for clarity in the law and the need to apply the law on a case-by-case basis, with the benefit of advocacy. I have tried to be mindful of both.

2. **What is your view on the proper balance of power and separation of powers in our federal system under the Constitution?**

   Response: The concepts of separation and balance of powers are at the bedrock of our federal system under the Constitution. Each of the three branches of government, Congress, the Executive and the Judiciary, must recognize the limits of its own power, and respect the authority of the other co-equal branches. At the same time, however, each must recognize its constitutional responsibility to check abuse of power by another branch. Similarly, in our federal system under the Constitution, certain matters are left to the states. These limits must be observed as well.

3. **Judge White, today you are bound as a state appeals court judge to follow the precedents of the Michigan Supreme Court. If confirmed to the Sixth Circuit, you will similarly be bound by the precedents of the United States Supreme Court. You have been active in organizations that take public and strong positions on political and legal issues which regularly come before the federal courts. You have been, for example, a life member of the NAACP for many years. The NAACP recently condemned in very strong language the Supreme Court's 6-3 decision upholding Indiana's voter identification requirement. The NAACP called the Supreme Court's decision "akin to voter suppression." Do you agree with this characterization of the Supreme Court's decision in *Crawford v. Marion County Election Board*? How will you maintain your impartiality and fairly apply precedents such as this one with such strong positions taken on these issues and decisions coming from organizations to which you are also sincerely committed?**

Response: I became a life member of the NAACP long ago because the organization represents a commitment to racial justice. Over the years, various organizations to which I have belonged or have contributed have taken positions on individual issues with which I may not agree, or regarding which I have no opinion. I have never regarded their positions on legal issues, if any, as being at all relevant to my decision-making process. If confirmed to the Sixth Circuit, I would adhere to the Code of Conduct for United States Judges regarding membership in organizations that take positions on issues that might come before the court. I have not read the full text of the *Crawford* opinions, but, if confirmed to the Sixth Circuit, I would apply the *Crawford* decision. I believe that my record demonstrates my ability to fairly and impartially apply precedent on any issue.

4. **Judge White, you served as a trial court judge before joining the Michigan Court of Appeals. The role of a trial court is very different than the role of an appellate court. Could you please describe what you see as the difference in their respective roles and how what we call the *standard of review* limits what appellate judges do?**

Response: Trial judges sit on the front lines and may make hundreds of decisions in a single case. Some of these are discretionary calls, and some involve issues of fact or law. Appellate judges have the luxury of being presented with clearly defined legal issues and having the time for reflection. The Michigan Court of Appeals affirms discretionary decisions of the trial court unless the decision amounts to an abuse of discretion. Legal decisions are reviewed de novo, but even if there is error, the court will not reverse unless the error was outcome determinative and substantial rights were affected. Lastly, all findings of fact are affirmed unless clearly erroneous. For these reasons, most cases before the court result in affirmance of the trial court's ultimate orders, and rightly so.

5. **Judge White, it is critical to the credibility and legitimacy of our judicial system that the American people believe judges make decisions based on the law. And by the law, I mean the law as enacted by the people and their elected representatives. If the *rule of law* means anything, it means that judges must follow the law even if they personally disagree with it, the result the law requires in individual cases, or the**

political cause or agenda furthered by a particular outcome. Otherwise, it is the rule of judges. Do you agree with that? Please explain your agreement or disagreement.

Response: I agree with these statements wholeheartedly. Judges must apply the law as the Legislature enacts it, without tailoring it to the judge's personal views of good policy and without regard to whether the judge likes the result. Judges should be prepared to have no constituency except the law. I have always put my personal views and reactions aside and focused only on the law as it is. I have also been prepared to be criticized by either side of any issue.

a. **Do you believe that judges, especially appellate judges, may decide cases based on their personal views, their personal sense of justice, their personal empathy, or their personal experience?**

   Response: No, I do not. I believe that judges, especially appellate judges, must decide cases based on the law.

6. **In my years in the Senate and on this committee, I have seen many state court judges nominated and appointed to the federal bench. These are sometimes judges who come from a common law system, in which judges develop the law, and they therefore have a common law perspective. In your hearing, you acknowledged that in a common law system such as where you currently serve, the Michigan supreme court "makes the law." But you have been nominated to be a judge in a written law system in which the people make or amend the Constitution or their elected representatives enact statutes. In this system, judges must have a different kind of focus and be more restrained. I think it is inappropriate for judges to approach interpretation and application of written law from a common law perspective. What do you think of this difference and how will you make the transition in perspective and approach should you move from the state appellate bench to the federal appellate bench?**

   Response: I agree that it is inappropriate for federal judges to approach interpretation and application of written law from the perspective of making the law, rather than interpreting it. If confirmed to the Sixth Circuit, I would be bound not only by precedent concerning substantive law, but also by precedent guiding lower courts as to their proper role in deciding cases.

7. **In *Marbury v. Madison*, the Supreme Court acknowledged that the Constitution is "a rule for the government of courts, as well as of the legislature." The judicial branch is as much a part of the government subject to the Constitution as is the legislative or the executive branch. The Constitution, however, cannot control government, including the judiciary, if government controls the Constitution. Since the operative substance of the Constitution – what the Constitution actually is – lies in the meaning of its words, the Constitution cannot control judges if judges can change its meaning. If they can change the Constitution by changing its meaning, their oath to support and defend the Constitution becomes an oath to support and**

defend themselves. The nature of the Constitution as a written document that belongs to the people and its function as a limitation on government necessarily means that judges must be bound not only by the Constitution's words but, more importantly, the meaning of those words as established by the people. Please explain your agreement or disagreement with these principles and how you believe they relate to the proper role of a federal appellate judge in our system of government.

Response: The Constitution both grants, and sets limits on, the powers of government. The legitimacy of our institutions of government rests on their adherence to the rules set forth in the Constitution. Although it is bound by the Constitution, the federal judiciary has the power to declare the meaning of that document. Because of the possibility of abuse by altering the meaning of the Constitution to remove or dilute the inherent limits on the power of the federal courts, federal appellate judges must be ever-mindful of their obligation to be true to the Constitution.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator John Kyl

1. **You are a member of the NAACP. In fact, you have been a life member for over 20 years. The NAACP recently released a press statement calling the Supreme Court's decision on voter ID in *Crawford v. Marion County Election Board* "akin to voter suppression." Do you agree with that statement?**

   Response: I became a life member of the NAACP long ago because the organization represents a commitment to racial justice. Over the years, various organizations to which I have belonged or have contributed have taken positions on individual issues with which I may not agree, or regarding which I have no opinion. I have never regarded their positions on legal issues, if any, as being at all relevant to my decision-making process. I have not read the full text of the *Crawford* opinions, but, if confirmed to the Sixth Circuit, I would apply the *Crawford* decision.

   a. **If you are confirmed, you will be required to apply that precedent to cases that come before you. What assurances can you give us that you will fairly apply the *Crawford* decision?**

      Response: If confirmed, my oath of office, my life-long commitment to the judiciary, and my understanding of the role of a Sixth Circuit judge, would assure that I will apply the *Crawford* decision, and all decisions of the Supreme Court of the United States, fully and without reservation.

2. **The NAACP has filed amicus briefs supporting school districts that use race as a factor in admissions. Last term, the U.S. Supreme Court heard two cases involving the use of race as a factor in assigning students to public schools. The NAACP filed amicus briefs in these cases, supporting the use of race in school assignments. The Supreme Court, however, in a joint opinion Parents Involved in Community Schools v. Seattle School District No. 1, ruled that these programs violated the Fourteenth Amendment. Following these decisions, the NAACP called the opinions disappointing. Do you agree with the Supreme Court's holding in this case?**

   Response: I do not follow the NAACP's amicus participation, nor do I follow its comments on the Supreme Court's decisions. I have not carefully studied the Supreme Court's opinion, but it appears to be based on the application of precedent to the specific facts of the case. Moreover, if confirmed to the Sixth Circuit, I would apply the Supreme Court's decision.

   a. **Do you believe a racial classification is always and intrinsically bad, or is a racial classification only harmful when used to subordinate or stigmatize a group?**

Response: Under the precedents of the Supreme Court of the United States on racial classification, racial classifications, regardless of the motivation in employing them, are subject to "strict scrutiny." They must be directed toward a "compelling government interest" and must be "narrowly tailored" to that interest.

b. **If you were confirmed, would you be able to fairly apply the Supreme Court's rulings on affirmative action, including its opinion in *Gratz v. Bollinger*, despite your membership in the NAACP?**

Response: If confirmed, I would fairly apply all of the Supreme Court's rulings on affirmative action, including its opinion in *Gratz v Bollinger*, in any case presenting an affirmative action issue.

3. **Last year, the NAACP actively opposed the nomination of Judge Leslie Southwick to the Fifth Circuit Court of Appeals. In an "action alert" the NAACP called Judge Southwick an "extremist judicial nominee" and called his record as a judge "abysmal" on civil rights. This characterization, however, was based on just one case, a case that Judge Southwick did not even author.**

a. **Do you agree with this characterization of Judge Southwick?**

Response: I am unfamiliar with Judge Southwick's record, but tend to be skeptical of any group's characterization of a judge.

4. **The NAACP also opposed the nomination of Judge Michael Mukasey as attorney general. Did you agree with the NAACP's opposition to Judge Mukasey's confirmation?**

Response: I did not follow the NAACP's position on Judge Mukasey, was unaware that it opposed his confirmation, and have no knowledge regarding why it took that position.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Jeff Sessions

1. **The Sixth Circuit has one of the highest adjusted weighted filings per judgeship – 665. If confirmed, what would you do to lower this number?**

   Response: The high number of filings per judgeship is determined by factors that are not within the control of the court or the judges. Nevertheless, because it is a reality that affects the court, the judges, and the litigants, judges must be prepared to deal with it. I presently sit on a court with a high number of filings per judgeship. We strive to achieve a clearance rate (the ratio of total dispositions to new cases filed during a given time period) of 100% or greater, so that a backlog of pending cases does not accumulate. We also strive to achieve high disposition rates (the percentage of the cases decided that were decided within a set period of time), so that cases are decided within an acceptable period of time. If confirmed, I would work with the other members of the Sixth Circuit to achieve high clearance and disposition rates.

   a. **How you would manage your cases if confirmed?**

      Response: If confirmed, I would expect to bring to the Sixth Circuit many of the docket management skills and approaches I have developed over the last fifteen years on the Michigan Court of Appeals. These include an immediate evaluation of all cases assigned to me upon receipt of the docket sheet for the month. Through this initial evaluation, I am able to determine which cases will require a substantial amount of legal research, which will require a painstaking review of a voluminous lower court record, which may involve both, which are appropriate for assignment to a law clerk, and which may require no law clerk involvement. After this "triage," I generally spend several days attacking the cases that appear more straightforward. In this way, I am able to do 90% of the work that will be required on these cases before the cases are argued. These cases can then be decided promptly after argument. While I would anticipate that the percentage of cases falling into this category would be lower on the Sixth Circuit than in the Michigan Court of Appeals, I would expect to manage these cases in a similar fashion. I would also conduct a preliminary review of the more difficult cases and assign them to law clerks, with a view to my being completely familiar with the difficult legal issues at argument so that I can clarify issues with counsel, and discuss the cases with my colleagues on the panel. I would constantly be balancing the need to complete work on cases that have already been submitted with the need to be ready to hear, and promptly decide, new cases.

   b. **How will you handle the transition from the state to the federal system?**

      Response: If confirmed, I would expect to first identify the differences between docket management in the Michigan Court of Appeals and the Sixth Circuit. I would also speak with sitting Sixth Circuit judges to determine the various approaches employed by the different judges. I would synthesize this information, and also draw on my own experience, and develop procedures and approaches that fit with the Sixth Circuit's practices and objectives.

c. **If confirmed, what do you believe would be your biggest challenge in transitioning to the federal bench?**

Response: If confirmed, I anticipate that the biggest challenges in making the transition would be in getting adjusted to the unique culture of the Sixth Circuit, which I expect exists just as it is present in any institution, and in becoming familiar with subject matter I have not previously encountered.

d. **How will you address the challenge?**

Response: I would ask colleagues who recently made the transition what they found particularly helpful. I would ask questions regarding internal practices, and be attentive to the need to adjust my practices as a judge to the new environment of the Sixth Circuit. I would work especially hard in cases presenting new subject matter.

2. **Judge White, you have been a state court judge since 1981, serving on both the trial and appellate bench.**

a. **Can you please tell us about your case management system?**

Response: As a Common Pleas/36th District Court judge, I received a daily assignment of cases depending upon what division I was sitting in. I handled those cases promptly, and if a case had to return for further proceedings, I worked it into a future day's docket, while still handling a full day's docket on the return date.

In the Wayne Circuit Court, I helped manage the court's transition from a central docket system to an individual docket system, and assisted other judges in making the transition and managing their dockets. I developed forms that made it easier to keep track of my cases, and made it possible for attorneys to obtain a scheduling order without having to wait in court for long periods of time. I reviewed the monthly printout of my cases to confirm that an event was scheduled in each case, and that no case lingered. I scheduled cases for trial and conferences with an eye to always having enough cases to provide for a full day's work, but without unduly imposing on lawyers and litigants by excessive overscheduling.

In the Michigan Court of Appeals, I review each month's cases as soon as I receive them to determine how much and what type of work they will require. I then take a few days to do the bulk of the work in whatever cases appear to be straightforward. I then return to my work on the more difficult cases from prior months, giving priority to my review of, and any responses to, opinions circulated by colleagues. I use MAPPIS (Michigan Appellate Information System) to keep track of the undecided cases assigned to me, and the cases assigned to others in which an opinion has been circulated.

b. **Have you ever thought that you had problems managing your cases or issuing your opinions in a timely fashion?**

Response: In my early years on the Michigan Court of Appeals, I came to realize that I needed to review my pending cases regularly, (this was before we had MAPPIS), respond to colleagues' opinions more quickly, and spend less time writing and editing my opinions in routine, fact-specific cases.

c. **Has anyone ever told you that you had problems managing your cases or issuing your opinions in a timely fashion?**

Response: In my early years on the Michigan Court of Appeals, the chief judge told me that it was the court's practice to respond to colleagues' opinions within a short time period, and that I needed to spend less time on each case.

d. **Can you provide the Committee with your caseload statistics as compared to other judges with whom you have served (for example median time intervals between case filing and date of disposition, etc)?**

Response: I am not aware that the Michigan Court of Appeals keeps statistics regarding the median time intervals between case filing and date of disposition for individual judges. The opinion status summary sheet for May 12, 2008 shows that I have 4 cases pending before me that were circulated by other judges. The status summary sheet shows that the other judges on the court have between 0 and 13 cases in this category. The report also shows that I have 5 pending cases assigned to me to author in which I have not yet circulated an opinion. The other judges on the court have between 0 and 19 cases in this category.

3. **What is the proper role, in your view, of foreign law in U.S. Supreme Court and Circuit Court decisions, and when, if ever, is citation to or reliance on these foreign laws appropriate?**

Response: Foreign law is appropriately considered in interpreting international law or treaties.

Responses of Helene N. White
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Arlen Specter

1. **Question 13a of the Senate Questionnaire asked you to "supply four (4) copies of all published materials to the Committee." You list two published pieces; however, you did not provide the Committee with either. Please explain why these materials were not provided.**

   Response: The first piece, "Towards Excellence in Case Flow Management," is out of print and I do not have any more copies. The second piece, Torts, Michigan Law and Practice, is a two-volume treatise on tort law in Michigan, published by the Michigan Institute for Continuing Legal Education. It was my understanding that because of my role as an editor, rather than an author, and because of the size of the work and the cost of purchasing the volumes, I could list that work rather than provide multiple copies with my responses to the Senate Questionnaire.

2. **Question 13d of the Senate questionnaire asked you to "supply four (4) copies, transcripts, or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. ... *If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter*." In response to this question on your questionnaire, you state that "[o]ver the years, I have participated as a member of various panel discussions at bench-bar, or state or local bar associations, conferences and meetings. None of these have been recorded or transcribed to my knowledge, and I have not retained any notes or outlines."**

   a. **Please submit for the record a list of the names and addresses of the groups involved in these panel discussions, conferences, and meetings, the dates of these events, and a summary of the subject matters.**

      Response: While a circuit court judge, I participated in a program of the Detroit Metropolitan Bar Association, 645 Griswold St., Ste 1356, Detroit, Michigan 48226, on the Michigan Court Rules. I do not remember the year. To the best of my recollection, the focus was on the rules regarding pre-trial practice.

      I recall participating in a panel regarding effective criminal advocacy. I do not recall the year, or the sponsoring organization. It was held in the Veterans Building in Detroit, Michigan.

      Several years ago, I participated in a panel at the Michigan State University College of Law, 368 Law College Building, East Lansing, Michigan 48824-1300, regarding judicial clerkships.

I have participated in panel discussions at meetings of the State Bar of Michigan, 306 Townsend St., Lansing, Michigan, 48933. I recall one was at the invitation of the Labor and Employment Law section. To the best of my recollection, the subject matter concerned handling employment cases on appeal, and it took place in the fall of 2006. I do not recall the subject matter of the other panels, or the years involved.

I have participated in panels at the various Michigan Appellate Bench/Bar conferences. In 2004, I participated in plenary panels on "Delay Reduction," and "Advocacy: A View From the Bench – What Works and What Doesn't," and in several smaller panels on motion practice, internal operating procedures of the court, civil practice, criminal practice, and family law. I participated in similar panels in other years in which the conference was held.

b. **Also, please explain why these materials were not provided previously in response to this question.**

Response: My answer to the question reflected my good-faith effort to provide the Committee with accurate information. I was concerned about providing information to the Committee that I could not verify through records where my recollection of the particulars is limited.

3. **Question 15d on the Senate Questionnaire asks for "a list of *and copies of* any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings." In response to question 15d, you provided copies of 23 opinions. However, in response to 15c, you list 9 opinions that were unpublished and reversed, but you did not provide copies of these opinions. Why did you not provide copies of these cases to the Committee? Please provide copies of these and any other unpublished opinions in which you participated that were reversed.**

Response: I did not include copies of the cases listed in response to question 15c because, unlike question 15d, the question did not ask for copies of the opinions referenced therein. However, the unpublished cases listed in the answer to question 15c should have been listed again in the answer to 15d. Five of these cases were included, and copies were provided. In reviewing my answers to questions 15c and 15d in order to prepare my responses to these supplemental questions, I discovered that eight of the unpublished opinions included in my response to 15c were not listed again in 15d. This was an oversight. I believe this occurred because the answers to question 15c and 15d were compiled separately. In answering 15c, I began with my answers to a prior Judiciary Committee Questionnaire that included the same question, and, with my law clerk's assistance, updated the list with cases decided after 1998, the last time the questionnaire was updated. In preparing the answer to question 15d, which did not have a parallel question in a prior questionnaire, I started from scratch, again with my law clerk's assistance, assembling a list of cases from the MAPPIS system, which does not include cases before July 1, 1996, and older cases in which we had retained hard copies of the decisions. I should also have referred to my answer to question 15c and included all unpublished cases listed in that answer.

I have now been able to secure copies of the opinions in these additional cases by asking the Court Clerks office to obtain the files from the central archive and make copies of the opinions.

In response to this supplemental question, I have also attempted to compile a list, and provide copies, of cases in which I participated, but did not write the opinion, that were reversed. However, this effort is hampered by the same limitations described elsewhere. The MAPPIS system does not include cases decided before July 1, 1996, and, more significantly, cannot list cases according to the assigned judge or whether subsequent action was taken by the Supreme Court. Hence, I cannot obtain a list of cases in which I participated that were reversed by the Supreme Court.

Even without the ability to use the case management software, my law clerk has compiled a partial list of cases in which I participated, but did not write the opinion, which were reversed. Copies of these opinions are attached. These are:

1. *Hartman v Port Huron Hospital,* unpublished opinion per curiam issued 9/6/07 (Docket No. 257536), reversed 480 Mich 1031 (2008).

2. *People v Goodman,* unpublished opinion per curiam issued 8/28/07 (Docket No. 269620), remanded to trial court for resentencing, in all other respects lv den 480 Mich 1052 (2008).

3. *Taylor v Yalamanchi,* unpublished opinion per curiam issued 1/18/07 (Docket No. 262763), reversed 480 Mich 980 (2007).

4. *People v Rosenberg,* unpublished opinion per curiam issued 11/21/06 (Docket No. 262673), reversed and remanded 477 Mich 1129 (2007).

5. *People v Greene,* unpublished opinion per curiam issued 11/12/06 (Docket No. 263126), reversed and remanded 477 Mich 1129 (2007).

6. *Helfner v Center Line Public Schools,* unpublished opinion per curiam issued 6/20/06 (Docket No. 265757), reversed and remanded 477 Mich 931 (2006).

7. *Ells v Eaton Cty Road Comm'n,* unpublished opinion per curiam issued 2/7/06 (Docket No. 264635), reversed 480 Mich 902 (2007).

8. *Price v Dep't of Transportation,* unpublished opinion per curiam issued 1/31/06 (Docket No. 257577), vacated and remanded 477 Mich 879 (2006), *Price v Dep't of Transportation (On Remand),* unpublished opinion per curiam issued 12/05/06 (Docket No. 257577, lv den 478 Mich 928 (2007).

9. *Morgan v Laroy*, unpublished opinion per curiam issued 4/14/05 (Docket No. 253789), reversed 474 Mich 917 (2005).

10. *Jackson v State Farm Mutual Auto Ins Co,* unpublished opinion per curiam issued 10/5/04 (Docket No. 246388), vacated 472 Mich 942 (2005).

11. *Griffith v State Farm Mutual Auto Ins Co,* unpublished opinion per curiam issued 8/16/02 (Docket No. 232517), reversed 472 Mich 521 (2005).

I have not included in this list cases in which I dissented and in which the Supreme Court reversed the Court of Appeals decision for the reasons stated in my dissent.

a. At your hearing, you said that the Michigan Court of Appeals rarely publishes opinions. Given that publication is rare, why did you not think it was important to provide the Committee with all of your unpublished opinions cases that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings?

Response: I made my best efforts to provide the committee with the information it requested. To respond to the questions, my staff printed cases off the court's computer system. Because older cases were not available on this system, my staff and I also searched our files for copies of the older cases, and located several, which were included with my answers to the Senate Questionnaire. In responding to these supplemental questions, I determined that additional opinions could be obtained through the Court's central archive. I requested that this be done and include additional opinions we have located that are responsive.

4. Question 15e of the Senate questionnaire asks for "a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored." Your answer on your questionnaire was nonresponsive. How many unpublished decisions have you participated in as a panel member and what percentage of the cases in which you have participated are unpublished.

Response: Because of the limitations of MAPPIS, I do not have the information necessary to answer this question precisely. I estimate that I have participated in upwards of 4500 cases, and that approximately 94% of the decisions in these cases are unpublished.

5. At you hearing you said that you were not familiar with and did not recall the factual scenario and your reasoning in the four cases I asked you about, *People v. Santiago*, *People v. Ryan*, *People v. Thomas*, and *People v. Hansford*. All of these cases were listed by you in your Senate Questionnaire, and a short summary of *People v. Ryan*, *People v. Thomas*, and *People v. Hansford*, written by you, appears in your answer to question 15(c) on the Senate Questionnaire. The Committee received your questionnaire less than two weeks before your hearing on April 25. Can you explain why you were not familiar with these cases when you provided summaries of them and apparently reviewed them so recently?

Response: Because of the age of these cases, their fact-specific nature, and the fact that I have decided thousands of cases over the years, I was hesitant to opine on my reasoning in deciding these specific cases without having the cases in front of me.

6. **During your hearing, in response to the question of how much experience you have with federal as opposed to state law, you stated that you have dealt with preemption issues since 1983.**

   a. **How much of your federal experience consists of preemption issues as opposed to other matters?**

      Response: Over the years, I have had cases dealing with ERISA preemption, Labor Management Relations Act preemption, National Labor Relations Act preemption, Federal Railway Safety Act preemption, Single State Registration System preemption, Federal Aviation Act preemption, Fair Credit Reporting Act preemption, Copyright Act preemption, Hazardous Materials Transportation Act preemption and other issues of federal preemption. However, because of the volume of cases I handle, and the fact that so many criminal cases present constitutional issues, I estimate that preemption issues have constituted only about 15% of my federal experience.

   b. **What percentage of the total number of cases you have handled over your career would you estimate have dealt with issues of preemption?**

      Response: Because of the large volume of cases I have handled over the years, I estimate that about 1% of my caseload over my career involved preemption issues.

7. **What philosophical approach would you bring to bear on a case of first impression – in which there are no relevant precedents?**

   Response: If presented with a case of first impression, in which there are no relevant precedents, I would look to precedent that might be informative, although not directly on point. I would also look to see whether courts in other jurisdictions have considered the issue. If the issue concerns a statute, I would look to the plain language of the statute to determine the Legislature's intent. If no legislation is involved, and there are different possible resolutions to the case, I would seek to determine which resolution is most consistent with existing case law.

   a. **If two different lines of precedent appear equally applicable to the case before you, but would lead to different results, how would you choose which line of precedent to follow?**

      Response: While two lines of reasoning may appear equally applicable to the case, usually application of one line, rather than the other, will appear more consistent with existing precedent or the direction of existing precedent.

8. What do you understand to be the proper role of a judge in a democratic society?

a. **What do you think about judges allowing their own political and philosophical views to impact on any jurisprudence?**

Response: Judges should not allow their own political and philosophical view to impact on any jurisprudence.

b. **Do you believe that there is any room for a judge's own values or personal beliefs when he or she interprets the Constitution?**

Response: I do not believe a judge's own values or personal beliefs should be considered in interpreting the Constitution.

c. **Do you believe that judges should consider political dimensions of controversial cases?**

Response: I believe that judges should not be influenced by the political dimensions of controversial cases.

d. **What is the proper role of a court in deciding highly-charged or politically charged cases?**

Response: The role of a court is to decide the case presented. If a highly-charged or politically charged case comes before the court, the court should decide the case on the facts and the law. However, to the extent the court explains its decision in a clear and reasoned fashion that recognizes the issues and addresses them thoroughly and fairly, the court can help to defuse the situation.

e. **If a judge was so inclined, he or she could expand on the interpretation, use, and effect of many provisions of the Constitution and the Bill of Rights. Do you agree with the school of thought that, when Congress and the executive branch are slow or do not act in a particular manner, then federal judges would have a license to create solutions based on some of the broad wording contained in the Constitution?**

Response: Federal courts are granted the power and authority to decide individual cases; they are not granted the power or authority to act in place of Congress or the executive branch simply because neither has taken the action the judge may deem appropriate.

i. **Do you think that this is a proper role for federal judges?**

Response: Federal judges should be most reluctant to assume the roles of problem-solver and solution-crafter. Federal judges should be deciding individual cases.

9. **In your response to the Committee questionnaire you state that 100 percent of your practice has been in state courts, but at your hearing you mentioned that some of your cases involve questions of federal law. Please explain in detail whether and to what extent you have handled cases during your legal career involving each of the following issues:**

   a. **Interpretation of the Equal Protection Clause of the Fourteenth Amendment;**

      Response: I have handled cases involving interpretation of the Equal Protection Clause of the Fourteenth Amendment as necessary to evaluate challenges to state statutes as being violative of the Clause.

   b. **Interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments;**

      Response: Many state criminal cases raise constitutional issues under the Fifth Amendment, through the Fourteenth Amendment. I have handled many cases, on the trial and appellate levels, dealing with Miranda warnings, voluntariness of confessions, constitutionality of line-ups, and double jeopardy issues, ineffective assistance of counsel claims and others. Additionally, I have handled many cases involving Fourth Amendment claims as applicable through the Fourteenth Amendment. I have also handled civil cases involving procedural due process claims and Fifth Amendment takings claims.

   c. **Interpretation of the Eighth Amendment prohibition of cruel and unusual punishment;**

      Response: Often a criminal defendant will couch a sentencing issue in constitutional terms, purporting to rely on the Eighth Amendment. I have handled many such cases.

   d. **Interpretation of federal criminal statutes;**

      Response: I do not recall handling any cases dealing with the interpretation of federal criminal statutes.

   e. **Interpretation of federal civil rights or antidiscrimination statutes, including Title VI, Title VII, and Title IX;**

      Response: I do not recall ever having cases involving Title VI or Title IX issues. Regarding Title VII, the Michigan state courts have often looked to Title VII cases for guidance in interpreting our own civil rights acts.

   f. **Interpretation of federal environmental laws such as the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act;**

Response: I have not handled cases involving the interpretation of the Clean Water Act or the Comprehensive Environmental Response, Compensation and Liability Act. I have, however, handled cases involving the interpretation of the Michigan Natural Resources and Environmental Protection Act, which is patterned after the CERCLA, and the Michigan Wetland Protection Act, which is Michigan's counterpart to the Clean Water Act.

g. Interpretation of the First Amendment freedom of speech;

Response: I have handled zoning cases involving challenges to local ordinances as unconstitutionally impinging on the First Amendment freedom of speech. I have also handled labor and employment cases involving public employees claiming the protection of the First Amendment in response to adverse employment decisions of their employers.

h. Interpretation of the First Amendment freedom of press; and

Response: I have handled defamation cases involving interpretation of the First Amendment as it applies to the press.

i. Interpretation of the First Amendment freedom of religion or free exercise clause.

Response: I have handled cases involving interpretation of the free exercise clause as relevant to the issue whether the court could properly exercise subject matter jurisdiction in disputes between church factions or a church and its members. I have also handled cases that required interpretation of the free exercise clause as tangentially involved in divorce disputes where religious observance is an issue.

STATE OF MICHIGAN

COURT OF APPEALS

ALLEN M. HARTMAN, Personal Representative of the Estate of MARY LOU HARTMAN,

Plaintiff-Appellant,

v

PORT HURON HOSPITAL, FORREST BRYAN FERNANDEZ, M.D., and JALAL UD-DIN AKBAR, M.D.,

Defendants-Appellees.

UNPUBLISHED
September 6, 2007

No. 257536
St. Clair Circuit Court
LC No. 02-000445-NH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff Allen M. Hartman,[1] acting as personal representative of the estate of his wife Mary Lou Hartman, appeals as of right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

Plaintiff brought this action on February 19, 2002, alleging that defendants breached the required standard of care in treating his wife following her admission to Port Huron Hospital on January 25, 1999. Specifically, plaintiff asserts that if the defendant physicians had properly interpreted certain diagnostic tests performed at defendant hospital and taken other appropriate diagnostic measures in light of his wife's prior history, a proper diagnosis would have been made at an earlier date and his wife would not have suffered a subsequent stroke that lead to her death.

Generally, malpractice actions must be brought within two years of the date of accrual to be timely. MCL 600.5805(6);[2] *Omelenchuk v Warren*, 461 Mich 567, 569; 609 NW2d 177

---

[1] Allen Hartman died during the pendency of this action in the trial court. As will be discussed further herein, a substitution of plaintiffs was sought, but the trial court denied that motion.

[2] MCL 600.5805 was amended by 2002 PA 715, which redesignated subsection (5) as subsection (6).

(2000), overruled on other grounds by *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004). Notwithstanding that limitation, for wrongful death actions such as this one, MCL 600.5852 allows a personal representative two years from the issuance of letters of authority to file a medical malpractice claim, so long as the claim is not filed more than three years after the statute of limitations has run. Further, the running of the controlling statute of limitations or repose will be tolled for 182 days if the plaintiff serves a notice of intent to file suit on the prospective defendants within 182 days of the time that the statute of limitations or repose would otherwise expire. MCL 600.2912b(1); MCL 600.5856(c); *Omelenchuk*, *supra* at 575.

In this case, plaintiff's claim accrued no later than February 16, 1999, when his wife was transferred from defendant hospital to Henry Ford Hospital. See MCL 600.5838a(1). Accordingly, under the basic statute of limitations, plaintiff's claim had to be filed by February 16, 2001. MCL 600.5805(6). However, because the decedent died on July 13, 1999, before the basic period of limitations had run, her personal representative had two years from the date letters of authority were issued to him on August 31, 1999 to file suit on behalf of the estate. MCL 600.5852. While plaintiff served defendants with a notice of intent within two years, on August 21, 2001, plaintiff did not file a complaint until February 19, 2002.

Defendants moved for summary disposition asserting that plaintiff's claims were time-barred under our Supreme Court's holding in *Waltz* that because the notice tolling provision "tolls only the applicable 'statute of limitations or repose,'" it did not serve to toll the running of the wrongful death saving provision. *Waltz*, *supra* at 650-651, quoting MCL 600.5856(d) (now subsection [c]).[3] The trial court agreed that the claim was time-barred under *Waltz* and accordingly granted summary disposition in favor of defendants under MCR 2.116(C)(7).

On appeal, plaintiff first contends that the trial court erred by applying *Waltz* retroactively. Our Court has squarely rejected this argument. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 507-510; 722 NW2d 666 (2006). *Waltz* applies here and the notice tolling provision did not toll the running of the wrongful death saving provision.

Plaintiff also attempts to distinguish *Waltz* on the basis that, in *Waltz*, more than five years had elapsed from the accrual of the plaintiffs' claims before suit was filed. Plaintiff's argument is predicated on a misconception of how the two- and three-year periods mentioned in the wrongful death saving provision operate.

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [MCL 600.5852.]

---

[3] MCL 600.5856 was amended by 2004 PA 87, which redesignated subsection (d) as subsection (c).

Contrary to plaintiff's assertion, the periods referred to in this statute are not aggregated to create a five-year period. As this Court has explained, the wrongful death saving provision

> does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can shorten the two-year window during which a personal representative may file suit, it cannot lengthen it. [*Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573 n 16; 703 NW2d 115 (2005).]

Here, plaintiff's claim accrued no later than February 16, 1999. The decedent's husband was appointed personal representative on August 31, 1999. The two-year saving period of the wrongful death saving provision expired on August 31, 2001. The three-year ceiling does not change that result. Accordingly, because the complaint was filed on February 19, 2002, it was time-barred.

Plaintiff also cites *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004) for the proposition that this Court should consider the equities of this case and use its power under MCR 7.216(A)(7) to allow this case to proceed. Again, we disagree; this argument has been squarely rejected in *Ward v Siano*, 272 Mich App 715, 719-720; 730 NW2d 1 (2006), lv pending (2007).

Plaintiff next asserts that the trial court erred by denying his motion for substitution of plaintiffs following Allen Hartman's death on February 15, 2004, about two years after the untimely complaint was filed. He asserts that had the trial court properly granted this motion and appointed a successor personal representative, the complaint would have been timely under *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).[4]

However, at the time the motion was made, the previously filed complaint was properly subject to summary disposition, as discussed above. Even had the trial court allowed plaintiff to substitute into the untimely action, such substitution could not transform the previous personal representative's untimely complaint into a timely one. *Mullins v St Joseph Hosp,* 269 Mich App 586, 591; 711 NW2d 448, aff'd in part 271 Mich App 503 (2006); *McMiddleton v Bolling,* 267 Mich App 667, 671-674; 705 NW2d 720 (2005). The trial court's order granting defendants summary disposition constitutes an adjudication on the merits of plaintiff's claims, and res judicata bars any further action on behalf of the estate against defendants. *Washington v Sinai Hosp of Greater Detroit,* 478 Mich 412; 733 NW2d 755 (2007). Thus, plaintiff would have received no benefit from any substitution of a successor personal representative into the case and suffered no prejudice from the trial court's denial of the motion.

---

[4] To the extent that this argument is predicated on the asserted five-year window in which to file, plaintiff's argument fails for the reasons set out in *Farley, supra* at 273 n 16.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS ANTHONY GOODMAN,

Defendant-Appellant

UNPUBLISHED
August 28, 2007

No. 269620
Wayne Circuit Court
LC No. 05-010643-01

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), and one count of second-degree CSC, MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). Defendant received concurrent sentences of 225 to 600 months' imprisonment for each first-degree CSC conviction and 84 to 180 months' imprisonment for the second-degree CSC conviction. We affirm.

I. Facts

In May 2005, the victim, a 10-year-old boy, reported to his school's social worker that defendant, a close friend of the victim's mother, had been "bothering" him. The victim told the social worker that he had been living with defendant since January 2005 and reported that defendant frequently forced him to engage in oral and anal sex. School officials called the Detroit Police Department. Soon thereafter, an officer with the department took the victim to the Sixth Precinct in Detroit for further questioning, and the victim again described the instances of sexual abuse committed by defendant.

At trial, the victim described the most recent instance of sexual abuse that had occurred. According to the victim, defendant picked him up from his father's house but did not take him to school. Instead, defendant and the victim went to the victim's mother's house. The victim's mother was not home. Defendant and the victim were watching television and started wrestling. Then, defendant began touching the victim's genital area. Although the victim told him to stop, defendant put his genitals near the victim's mouth and "talk[ed] about sucking it." The victim declined. Soon thereafter, defendant came up behind the victim and "started humping on [him]." Defendant pulled down the victim's shorts. The victim felt something "inside [his] butt" that was painful. Defendant ejaculated.

The victim testified that defendant had performed similar actions approximately 14 or 15 times before, admitted that "sometimes" defendant inserted his penis inside the victim's anus and described another instance in which anal sex occurred. The victim also testified that defendant had forced him to perform oral sex at least three times.

II. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel because his trial counsel failed to challenge opinion testimony by two witnesses concerning the victim's veracity and several instances of inadmissible hearsay. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In general, we review a trial court's findings of fact for clear error and review questions of constitutional law de novo. *Id.* Because defendant "failed to move for a new trial or an evidentiary hearing with regard to his claim, review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, "a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Where, however, the defendant is denied counsel during a critical stage of the proceedings, the proceedings are presumed to have been unfair. *United States v Cronic*, 466 US 648, 662; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In that case, the conviction is constitutional error and no showing of prejudice is required. *Id.* at 659 n 25.

As an initial matter, counsel's performance in this case does not rise to the level of denial of counsel as contemplated by the *Cronic* Court. Counsel was neither "totally absent" during a critical stage of the proceeding, nor did she "entirely fail[] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659 & n 25. Counsel cross-examined each prosecutorial witness during the trial and presented two defense witnesses in addition to defendant. She presented a competent opening statement, closing argument, and theory of the case. Therefore, defendant was required to show both that counsel's performance was unreasonable and that he was prejudiced by her deficient performance.

With respect to defendant's argument that his trial counsel was ineffective for failing to challenge the opinion testimony of two witnesses concerning the victim's veracity, we note that "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, defendant fails to identify the witnesses and statements to which he refers. We speculate that he is referring to a statement by the school social worker, who testified that when the victim told her about the alleged abuse, she "looked in his eyes" and saw "sincerity." In this instance, however, defense counsel objected. The trial court overruled the objection, reasoning that the social worker could "testify as to what she did and what she perceived. It's personal knowledge." Counsel's performance in that instance was not deficient because she raised an objection. It is not clear to what other instance of opinion testimony defendant refers.

We agree that the failure of defendant's trial counsel to challenge the admission of inadmissible hearsay was unreasonable and constituted deficient performance. Three of the prosecution's witnesses testified regarding the victim's statements concerning the alleged sexual abuse. The school social worker testified:

> And so then I asked him to clarify what he was—what he meant by hurting him and he said, 'Well, he does sexual things to me, um, in the home at night.' There are other people that live in the home but he would wait until these people were in bed and then he would come into the room where he was and he said that, um, he did oral sex and that he does it—quote, 'He does it to me in my butt.'

The victim's mother testified:

> He looked me in my face and he said, 'Ma, I never ever would try to destroy your friendship with your brother but your brother touched me and I need for you to believe me.' With tears running down his eyes he said, 'I'm your child and I need you to believe that your brother has been hurting me.'

In addition, a police officer testified, "[the victim] said that his uncle had been sexually abusing him."

These and other statements made during trial constituted hearsay not falling within any exception. In particular, the statements do not fall within the exception in MRE 803A.[1] This hearsay exception only applies when the declarant was under 10 years of age when the statement was made. MRE 803A(1). The victim in this case was 10 years old when he first reported the alleged abuse.

---

[1] MRE 803A allows, under certain circumstances, the admission of a child-declarant's statement regarding sexual abuse to the extent it corroborates the declarant's testimony during the same proceeding.

The statements may fall under the rationale of the "catch-all" hearsay exception, MRE 803(24), and the prosecution properly notes our Supreme Court's observation in *People v Katt*, 468 Mich 272, 295-296; 662 NW2d 12 (2003), that a child's earlier statement is more probative than one repeated at trial. However, MRE 803(24) also provides:

> [A] statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [MRE 803(24).]

Under this circumstance, admission of hearsay testimony under MRE 803(24) is not allowed. There is no indication that the prosecution provided any notice to defense counsel.

Finally, the statements do not fall under the hearsay exception for excited utterances. MRE 803(2). There was no indication that when the victim reported the alleged abuse he was "under the 'sway of excitement precipitated by an external startling event'" and did not "'have the reflective capacity essential for fabrication . . . .'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04(1), p 803-819. The social worker's testimony did not suggest that the victim lacked the capacity for fabrication at the time he spoke with her. She did not, for example, testify that he was scared, crying or shaking. See *People v McLaughlin*, 258 Mich App 635, 660; 672 NW2d 860 (2003) (finding an excited utterance where the declarant was "frantic" and having trouble breathing and speaking when she made the statement); *People v Kowalak* (*On Remand*), 215 Mich App 554, 557-560; 546 NW2d 681 (1996) (finding an excited utterance where the statement was made 30 to 45 minutes after the starling event and where the declarant was "petrified" and "scared to death" at the time she made the statement). Therefore, defense counsel should have challenged the hearsay statements made by the social worker, the victim's mother, and a police officer. Also, she should not have stipulated that, had a second police officer testified, he would have testified that the victim told him he had been sexually abused by defendant. There was no conceivable trial strategy for allowing the jury to hear these damaging allegations against defendant repeated by multiple witnesses.

However, defendant has not established that counsel's failure to raise these objections was prejudicial in that, absent the admission of this hearsay evidence, the result of the trial would likely have been different. Even if the trial court ruled the evidence inadmissible, the social worker, the victim's mother, and a police officer would likely have testified that they took certain actions as a result of what they learned from the victim. This would tend to show that the victim told them about the alleged sexual abuse and that they believed him. Moreover, the victim testified at trial and there is reason to believe that the jury was persuaded by his testimony. The victim was 10 years old when he reported the abuse and 11 years old when he testified at trial. He was old enough to have had a clear understanding of what was happening to him and his testimony was competent and consistent. Accordingly, there is no indication that the absence of the hearsay statements in question would have tipped the scales in defendant's favor.

III. Sentencing

A. Constitutionality

Defendant argues that the trial court violated his constitutional right to trial by jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered facts not admitted by defendant or established by a jury beyond a reasonable doubt when determining his minimum sentence. We disagree. In *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), cert den *Drohan v Michigan*, __ US __; 127 S Ct 592; 166 L Ed 2d 440 (2006), our Supreme Court concluded that the United States Supreme Court's holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant's constitutional right was not violated.[2]

B. OV 11

Defendant also argues that the trial court erred in scoring him 50 points for offense variable ("OV") 11, because none of the alleged sexual penetrations used to score OV 11 arose from the sentencing offense. We disagree. We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

The sentencing court may score 50 points under OV 11 where two or more criminal sexual penetrations occurred. MCL 777.41(1)(a). OV 11 directs the sentencing court to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). However, "the 1 penetration that forms the basis of a first- or third- degree criminal sexual conduct offense" cannot be scored. MCL 777.41(2)(c). A criminal sexual penetration that forms the basis of an additional criminal sexual conduct conviction may be scored under OV 11. *Cox*, *supra* at 455-456; *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). In this case, defendant was convicted of four counts of first-degree criminal sexual conduct. Therefore, the statute operates to exclude the use of one of these sexual penetrations as the sentencing offense, *Mutchie*, *supra* at 280-281, but the remaining three criminal sexual penetrations for which defendant was convicted may be used to score OV 11, as long as these penetrations "arise out of" the sentencing offense.

---

[2] In addition, a sentencing court may consider all record evidence before it when calculating the guidelines, including admissions by the defendant, trial evidence or testimony, and the contents of the presentence investigation report. *People v Dewald*, 267 Mich App 365, 380; 705 NW2d 167 (2005); *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

The trial court in this case noted the "arising out of" requirement, but did not articulate its reasoning with respect to that requirement. We uphold scoring decisions for which there is any evidence in support, *Endres*, *supra* at 417, and there is some support for the proposition that the subsequent penetrations "arose out of" the first. Defendant's sexual penetrations of the victim could be considered part of a pattern of defendant's abuse of his close relationship with the victim's mother. There is causal connection between the first penetration and subsequent penetrations; the subsequent penetrations occurred because defendant influenced the victim to not tell his mother by convincing him that she would not believe his allegations. Therefore, the trial court did not abuse its discretion in scoring defendant 50 points for OV 11.

C. OV 13

Finally, defendant argues that the trial court erred in scoring him 50 points for OV 13 because it scored points for the same conduct under OV 11 and OV 13. We disagree.

The sentencing court may score 50 points under OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). Conduct scored in OV 11 or OV 12 may not be scored under OV 13. MCL 777.43(2)(c). The trial court scored defendant 50 points for OV 13. This was not an abuse of discretion because there was evidence of at least three instances beyond those scored in OV 11 in which defendant penetrated the victim.

Again, judicially ascertained facts may be used to increase a defendant's sentence within the range authorized by the jury's verdict. *Drohan*, *supra* at 163. Even where a factfinder declines to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. *People v Perez*, 255 Mich App 703, 713; 622 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). At trial, the victim testified that defendant performed anal sex on him 14 or 15 times. The trial court's finding that the victim's testimony was credible in that additional uncharged sexual penetrations occurred is sufficient to sustain its scoring of OV 13 at 50 points. See *id.* ("[T]he victim testified that there were multiple penetrations. The trial court obviously found the victim's testimony to be credible. Therefore, there existed evidence to support the score and we shall affirm the scoring.")

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

JAMES TAYLOR, Personal Representative of the Estate of AFRADITA TAYLOR, Deceased,

Plaintiff-Appellee,

v

RAMALINGESWARA YALAMANCHI, M.D., R.R. YALAMANCHI, M.D., P.C., and PANKAJ K. VIJ, M.D.,

Defendants,

and

GRAHAM W. LONG, M.D., WILLIAM BEAUMONT HOSPITAL, DAVID M. MONTGOMERY, M.D., and MITUL K. PATEL, M.D.,

Defendants-Appellants.

UNPUBLISHED
January 18, 2007

No. 262763
Oakland Circuit Court
LC No. 03-053470-NH

JAMES TAYLOR, Personal Representative of the Estate of AFRADITA TAYLOR, Deceased,

Plaintiff-Appellee,

v

RAMALINGESWARA YALAMANCHI, M.D., and R.R. YALAMANCHI, M.D., P.C.,

Defendants-Appellants,

and

No. 262771
Oakland Circuit Court
LC No. 03-053470-NH

GRAHAM W. LONG, M.D., WILLIAM BEAUMONT HOSPITAL, DAVID M. MONTGOMERY, M.D., MITUL K. PATEL, M.D., and PANKAJ VIJ, M.D.,

Defendants.

JAMES TAYLOR, Personal Representative of the Estate of AFRADITA TAYLOR, Deceased,

Plaintiff-Appellee,

v

No. 262777
Oakland Circuit Court
LC No. 03-053470-NH

RAMALINGESWARA YALAMANCHI, M.D., R.R. YALAMANCHI, M.D., P.C., GRAHAM W. LONG, M.D., WILLIAM BEAUMONT HOSPITAL, DAVID M. MONTGOMERY, M.D., and MITUL K. PATEL, M.D.,

Defendants,

and

PANKAJ VIJ, M.D.,

Defendant-Appellant.

Before: White, P.J., Whitbeck, C.J. and Davis, J.

PER CURIAM.

In this consolidated appeal, defendants appeal by leave granted an opinion and order denying their respective motions for summary disposition based on the statute of limitations. This is a medical malpractice case, and the relevant facts are undisputed. We reverse.

Plaintiff's decedent, Afradita Taylor (decedent), received treatment from defendants in April and May 2000. She died on May 24, 2000. On April 18, 2001, plaintiff obtained letters of authority as personal representative of decedent's estate. Two years later on April 18, 2003, plaintiff mailed a notice of intent to file a claim. On October 17, 2003, plaintiff filed the complaint.

Appellate courts review de novo rulings on summary disposition motions. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). This Court also reviews de novo whether a statute of limitations bars a claim. *Farley v Advanced Cardiovascular*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005). Questions of law and interpretations of statutes are also reviewed de novo. *Office Planning Group, Inc, v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005). MCL 600.5805 provides a two-year limitations period for a medical malpractice claim or action. A medical malpractice claimant must give defendants notice of his intent to sue at least 182 days before filing a complaint. MCL 600.2912b(1). Doing so tolls the statute of limitations. MCL 600.5856(d)[1]; *Waltz, supra*, p 644 n 1. The two-year limitations period is tolled only if that period would expire during the 182-day notice period. MCL 600.5856(d).

The wrongful death savings statute provides an independent two-year period within which a wrongful death claimant may commence an action: "If a person dies before the period of limitations has run . . . an action . . . may be commenced . . . at any time within 2 years after letters of authority are issued although the period of limitations has run." MCL 600.5852. "Thus, § 5852 provides an exception to the otherwise-applicable limitation periods by permitting the personal representative of a decedent's estate to file a wrongful death action up to two years after letters of authority are issued, subject to a three-year ceiling." *Waltz, supra*, p 645 n 5. However, our Supreme Court has held that the saving period is not tolled by filing of a notice of intent, and this Court has held that our Supreme Court's decision in that regard applies retroactively. *Mullins v St Joseph Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006). This Court has further held that "plaintiffs who filed before *Waltz*, but incorrectly and detrimentally relied on their affidavit of merit to toll the running of the saving statute" may not use equitable tolling to avoid the inequitable results of that retroactive application. *Ward v Siano*, Mich App ___; ___ NW2d ___ (2006). Therefore, we are bound to conclude that plaintiff's notice of intent, sent on April 18, 2003, could not have prevented the expiration, on that same date, of the two-year wrongful death savings provision.

Reversed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis

---

[1] This section is now designated MCL 600.5856(c), pursuant to 2004 PA 87; see also *Mullins v St Joseph Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006). The designation used in this opinion is the designation in place at the dates relevant to the actions below.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2006
v TIMMY ALLEN ROSENBERG, Defendant-Appellant.	No. 262673 Barry Circuit Court LC No. 02-100200-FH

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

On remand, defendant was sentenced as a fourth habitual offender, MCL 769.12, to 92 to 240 months' imprisonment for delivery of a controlled substance less than 50 grams, MCL 333.7401(2)(a)(iv). Defendant appeals by right. We affirm in part and vacate in part.

After a jury convicted defendant, the trial court, relying on defendant's 31 prior misdemeanor convictions, his two acquittals and a pending charge for criminal sexual conduct, and the threat his continuous criminal behavior posed to the community, sentenced defendant to 180 to 360 months' imprisonment. Defendant's sentence was a departure of more than double the recommended minimum sentence range under the legislative guidelines. On appeal, a panel of this Court affirmed defendant's conviction but vacated his sentence of 180 to 360 months' imprisonment and remanded for resentencing. *People v Rosenburg*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 251930). In addition to finding that the trial court incorrectly scored two offense variables, the panel concluded that while the factors the trial court relied on to depart from the minimum recommended sentence range were objective and verifiable, the factors did not justify the extent of the trial court's departure from the minimum sentence range. *Id.* On remand, the trial court sentenced defendant to 92 to 240 months' imprisonment, a departure double the recommended minimum sentence range of 10 to 46 months under the recalculated legislative guidelines.

Defendant first claims that his sentence was disproportionate to the seriousness of his conduct and his criminal record. Defendant asserts that because he delivered less than five percent of the amount punishable by MCL 333.7401(2)(a)(iv), and because he already faced a significant guidelines augmentation due to his status as an habitual offender, a more proportionate sentence would have fallen within or just over the maximum of the recommended minimum sentence range. We review a departure from the recommended sentence range under the legislative guidelines to determine if the sentence imposed is proportionate to the seriousness of the crime and the defendant's criminal history. *People v Babcock*, 469 Mich 247, 262, 264; 666 NW2d 231 (2003). A trial court abuses its discretion when it imposes a sentence that falls outside the principled range of outcomes. *Id.* at 269.

The principle of proportionality requires that the sentence the trial court imposes be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). For almost 20 years, from 1983 until his arrest in 2002, defendant continuously engaged in assaultive, violent, intimidating, and destructive behavior. He was convicted of 31 misdemeanors, and he was charged three times with criminal sexual conduct. In addition, there was evidence in the record of at least thirteen other instances where defendant engaged in criminal behavior. Defendant's behavior during those 20 years indicates that he harbored no respect for the law or any willingness to follow the law. The trial court recognized that defendant's unwillingness to alter his behavior reflected on his ability to be rehabilitated and that he posed an ongoing danger to his community. Even though the sentence the trial court imposed was double the recommended maximum/minimum under the legislative guidelines, it was proportionate to the seriousness of the offense and offender and was within the principled range of outcomes. *Babcock, supra* at 269. Thus, the trial court did not abuse its discretion.

Defendant next claims on appeal that the $25,000 fine imposed by the trial court was excessive and violated the principle of proportionality. Specifically, defendant asserts that the fine was excessive and disproportionate because he was fined the maximum amount allowed by MCL 333.7401(2)(a)(iv) for delivering one of the least amounts necessary to violate the statute. Defendant did not appeal the amount of this fine in his prior appeal and reconsideration of the amount of the fine was outside the scope of remand. Thus, defendant has waived this issue. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). Accordingly, there is no error for us to review. If we were to reach the issue we would find no error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). We affirm the $25,000 fine.

Defendant also claims that the trial court erred in ordering him to pay $500 in court costs. Defendant failed to object to the imposition of court costs. Appellee agrees. Accordingly, we vacate the trial court's order requiring defendant to pay $500 in court costs.

Defendant finally claims on appeal that, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), Michigan's sentencing scheme violates his Sixth Amendment right to have a jury make factual findings. Our Supreme Court has definitively ruled to the contrary, holding that *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

We affirm in part and vacate in part.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH GREENE,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 263126
Kalamazoo Circuit Court
LC No. 04-002140-FC

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of 126 months to 25 years for the armed robbery conviction, and 198 days served for the resisting or obstructing conviction. He appeals as of right. We affirm.

On October 30, 2004, the victim was working as an adult entertainer for a group of males in an apartment. As she danced, the men gave her tips ranging from $1 to $20. At one point, defendant entered the apartment with two other males. This small group looked around for a few minutes and then left after the victim indicated she did not know where the weed was. Defendant later confronted the victim in the parking lot as she was entering a car that had three other individuals in it. Defendant pointed what appeared to be a handgun at the victim's side and repeatedly demanded the money the victim had just earned. When the victim did not immediately comply, defendant got into the car, rummaged though the victim's purse, and reached under the victim's leg where she had hidden some of her earnings. At one point, defendant's gun discharged, and it sounded like a cap pistol. Defendant ran, and the police were called. When police arrived, they encountered defendant near the scene. A police officer repeatedly ordered defendant to stop, but defendant continued to run. Eventually, the police captured defendant and retrieved $30, consisting of one ten-dollar bill, and 20 one-dollar bills. They did not recover a gun or the other $270 the victim estimated had been stolen. At trial, defendant explained that he ran from the police because he "had warrants out on him and did not want to go to jail."

Defendant first argues that defense counsel was ineffective for failing to investigate and argue an insanity defense and for failing to produce several alibi witnesses. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 659. At trial, defendant consistently maintained his innocence, and there is no evidence that he made a good-faith effort to avail himself of the right to present an insanity defense. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Likewise, defendant has not provided any affidavits of qualified medical personnel or other documentation indicating that he had any medical or psychological condition at the time of the offenses to support that exploration of insanity might have been reasonable. Therefore, defendant fails to demonstrate that the insanity defense could have made a difference at trial, and we will not reverse his conviction solely on the basis of his speculation. *Id.*

Defendant relies on references in the presentence investigation report and the Michigan Department of Corrections reception center psychological report to support his contention that he "suffers from a number of mental health issues" and substance abuse problems, but there is nothing in either report that provides a basis for a diagnosis of criminal insanity. In fact, the MDOC psychological report concluded that "[t]here was no behavioral evidence of a major mood disorder or formal disorder of thought. At this time, [defendant] appears stable and not in the need of further mental health treatment." Although defendant may have certain mental health issues, mental illness alone does not constitute a defense of legal insanity, and there was no evidence that defendant lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. MCL 768.21a(1). With regard to substance abuse, voluntary intoxication cannot form the basis for an insanity defense, MCL 768.21a(2), and although defendant mentions involuntary intoxication, he has not proffered any evidence that he suffered from involuntary intoxication at the time of the offenses. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Because there is no basis for concluding that an insanity defense was a substantial defense and no basis for concluding that defendant tried to assert it, defendant cannot establish a claim of ineffective assistance of counsel. *Kelly*, *supra*.

Likewise, defendant has not provided any witness affidavits or identified any evidence in the record establishing that the proposed witnesses' testimony would have yielded valuable evidence that would have affected the outcome of trial. Moreover, defendant's argument relies on information that, according to his trial counsel, came to light on the first morning of trial. The information arrived too late to file a notice of alibi, which defendant admits was the only relevant purpose of the evidence, so we reject defendant's argument that he made good-faith efforts to assert the defense. *Kelly*, *supra*.

Defendant next argues that he is entitled to resentencing because the trial court improperly scored 20 points for offense variable (OV) 1 (aggravated use of a weapon) and ten points for OV 9 (number of victims). We decline to review defendant's challenge to the scoring of OV 1 and OV 9 because the record reflects defense counsel's on-the-record expression of satisfaction with those scores. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Next, defendant argues that he must be resentenced because the trial court's factual findings supporting his sentence were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

We also reject defendant's claim that he is entitled to resentencing because his sentence for armed robbery is disproportionate and constitutes cruel and unusual punishment. Defendant's sentence of 126 months to 25 years is at the lowest end of the sentencing guidelines range of 126 to 262 months. Under the circumstances, we find nothing disproportionate or cruel about defendant's punishment. Moreover, we generally affirm a sentence within the guidelines' range unless there was an error in the guidelines' scoring or the court relied on inaccurate information. MCL 769.34(10). Here, defendant has not demonstrated either type of error, so we defer to the Legislature's determination of sentence proportionality as delineated by the guidelines. See *id.*; *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003).

In a supplemental brief filed in propria persona, defendant argues that there was insufficient evidence to convict him of armed robbery because the witnesses' identification of him was tainted by a suggestive lineup. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Two witnesses, the victim and a passenger in the car, identified defendant as the perpetrator at pretrial lineups and in court. The victim testified that, during the robbery, she got "a good look at [defendant's] face," that his face was "not even a foot away from [hers]," and that defendant "was in [her] face." She also noted that defendant was the same person whom she had seen earlier in the "well-lit" apartment. The victim indicated that, when identifying defendant in a pretrial lineup, she "pretty much knew off the bat who it was." She explained that she had indicated that she was 90 percent certain that defendant was the person who robbed her, "because there's still that little chance that it could have been somebody that looked identical to him." The passenger testified that he got a "good look" at defendant's face, and was 100 percent certain that defendant was the person who committed the robbery. Levin explained that he could clearly see defendant's face under the car's dome light, that defendant was "approximately two feet" from him, and that the majority of defendant's body was inside the car. Police testimony was presented that the parking lot "was fairly well-lit." Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably conclude, beyond a reasonable doubt, that defendant was the robber. The credibility of the identification testimony was for the trier of fact. *Id.*

Defendant also claims that he was denied his right to due process because the pretrial lineup procedure was unduly suggestive. Defendant argues that the other lineup participants had a darker complexion, so he was the only individual fitting the description that the victim provided to police. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). However, "to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). In this case, the only evidence of suggestion was that defendant was the only "light-skinned" African-American in the lineup, which matched the victim's original description. However, the victim also indicated to police that defendant was "not real light-skinned," so without more, we are not persuaded that defendant's complexion invalidated the lineup. See *People v Gunter*, 76 Mich App 483, 490; 257 NW2d 133 (1977). Police are not required to exert extraordinary effort to arrange a lineup of participants whose physical characteristics exactly match those of the defendant. See *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Even if it were possible to present a lineup in which the participants looked identical, the purpose of the lineup would be thwarted and misidentification would be almost unavoidable. Likewise, a lineup in which the defendant represents the median of all physical features is likely as suspect as one in which some of the defendant's features set him apart. "Physical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Defendant fails to persuade us that the lineup fostered irreparable misidentification. *Kurylczyk*, *supra*. Accordingly, we also reject defendant's alternative argument that he was denied the effective assistance of counsel because defense counsel failed to move to suppress the identification testimony. *Sabin*, *supra* at 660.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey

STATE OF MICHIGAN

COURT OF APPEALS

STACEY HELFNER, Next Friend of AMBER SEILICKI, Minor,

Plaintiff-Appellee,

v

CENTER LINE PUBLIC SCHOOLS and DEANNA LYNN MULRENIN,

Defendants/Third-Party Plaintiffs-Appellants,

and

MICHELLE SLOAT,

Defendant/Third-Party Defendant.[1]

UNPUBLISHED
June 20, 2006

No. 265757
Macomb Circuit Court
LC No. 2004-003161-NI

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendants appeal as of right an order that, in relevant part, denied their motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) on the grounds that there existed genuine issues of material fact whether the motor vehicle and governmental employee exceptions to governmental immunity existed. We affirm.

This case arose when defendant Deanna Lynn Mulrenin, the driver of a school bus for defendant Center Line Public Schools, ordered eighth-grader Amber Seilicki to disembark from the bus. Mulrenin was Amber's regular bus driver. To reach the bus, Amber was required to cross the street. On the day of the accident, Mulrenin apparently understood Amber to be suspended from school, although there is some debate whether Amber had actually received permission to ride the bus that day notwithstanding her suspension. Amber boarded the bus as

---

[1] Michelle Sloat is not a party to this appeal. We use the term "defendants" in this opinion only in reference to Center Line Public Schools and DeAnna Lynn Mulrenin.

usual, whereupon Mulrenin ordered Amber to get off. The two of them debated the matter for some unspecified period of time, during which Amber became upset, embarrassed, and emotional. She eventually disembarked, and Mulrenin ordered her to cross the street and go home. Apparently, Amber did not do so immediately. At some point, Mulrenin deactivated the school bus' red flashing warning lights. Michelle Sloat had been stopped in her car alongside the school bus, and when the lights were deactivated, Sloat attempted to pass the bus. At the same time, Amber attempted to cross the street in front of the bus, where she collided with Sloat's vehicle.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, all evidence submitted by the parties must be considered in the light most favorable to the non-moving party, and summary disposition is granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id.*, 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id.*, 119.

As a general matter, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A public school district's operation of a school bus system constitutes a generally immune governmental function. *Cobb v Fox*, 113 Mich App 249, 257; 317 NW2d 583 (1982). Exceptions to this broad grant of immunity should be construed narrowly. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). However, interpretation of statutory language obligates us "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002).

The motor vehicle exception to governmental immunity, MCL 691.1405, excepts injuries "resulting from the negligent operation . . . of a motor vehicle." Our Supreme Court has explained that "operation," in this context, is limited to "the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle." *Chandler*, *supra* at 321-322 (emphasis in original). Therefore, a vehicle that is undergoing cleaning while parked inside a maintenance facility is not in "operation." *Id.*, 316, 322. Similarly, a city-owned water truck that was parked at the side of the road, with its warning lights activated, while the driver exited the vehicle to inspect a fire hydrant was no longer in "operation." *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003). As this Court noted, "[o]nce stopped for this purpose, [the truck's] presence on the road was no longer 'directly associated with the driving' of that vehicle." *Id.*, quoting *Chandler*, *supra* at 321.

However, *Chandler* and *Poppen* are significantly distinguishable. Simple, everyday experience demonstrates that the act of driving does not entail *constant* movement. A vehicle does not cease to be "driven" while temporarily halted for a stop sign or a traffic light. Under some circumstances, temporary cessation of movement is "directly associated with the driving" of a vehicle. Temporary stops are an integral part of the driving of a school bus, whether coming to a halt before proceeding over railroad tracks or stopping to take on or discharge passengers. The fact that a school bus is temporarily at rest does not take it outside the motor vehicle exception under these circumstances. Although halted, the school bus is still being driven, and is therefore still being operated as a motor vehicle within the definition provided by *Chandler*.

Our Supreme Court has also explained that "resulting from" cannot be satisfied by a proximate cause analysis. Instead it requires, in the context of a police pursuit of a fleeing vehicle, that the government vehicle "hit the fleeing car or otherwise physically force[d] it off the road or into another vehicle or object." *Robinson*, *supra* at 456-457, 457 n 14. This Court then held that the motor vehicle exception requires the government-owned vehicle to physically and directly cause the incident that results in injury. *Curtis v City of Flint*, 253 Mich App 555, 561-562; 655 NW2d 791 (2002). Again, however, *Robinson* and *Curtis* are not directly applicable to the facts here.

Both of those cases involved purely vehicular collisions where the plaintiff was inside a vehicle, and the government-owned vehicle had no physical involvement in the injury-causing collisions. In *Robinson*, the police made arguably questionable decisions to pursue fleeing criminals, who crashed the vehicles they were driving. In *Curtis*, a driver, Kells, pulled over to permit passage of an emergency vehicle that may not have been following proper emergency protocol, whereupon the plaintiff crashed into the rear of Kells' vehicle. The plaintiff then sued the driver and owner of the emergency vehicle. In both cases, the plaintiffs were dismissed because the government-owned vehicle must "be physically involved in the collision that caused [the] plaintiff's injuries, either by hitting [the] plaintiff's *vehicle* or by physically forcing that *vehicle* off the road or into *another vehicle* or object." *Curtis*, *supra* at 562 (emphasis added). This rule is not directly applicable where the plaintiff is not, in fact, in a vehicle at all. Instead, the entirely consistent and more general rule is that the government vehicle must directly compel the injury-causing accident.

There is no dispute that there was no physical contact between Amber and the school bus here. However, even under *Robinson* and *Curtis*, there would not necessarily be physical contact between the government vehicle and a plaintiff. For example, in *Robinson*, our Supreme Court suggested that the motor vehicle exception would apply if, for example, a police vehicle had rammed a car off the road and into an innocent pedestrian. See *Robinson*, *supra* at 445 n 2. In other words, it is sufficient for the government vehicle to cause an injury by placing some object in motion, and that object then injures the plaintiff. This Court has found the motor vehicle exception applicable where a government-owned vehicle drove over a piece of tire tread on the road, thereby flinging the tire tread into the plaintiff's windshield. *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153, 161; 641 NW2d 285 (2002).

The dissent notes that these cases still involve the government vehicle physically contacting and physically forcing into motion the injury-causing object. Under the circumstances of this case, where the driver prematurely turned off safety devices and violated protocols mandated by law and unique to a school bus, the dissent's observation is a distinction without a difference. Because this case involves a school bus, it is viewed in light of the strong public policy mandated by our Legislature's enactment of the Pupil Transportation Act, MCL 257.1801 *et seq*., among other statutory provisions. See *Nolan v Bronson*, 185 Mich App 163, 171-173; 460 NW2d 284 (1990), abrogated on other grounds by *Chandler*, *supra* (mostly discussing predecessor statutes). Among other purposes, a school bus is designed to control the motion of other vehicles on the highway, to promote one of the most important public policies imaginable – the safety of our children. Our Supreme Court has explained how special school busses are, noting in the context of no-fault insurance that the "use" of a school bus – as distinguished from any other ordinary public transit – includes both transporting students *and* properly disembarking them. *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 225-227; 549 NW2d 872 (1996). By operation of statute, the deactivation of a school bus' warning lights "is the signal for stopped traffic to proceed." MCL 257.1855(2)(b). That is precisely what occurred here.

A significant fact here, then, is that the defendant driver *did* physically place an object in motion – by prematurely deactivating the warning lights on the bus, which constituted an affirmative signal to waiting vehicles on the road to proceed. Defendant's operation of the school bus may be found to have directly caused the accident because it exercised control over the physical movement of another vehicle. The motor vehicle exception could be found to apply even though the bus was temporarily paused and did not itself physically strike Amber or physically contact the car that struck Amber. Under the unique circumstances of a school bus deactivating its warning lights, there is no principled reason to take this issue from the trier of fact simply because there was no physical contact between the bus and the vehicle that struck Amber.

The governmental employee exception to governmental immunity provides that the employee of an agency exercising a governmental function "may be liable for grossly negligent conduct" performed while acting within the scope of her authority "if that conduct is 'the proximate cause of the injury or damage.'" *Curtis*, *supra* at 562-563, quoting MCL 691.1407(2). There is no dispute that this school bus did not have its flashing red warning lights activated at the time of the accident, contrary to MCL 257.1855. At the time of the accident, MCL 257.1855 provided in relevant part as follows:

> (1) A school bus driver shall actuate alternately flashing lights only when the school bus is stopped or stopping on a highway or private road for the purpose of receiving or discharging pupils in the manner provided in this act. . . .
>
> (2) The driver of a school bus while operating upon the public highways or private roadways open to the public shall receive or discharge pupils from the bus in the following manner:
>
> * * *
>
> (b) If the pupils are required to cross the roadway, the driver of a school bus equipped with red and amber alternately flashing overhead lights in accordance with section 19[2] shall activate the alternately flashing overhead amber lights not less than 200 feet before the stop, stop the bus as far to the right side of the roadway or private road as is possible to provide for the safety of the pupils being boarded or discharged, deactivate the alternately flashing overhead amber lights, and activate the alternately flashing overhead red lights while receiving or discharging pupils. Before resuming motion, the driver shall deactivate these

---

[2] This bus' compliance with MCL 257.1819 is not disputed.

> lights and allow congested traffic to disperse where practicable. The deactivation of these lights is the signal for stopped traffic to proceed.

Amber always crossed the street after exiting the bus. The driver was Amber's regular driver, so she knew that Amber would need to cross the street immediately after exiting the bus and that she would need to activate the red flashing lights while Amber did so.

On the day of the accident, the driver understood Amber to be suspended from school and therefore not permitted to ride the bus. There is some dispute whether Amber had nevertheless been granted permission to ride the bus. The driver ordered Amber to leave the bus and debated the issue with Amber to the point where Amber was crying and pleading to remain. The driver nevertheless told Amber to leave, knowing that Amber was angry, embarrassed, and upset. The driver then directed Amber to cross the street and deactivated the warning lights. Given the summary disposition posture of this case, there is no doubt that plaintiff has at least presented a genuine issue of material fact whether the school bus driver's conduct was "so reckless as to demonstrate a substantial lack of concern for whether" Amber would be injured. See MCL 691.1407(7)(a), defining "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

In the context of the governmental employee exception to governmental immunity, the dissent correctly notes that "the proximate cause" means that the driver's conduct must be "the one most immediate, efficient, and direct cause preceding an injury." *Curtis*, *supra* at 563, quoting *Robinson*, *supra* at 458-459. The dissent then goes on to conclude that it was not the driver's conduct, but rather plaintiff's inattentiveness to traffic that meets that requirement. It seems to us that this is a question properly determined by the trier of fact. We do not now hold that the driver's conduct *was* that sole cause. This case is before us on summary disposition. Our inquiry is into the existence of a genuine factual question whether the driver's conduct was the "one most immediate, efficient, and direct cause." We agree with the dissent that there is no reason why the voluntary act of a child *cannot* be the proximate cause. We merely decline to hold, on the basis of the record and procedural posture of the case before us, that it necessarily was. Again, the driver ordered Amber to disembark, leaving Amber with no options other than crossing the street. There is no dispute that the only reason the other vehicle drove forward and was in a position to strike Amber was the driver's deactivation of the warning lights on the bus. There is testimony that the driver ordered Amber to cross the street, although Amber apparently did not do so immediately. The driver was aware of Amber's upset emotional state.

Affording every legitimate inference to the plaintiff, the driver had discharged an upset 13-year-old child by the side of the road. To go home, she would need to cross the road. Students are required to cross *in front* of the bus, MCL 257.1855(3), where oncoming traffic is difficult to see. Finally, the driver had deactivated the warning lights, directing traffic to proceed. MCL 257.1855(2)(b). There is at least a genuine question of material fact whether anything other than the bus driver's conduct caused Amber and the other vehicle to come to be in the same place at the same time. The trial court therefore appropriately denied summary disposition on the issue of the governmental employee exception to governmental immunity.

Affirmed.

/s/ Helene N. White
/s/ Alton T. Davis

STATE OF MICHIGAN

COURT OF APPEALS

STACEY HELFER, Next Friend of AMBER SEILICKI, Minor,

Plaintiff-Appellee,

UNPUBLISHED
June 20, 2006

v

No. 265757
Macomb Circuit Court
LC No. 2004-003161-NI

CENTER LINE PUBLIC SCHOOLS, and DEANNA LYNN MULRENIN,

Defendants/Third-Party Plaintiffs-Appellants,

and

MICHELLE SLOAT,

Defendant/Third-Party Defendant.

Before: White, P.J., Whitbeck, C.J., and Davis, J.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent. Because I conclude that the government vehicle in this case did not directly place the injury-causing object into motion and that none of Mulrenin's actions, albeit arguably grossly negligent, were *the* proximate cause of Amber Seilicki's injury, I would reverse.

I. The Motor Vehicle Exception

The majority interprets the language, "resulting from the negligent operation . . . of a motor vehicle"[1] to hold that "the government vehicle must directly compel the injury-causing accident."[2] According to the majority, "it is sufficient for the government vehicle to cause an

[1] MCL 691.1405.

[2] *Ante* at ____.

injury by placing some object in motion, and that object then injures the plaintiff."[3] The majority then provides, for example, the situation where a police car rams another vehicle off the road and into a pedestrian, or the situation where a government vehicle drives over debris, causing the debris to fling into the air and strike another vehicle. According to the majority, Mulrenin therefore placed into motion the vehicle that hit Seilicki by deactivating the bus's warning lights. However, in my opinion, this conclusion contradicts the majority's own examples. In both situations the majority cites, the government vehicle came into direct physical contact with the injury-causing object and, in each example, that direct physical contact forced the injury-causing object into motion. In this case, however, there was *no* direct physical contact between the bus and the vehicle that hit Seilicki, nor was there direct contact between Seilicki and the bus. Therefore, I would conclude that Seilicki's injury did not result from the negligent operation of the bus.

II. Governmental Employee Immunity

MCL 691.1407(2) provides in relevant part that a government employee is immune from tort liability for injuries to a person caused by the employee while in the course of employment if the following are met:

> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Thus, if (a) and (b) have been met, as they plainly are in this case, "a governmental employee may be liable for grossly negligent conduct if that conduct is 'the proximate cause of the injury or damage.'"[4]

"'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[5] "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. . . . To hold otherwise would create a jury question premised on something less than the statutory standard."[6]

> [T]he phrase "the proximate cause," as used in MCL 691.1407(2)(c), is not synonymous with "a proximate cause," and . . . to impose liability on a

---

[3] *Id.*

[4] *Curtis v Flint*, 253 Mich App 555, 562-563; 655 NW2d 791 (2002).

[5] MCL 691.1407(7)(a).

[6] *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

governmental employee for gross negligence, the employee's conduct must be "the one most immediate, efficient, and direct cause preceding an injury."[7]

While plaintiff arguably presented evidence that Mulrenin was grossly negligent, this was plainly not the proximate cause of Seilicki's injuries.

I agree with that majority that, pursuant to MCL 257.1855(b), Mulrenin was required to activate the red flashing lights while Seilicki exited and crossed the street. Here, there is disputed evidence whether Mulrenin had activated any of the bus's flashing lights at the time of the accident. Nevertheless, Mulrenin admitted that the red flashing lights were not activated when Seilicki exited the bus. In addition, there was testimony that (1) Seilicki was crying and pleading with Mulrenin to let her ride the bus and became angry and embarrassed after being told to exit the bus and that (2) Mulrenin was Seilicki's everyday bus driver at the time of the incident and was therefore likely aware that Seilicki was about to cross the street because Seilicki stated that she did every time she exited the bus. Viewing the testimony in a light most favorable to plaintiff, she has arguably presented evidence that Mulrenin was grossly negligent, that is, that Mulrenin's conduct was reckless and demonstrated a substantial lack of concern for whether an injury to Seilicki would result.

However, it is manifest that none of Mulrenin's actions or inactions were "the one most immediate, efficient, and direct cause preceding"[8] Seilicki's injury. As Seilicki acknowledged, she attempted to run across the street without looking for cars. Seilicki's crossing of the street in this manner was plainly a more immediate, efficient, and direct cause of her injury than Mulrenin having instructed her to leave the bus. Further, although there was deposition testimony indicating that Mulrenin may have also told Seilicki to cross the street, that same testimony indicates that Seilicki failed to immediately heed this instruction. Thus, again, Seilicki's decision to cross the street at the moment when she did was *the* immediate, efficient, and direct cause of her injury. While plaintiff invokes the potential for children to act impulsively, nothing in the language of MCL 691.1407(2) or the controlling case law suggests that the voluntary act of a child cannot constitute "the proximate cause" of injury. Therefore, the trial court erred in failing to grant summary disposition in favor of Mulrenin with regard to governmental employee immunity.

I would reverse and remand for entry of judgment in favor of defendants.

/s/ William C. Whitbeck

---

[7] *Curtis*, *supra* at 563, quoting *Robinson v Detroit*, 462 Mich 439, 458-459, 462; 613 NW2d 307 (2000).

[8] *Curtis*, *supra* at 563.

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN M. ELLS, Personal Representative of the ESTATE of MAYNARD B. ELLS,

Plaintiff-Appellee,

v

EATON COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
February 7, 2006

No. 264635
Eaton Circuit Court
LC No. 05-000128-NI

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's denial of its motion for summary disposition under MCR 2.116(C)(7) in this negligence action. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004). MCR 2.116(C)(7) tests whether a claim is barred because of governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Wilson, supra* at 145. Additionally, we review de novo issues of statutory interpretation. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

To establish a prima facie case of negligence, a plaintiff must be able to prove that the defendant owed the plaintiff a duty, the defendant breached that duty, causation and damages. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Further, where the defendant is a governmental agency, the plaintiff must plead a cause of action in avoidance of governmental immunity. *Id.* at 302-304.

Plaintiff's complaint alleged that plaintiff's decedent died in a motor vehicle accident that was proximately caused by defendant's negligence when it "permitted, authorized or consented to the placement of a Type-3 barricade with various other signage" at the intersection where the accident occurred. Specifically, plaintiff alleged that defendant "owed a statutory duty to [p]laintiff's decedent, outside government immunity, to keep their highway in reasonable repair and to insure [sic] that it was reasonably safe and convenient for public travel." Plaintiff alleged that the barricade "was placed on the traveled portion of the highway," and that it "created an obstruction and defect in the traveled portion of the highway in that it obscured vision of vehicular traffic . . . including the decedent . . . ." Stated another way, the decedent's "view of oncoming traffic . . . was obscured . . . so that he could not readily observe traffic approaching the intersection," and "[t]hat as a proximate result of [d]efendant['s] negligence and breach of duty, the decedent was struck at the intersection and died of his injuries."

Defendant moved for summary disposition under MCR 2.116(C)(7), on the basis that plaintiff's cause of action did not fall within the highway exception to governmental immunity, MCL 691.1402(1). Defendant also argued that it was entitled to summary disposition because plaintiff failed to provide proper notice as required by MCL 691.1404, and because it could not be held liable for failing to anticipate plaintiff's decedent's negligence in entering an intersection before making reasonable and proper observations of cross traffic.

The governmental immunity act, MCL 691.1401 *et seq*., provides that a governmental agency is immune from tort liability while engaging in a governmental function unless a specific exception applies. The highway exception to governmental immunity requires a "governmental agency having jurisdiction over a highway"[1] to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). "The duty of the . . . county road commission to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . ." *Id. Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000).

The circuit court denied defendant's motion, finding that the highway exception to governmental immunity was applicable because the "barricade was located in the roadbed," therefore constituting a "defect . . . in the active roadbed designed for vehicular travel."[2] We agree.

Here, two large signs had been placed on the actual roadbed, the taller of the two signs was placed immediately behind the shorter one. The taller one stated "Road closed to thru traffic," and the shorter one was an arrow stating "Detour" super imposed on a barricade, to alert passersby that the road was closed to thru traffic and that a detour existed, but that the road was open to a local golf course. The barricade was placed on the actual roadbed designed for vehicular travel. Under *Nawrocki, supra,* plaintiff thus pleaded in avoidance of governmental immunity. Although the *Nawrocki* Court's holding included that "the state or county road

---

[1] Defendant does not dispute that it had jurisdiction over the roadway where the accident occurred.

[2] The circuit court relied on *Page v Bidwell*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket No. 249224), which affirmed a trial court's decision that "[a] tree limb lying in the roadway and blocking a lane of traffic" fell within the highway exception to governmental immunity because it was "akin to any other type of debris that causes a dangerous condition in the improved portion of a highway designed for vehicular travel," and therefore "clearly [constituted] a defect in the actual roadbed." We are not bound by unpublished decisions of this Court, MCR 7.215(C)(1).

commissions have no duty, under the highway exception, to install, maintain, repair, or improve traffic control devices, including traffic signs," *id.*, at 184, its holding is clearly limited to signage *not* located in the improved portion of the highway designed for vehicular travel. *Id.* at 183 ("A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because *signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel.* Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.") In contrast, the signage involved here was located within the actual roadbed designed for vehicular traffic.

Defendant alternatively argues that the circuit court erred in failing to address its claims that plaintiff failed to provide it proper notice under MCL 691.1404. We disagree.

Plaintiff's complaint alleged that and the record supports that the Road Commission had actual notice of the incident. A manager (civil engineer) for the Eaton County Road Commission testified on deposition that he went to the scene of the crash on the afternoon of the incident and took extensive photographs of the crash scene. He testified that two other personnel from the Road Commission were present in the vicinity of the crash scene as well. On appeal, defendant asserts that it was prejudiced by the lack of notice because it was unable to "quickly preserve evidence necessary for its defense." The documentary evidence submitted below, including photographs of the crash scene and the Road Commission manager's deposition testimony, belie this contention. Defendant has not shown actual prejudice, thus its claim fails under *Brown v Manistee Co Rd Comm'n,* 452 Mich 354, 366-368; 550 NW2d 215 (1996).

Defendant's final argument is that the circuit court erred in ignoring defendant's argument below that the road commission did not have a duty to anticipate decedent's negligence in failing to properly stop at the intersection as required by Michigan law. We disagree. First, we observe that defendant moved for summary disposition while discovery remained open. Further, defendant's duty is defined by statute and plaintiff establish a genuine issue regarding whether that duty was violated.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Helene N. White

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN M. ELLS, Personal Representative of the ESTATE of MAYNARD B. ELLS,

Plaintiff-Appellee,

v

EATON COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
February 7, 2006

No. 264635
Eaton Circuit Court
LC No. 05-000128-NI

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

BANDSTRA, P.J. (*dissenting*).

To successfully plead a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty, the defendant breached that duty, the plaintiff suffered harm, and the plaintiff's harm was caused by the defendant's negligence. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Further, where the defendant is a governmental entity, the plaintiff must allege facts that place the claim within an exception to governmental immunity. *Id.* at 302-304.

The highway exception, upon which plaintiff relies, requires a "governmental agency having jurisdiction over a highway"[1] to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). "The duty of the . . . county road commission to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . ." *Id.* Stated another way, "if the [dangerous or defective] condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000).

Here, the signs and barricade had been placed on the roadbed to alert passersby that the road was closed to thru traffic and that a detour existed, but that the road was open to a local golf

---

[1] Defendant does not dispute that it had jurisdiction over the roadway where the accident occurred.

course. Our Supreme Court has noted that, under the highway exception, the government's duty is only implicated upon its failure to repair or maintain "the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage," and that "[t]his does not include signage." *Id.* at 185. Thus, while the signs and barricade were placed on the actual roadbed (i.e., *between* the two edges of the roadbed), I conclude that the accident here was not caused by defendant's failure to repair or maintain the actual physical structure of the roadbed surface. Stated another way, the barricade and signs did not constitute a "dangerous or defective condition[] in the actual roadbed itself." *Id.* at 177 (i.e., *a part of* the actual physical structure of the roadbed surface).

Additionally, this Court has held that liability for the failure to maintain a highway exists only if the defect complained of is "actually and specifically included" in the statutory definition of the term "highway." *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 516; 673 NW2d 448 (2003). Because barricades and signs are not part of the definition of "highway" as set out in MCL 691.1401(e), they do "not represent a defect in the highway itself because [they are] not part of the highway." *Ridley*, *supra* at 515.

Consistent with our Supreme Court's mandate to narrowly construe the statutory exceptions to the broad grant of governmental immunity, *Nawrocki*, *supra* at 158, I conclude that plaintiff failed to plead in avoidance of governmental immunity, and the trial court erred in denying defendant's motion for summary disposition. Given that conclusion, I would not consider defendant's alternative arguments that the trial court erred in failing to address its claims that plaintiff failed to provide it proper notice under MCL 691.1404, and that it could not be held liable for failing to anticipate the negligence of plaintiff's decedent.

I would reverse and remand for entry of an order granting summary disposition in favor of defendant.

/s/ Richard A. Bandstra

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN PRICE,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
January 31, 2006

No. 257577
Court of Claims
LC No. 01-018063-MT

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition on the ground of governmental immunity. We affirm.

Plaintiff sustained injuries while riding his bicycle on a bridge on M-68. Plaintiff alleged that he was struck by an automobile when he had to swerve into its path to avoid a 1 3/8 to 3 inch deep drain hole on the bridge in an area between the fog line and the curb.

We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004). MCR 2.116(C)(7) tests whether a claim is barred because of governmental immunity, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Wilson*, *supra* at 145. Additionally, we review de novo as a question of law the trial court's decision regarding the applicability of the highway exception to governmental immunity. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

Under the highway exception to governmental immunity, "[t]he duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . ." MCL 691.1402(1). Stated another way, the duty "is limited exclusively to dangerous or defective conditions within the actual roadway, paved or unpaved, designed for vehicular travel." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 184; 615 NW2d 702 (2000).

Defendant first argues that the area where the drain hole was located was the shoulder of the road and that the shoulder is not "designed for vehicular travel." MCL 691.1402(1).

However, even assuming that the area where the drain hole was located was considered the shoulder area of the road, our Supreme Court in *Gregg v State Hwy Dep't*, 435 Mich 307, 315-316; 458 NW2d 619 (1990), held that the shoulder was included in the improved portion of the highway designed for vehicular travel. See also *Meek v Dep't of Transportation*, 240 Mich App 105, 114; 610 NW2d 250 (2000) and *Soule v Macomb Co Bd of Rd Comm'rs*, 196 Mich App 235, 237; 492 NW2d 783 (1992). Defendant argues that *Gregg* was wrongly decided and is no longer valid in light of *Nawrocki*. However, *Nawrocki* did not overrule *Gregg* and we are bound by *Gregg*. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) ("[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [the] Court takes such action, the Court of Appeals and all lower courts are bound by that authority.").[1]

Defendant next argues that although plaintiff's complaint used the words "repair and maintain," plaintiff was actually alleging a claim based on a design defect. We disagree. The plain language of the statute makes it clear that there is "no duty, under the highway exception to governmental immunity, to correct [] design defects." *McIntosh v Dep't of Transportation (On Remand)*, 244 Mich App 705, 710; 625 NW2d 123 (2001). "Nowhere in the statutory language is there a duty to install, to construct or to correct what may be perceived as a dangerous or defective 'design.'" *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501; 638 NW2d 396 (2002).

However, we conclude that plaintiff did not allege a design defect in his complaint. Plaintiff alleged that defendant failed to repair and maintain the bridge surface when it repaved the surface. The drain grates were originally designed to be flush with the roadway but, as a result of defendant repaving the bridge, the grates were not flush with the surface and allegedly caused plaintiff to swerve into danger. It was the act of improperly resurfacing the bridge that allegedly led to plaintiff's injuries. Because plaintiff alleged that defendant's failure to properly repair and maintain the bridge caused the dangerous or defective condition in the roadway, *Nawrocki*, *supra* at 184, the highway exception to governmental immunity applies to plaintiff's claim.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

---

[1] We note that this Court has previously rejected defendant's argument in *Grimes v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2004 (Docket No. 249558) and *Powell v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2005 (Docket No. 261541), that application for leave to appeal has been granted by our Supreme Court in *Grimes* (order of the Supreme Court, issued October 6, 2005 (Docket No. 127901)), and that application for leave to appeal is pending before our Supreme Court in *Powell* (Docket No. 129043).

STATE OF MICHIGAN

COURT OF APPEALS

EDWARD MORGAN,

Plaintiff-Appellant,

v

JAMES LAROY and LUANN LAROY,

Defendants-Appellees.

UNPUBLISHED
April 14, 2005

No. 253789
Kalamazoo Circuit Court
LC No. D03-000201 NO

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals the court's grant of summary disposition dismissing his premises liability action brought as a result of the injuries he sustained when he slipped and fell on snow-covered ice on defendants' walkway. The court found that defendants owed plaintiff no duty because the hazard was open and obvious and not effectively unavoidable. We find that the condition was not open and obvious and, therefore, do not reach the question of avoidability. We reverse the court's order.

Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.1116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court must consider all pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiff visited defendants' home for an appointment for the purpose of selling insurance. When he arrived, he parked in the driveway, entered the open garage, and knocked on the interior door. He did not encounter any snow or ice during the few steps from his car to the garage. Defendants welcomed him and he entered through the interior door.

Defendants' home had two other entry points. There was a front door that guests rarely used. There was a side door in close proximity to the interior garage door and both were connected to opposite ends of a breezeway. Guests typically used the side door, which opened to an outdoor walkway paved with patio blocks.

After the meeting, plaintiff exited through the side door. He stated that Mrs. LaRoy indicated to him that he could exit through the side door and directed him that way. Her husband in his deposition stated that she was upset that plaintiff entered through the interior garage door, where there is no doorbell. At no point were her feelings communicated to plaintiff, however.

The weather was cold and during the preceding week there had been significant snow accumulation. The snow outside the side door was fresh in the sense that one could leave a footprint in it or scrape a snowball out of it. Plaintiff took eight to ten steps through the snow and past the one or two steps down onto the walkway and then slipped and fell. His right foot twisted behind him. Plaintiff described his speed as a normal walking gait. He did not see any ice, but he felt with his hands cold, hard ice that was not wet when he was getting up. Plaintiff did not see the ice. He only saw snow. He walked very cautiously without incident over more snow-covered ice to his car. He noticed swelling when he returned home and sought medical attention, which revealed two bone fractures in his foot.

Principles of invitee law determine whether defendants owed plaintiff a duty of care. Plaintiff was an invitee because he was on defendants' premises for the commercial purpose of selling insurance. See e.g., *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). Generally, a premises possessor owes invitees a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to dangers that are open and obvious, unless there exist special aspects of an open and obvious condition that create an unreasonable risk of harm, in which case the premises possessor has a duty to take reasonable steps to protect invitees from the risk. *Id.* at 516-517. "'[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee'" unless the risk of harm is unreasonable despite being obvious or known to the invitee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 613; 537 NW2d 185 (1995) (quoting *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)). "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993)).

The role of judge and jury with respect to the open and obvious analysis in cases involving ice and snow has been developed in a long line of case law. According to the Supreme Court in *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732(1975):

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. [*Quinlivan, supra* at 261.]

The Court recently by implication affirmed that accumulation of snow and ice is not open and obvious as a matter of law. In *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), the Court stated the following:

> [I]n the context of an accumulation of snow and ice, *Lugo* means that, *when such an accumulation is 'open and obvious,'* a premises possessor must 'take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff]' only if there is some 'special aspect' that makes such accumulation 'unreasonably dangerous.' [Emphasis added.]

The emphasized language indicates that not all accumulation of snow and ice is open and obvious. See also *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106, 108; 689 NW2d 737 (2004) (holding that summary disposition was improper because reasonable minds could disagree as to whether black ice under a coating of snow was open and obvious). Indeed, in *Mann* the Court refrained from deeming open and obvious the "icy and snow-covered parking lot" upon which the intoxicated plaintiff fell and remanded the case to the trial court. *Mann, supra* at 327, 334. The Court explicitly acknowledged the role of the jury. "[I]n determining whether defendant breached its duty, the fact-finder must decide only whether a reasonably prudent person would have slipped and fallen on the ice and snow in defendant's parking lot, or whether that reasonably prudent person should have been warned by defendant of the dangerous condition" *Id.* at 330. The Court also held that liability hinges on the condition of the premises, not the particular plaintiff. *Id.* at 329. It relied on the objective standard of care of the reasonably prudent person and rejected as irrelevant the intoxication of the plaintiff and the dramshop's knowledge of the intoxication. *Id.* at 329-330.

This Court must therefore ask if a reasonably prudent person in plaintiff's position would have, upon casual inspection, discovered the danger and the risk that defendants' snow-covered walkway presented. We answer this question in the negative. All plaintiff saw was snow. He did not see ice and had no reason to believe that slippery ice was underneath the snow. The trial court's pronouncements on temperature fluctuations and a general knowledge in Michigan that "where there is snow, there is ice" typify the general conclusion rejected in *Quinlivan* and *Mann*. Were it otherwise, then all accumulations of snow and ice would be open and obvious per se, which is not the law in Michigan. Furthermore, one walks more cautiously on visible or otherwise known ice than on snow alone. See *Kenny, supra,* 264 Mich App at 108-109. This phenomenon is apparent in the fact that, after falling, plaintiff gained an awareness of the ice and walked cautiously without incident over the remaining snow-covered ice.

The trial court also erred when it emphasized in its ruling that plaintiff felt the ice as he got back to his feet. The relevant point of time is before falling, not after. This distinction is crucial because it also sets apart other cases in which this Court held that accumulations of snow and ice were open and obvious. In each case, the plaintiff had or should have had advance knowledge of the slippery condition, unlike plaintiff in the present case. In *Perkoviq v Delcor Homes–Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), there "was nothing hidden about the frost or ice on the roof" off of which the plaintiff slipped and fell. In *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002), this Court found that the plaintiff was "a reasonable person who recognized the snowy and icy condition of the [dormitory] steps and the danger the condition presented." Finally, in *Joyce, supra* at 239, the plaintiff was aware of the slippery sidewalk, repeatedly told the defendant about it, and had slipped on it twice prior to falling.

Defendants cite several unpublished opinions in support of their position. These cases have no precedential effect and, therefore, do not merit comment. MCR 7.215(C)(1). To the extent that they are persuasive authority, many, like the cases distinguished above, relied heavily on the fact that the plaintiff had or should have had advance knowledge of the hazard.

Accordingly, snow-covered ice is not open and obvious as a matter of law. Reasonable minds can disagree on the nature of the hazard that a reasonable person in plaintiff's position would encounter and, concomitantly, on the extent of defendants' duty to that person. A fact-finder and not a court of law must decide those questions. We reverse the trial court's grant of summary disposition.

Because consideration of special aspects of the hazard, such as whether it was effectively unavoidable, is conditioned on a finding that the hazard is open and obvious, we need not reach the question. See *Lugo, supra* at 516-517.

Reversed and remanded for proceedings consistent with this opinion. We do no retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot

STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE JACKSON, Personal Representative of the Estate of Alvin Cook,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 5, 2004

No. 246388
Wayne Circuit Court
LC No. 01-116994-NF

Before: Murphy, P.J., and Griffin and White, JJ.

GRIFFIN, J. (*dissenting*).

Plaintiff sues defendant for breach of contract over defendant's refusal to pay uninsured motorist benefits arising out of a hit-and-run accident in which plaintiff's decedent was killed. The issue on appeal is whether the provision in the parties' insurance contract requiring the person making a claim to report a hit-and-run accident to defendant within 30 days is enforceable. I would hold that the contractual notice provision is enforceable and, therefore, affirm the lower court's grant of summary disposition in favor of defendant. MCR 2.116(C)(10).

I

Plaintiff frames her first issue as follows: "Whether under Michigan law State Farm's insurance contract's 30 day notice provision is ambiguous as to the estate, impossible to perform by the estate, and/or unenforceable as unconscionable?"

In regard to the alleged ambiguity of the notice provision, plaintiff argues that because plaintiff's decedent was killed instantly at the scene, "Mr. Cook did not live 30 days so as to live long enough to notify the defendant of his uninsured motorist claim." Further, plaintiff asserts "Certainly, if the defendant wanted the 'estate' or 'personal representative' to notify the defendant within 30 days, it would have used the proper language." In essence, plaintiff argues that the notice provision contained in the policy does not contemplate the death of an insured in a hit-and-run accident. I disagree and would hold that the notice provision is not ambiguous. *Morley v Auto Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998); *Hellebuyck v Farm Bureau General Ins Co of Michigan*, 262 Mich App 250, 254; ____ NW2d ____ (2004).

In dispute is the following section of the parties' insurance contract:

> "REPORTING A CLAIM – INSURED'S DUTIES." "The *person* making claim . . . under the uninsured motor vehicle coverage" [shall] "report a 'hit-and-run' accident . . . to us within 30 days."

The insurance contract at issue specifically defines "person" as: "person – means a human being." Plaintiff's argument that, until a personal representative is appointed, a "person" cannot give notice of the claim, was rejected by our Court in an analogous context in *Halton v Fawcett*, 259 Mich App 699, 704; 675 NW2d 880 (2003). In construing the substantially similar medical malpractice statutory notice provision, we held in *Halton* as follows:

> In sum, the word "person" refers to a human being, whether in their individual or representative capacity. Plaintiff is the same human being who is responsible for the notice of intent and the filing of the lawsuit. Therefore, the statutory requirement that the person who files the suit must have previously given notice of intent is satisfied. To impose a requirement that the appointment to the position of personal representative be made before the serving of the notice of intent would create a statutory requirement that simply does not exist and for which the courts have no authority to impose."

Although *Halton, supra*, involved the notice requirement by a "person" for medical malpractice, its reasoning is applicable to the present case involving a contractual notice provision.

Unlike the majority, I view the 30-day notice provision as plain and unambiguous. As a condition precedent, "*the person making claim*" under the insurance policy must report the hit-and-run accident to defendant within thirty days. Here, it is undisputed that plaintiff is "the person making claim," and that she failed to comply with the notice provision. The majority finds ambiguity in the notice provision on the basis that the class of allowable claimants is unclear: "The policy is thus ambiguous regarding who may be the 'person making claim' and therefore who has the obligation to provide notice." Contrary to the majority's position, the questions of (1) notice, and (2) the universe of allowable claimants, are two separate issues. Irrespective of whether "the person making claim" under the policy is a proper claimant, that person must give notice of the accident to defendant for that person's claim to proceed. The notice provision, itself, as a condition precedent, is not ambiguous.

Next, plaintiff raises the related argument that it was impossible for the estate to comply with the 30-day notice requirement because the personal representative was not appointed within the 30-day period. Again, for the reason stated in *Halton, supra*, plaintiff, Charlotte Jackson, is a "person" (irrespective of her appointment as personal representative), and the same human being who ultimately filed a claim under the contract. Therefore, she was required to give notice pursuant to the contractual notice provisions.

Last, plaintiff argues that the contractual notice provision is unenforceable because it is unconscionable. In this regard, plaintiff argues a disparity in relative bargaining power of the parties, and contends that the notice provision is substantially unreasonable. As to the relative bargaining strength of the parties, I note that because uninsured motorist benefits are not required by statute, *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993), the parties are free to contract for the terms, if any, of uninsured motorist benefits. Plaintiff has not alleged that the numerous auto insurance companies that do business in the state of Michigan fail to offer a choice of the terms of uninsured motorist benefits. Similarly, plaintiff has not cited authority for her argument that the 30-day notice provision for hit-and-run accidents is unreasonable.[1] On the contrary, in *Reynolds v Allstate Ins Co*, 123 Mich App 488; 332 NW2d 583 (1983), we held that a 60-day notice provision contained in a statute for claims made under the standard homeowners insurance policy was reasonable. Plaintiff has failed to bring to our attention any authority from Michigan or other jurisdictions in support of her position. In this regard, it is well settled that issues which are insufficiently briefed are deemed abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). "A party may not leave it to this Court to search for authority to sustain or reject its position." *Consumers Power Co v Public Service Com'n*, 181 Mich App 261, 268; 448 NW2d 806 (1989).

II

Plaintiff's second issue is "Whether the notice provision of State Farm's policy which in effect acted as limitations period was tolled until the estate was formed?"

On this issue, plaintiff confuses the contractual notice provision (which is a condition precedent for bringing suit) with statutory tolling provisions for the bringing of a wrongful death action. In the present case, defendant did not argue, and the lower court did not rule, that the statute of limitations had run. Compare *Rory v Continental Ins Co*, ____ Mich App ____; ____ NW2d ____ (2004) (Docket No. 242847, released July 6, 2004), with *Aldalali v Underwriters at Lloyd's, London*, 174 Mich App 395; 435 NW2d 498 (1989). Rather, summary disposition was granted on the basis that a condition precedent to bringing suit – the 30-day notice provision following a hit-and-run accident – was not satisfied by plaintiff. See *Continental Studios v American Auto Ins* Co, 340 Mich 6; 64 NW2d 615 (1954). For this reason, the authorities cited by plaintiff are not applicable.

III

Finally, plaintiff argues that the 30-day notice provision contained in the policy can be enforced only if defendant can prove actual prejudice. Plaintiff cites *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971), for her argument that "prejudice to [the] liability insurer is a material element in determining whether notice of accident or suit is reasonably given, and [the] burden is on insurer to demonstrate such prejudice." However, *Wendel, supra*, involved a statutory homeowners insurance policy which provided that, following the filing of a lawsuit, the summons and complaint shall be "immediately forwarded" to the insurer. The Supreme Court interpreted this unspecific provision to require the insured to deliver the summons and complaint within a "reasonable" time to his insurance carrier and that prejudice to the insurer is a material element in determining whether notice was given within a reasonable time.

---

[1] At oral argument, defense counsel argued that the 30-day notice provision was reasonable for hit-and-run accidents in view of the inherent difficulties of investigating such accidents after the fact.

Wendel is distinguishable on the basis that it does not involve a condition precedent to the filing of an action against an insurer, but, rather, when reasonable notice of a pending lawsuit is given to the insurance carrier. Furthermore, the present case does not involve any statutory obligations; instead, it entails a matter of contractual interpretation. In this regard, we stated the following in *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 19-20; 592 NW2d 379 (1998):

> Underinsurance automobile insurance protection is not required by law and therefore is optional insurance offered by some, but not all, Michigan automobile insurance companies. Because such insurance is not mandated by statute, the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts. *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993). As the Supreme Court stated in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993), regarding substantially similar uninsured motorists benefits:
>
> > PIP [personal protection insurance] benefits are mandated by statute under the no-fault act, MCL 500.3105; MSA 24.13105, and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. Therefore, *because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded.* [Emphasis added.]

Because we are dealing solely with an issue of contractual interpretation, we construe and enforce the plain and unambiguous terms of the contract. Because a condition precedent of the contract was not satisfied, the optional contractual coverage of uninsured motorist benefits is not available to the plaintiff, and her remedies are limited to statutory no-fault personal protection insurance (PIP) benefits. See, generally, *Bradley v Mid-Century Ins Co*, 409 Mich 1, 53; 294 NW2d 141 (1980), overruled on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 56-63; 664 NW2d 776 (2003).

For these reasons, I respectfully dissent and would affirm.

/s/ Richard Allen Griffin

STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS L. GRIFFITH, Legal Guardian for DOUGLAS W. GRIFFITH, a Legally Incapacitated Adult,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 232517
Ingham Circuit Court
LC No. 97-087437-NF

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order ruling that room and board expenses for Douglas W. Griffith (hereinafter "Griffith"), a legally incapacitated adult, are an allowable expense under the no-fault act. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 28, 1994, Griffith sustained a severe brain injury in a motor vehicle accident. The accident left him totally disabled. He requires constant monitoring, care and assistance with every aspect of life. For fifteen months after the accident Griffith received in-patient treatment in hospitals and rehabilitation facilities. From August 1995 through August 1997 Griffith resided in a modified apartment and received continuous care. On August 6, 1997, Griffith returned to his home. Plaintiff, his wife, and other attendants provide the care that he requires.

At the time of the accident Griffith was covered under a no-fault automobile insurance policy issued by defendant. During the period that Griffith was hospitalized and while he resided in the apartment, defendant paid his expenses, including those incurred for food. After Griffith returned home a dispute arose regarding defendant's obligation to pay for various modifications to his home and for certain other expenses, including his food. Plaintiff filed suit seeking reimbursement of certain expenses, including those incurred for Griffith's food. The trial court ruled that the cost of Griffith's food was an allowable expense under MCL 500.3107(1)(a). That ruling is the only aspect of the trial court's decision challenged on appeal.

Defendant argues the trial court erred by holding that the cost of Griffith's food was an allowable expense under MCL 500.3107(1)(a), and asserts that a causal link must exist between injuries sustained in a motor vehicle accident and an incurred expense. Defendant reasons that a person must consume food regardless of whether he is disabled and regardless of where he resides, and maintains that once Griffith returned home, his food expenses were no longer incurred as a result of his injuries. We affirm the trial court's decision.

Under the no-fault insurance act, an insurer must pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle. Payable benefits include allowable expenses. Allowable expenses consist of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. MCL 500.3105(1); MCL 500.3107(1)(a). To be entitled to reimbursement for an allowable expense under MCL 500.3107(1)(a), a plaintiff must prove that: (1) the expense was reasonable; (2) the expense was reasonably necessary; and (3) the expense was incurred. *Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 574; 633 NW2d 461 (2001).

The issue raised in this appeal is controlled by *Reed v Citizens Ins Co*, 198 Mich App 443, 453; 499 NW2d 22 (1993). In *Reed*, this Court held that where a person injured in a motor vehicle accident is unable to care for himself or herself and would be institutionalized if a family member were unwilling to provide home care, a no-fault carrier liable for the cost of maintenance in an institution is liable for the cost of maintenance, including room and board, in the home. The *Reed* Court expressed agreement with Justice Boyle's statement in *Manley v DAIIE*, 425 Mich 140, 152-153; 388 NW2d 216 (1986), that if a person who would require institutionalized care can be cared for at home due to the devotion of family members, the test for allowable expenses should not differ from that set out in MCL 500.3107(1)(a). *Manley, supra*, 169 (Boyle, J., concurring in part and dissenting in part).[1]

Defendant's assertion that the no-fault act requires that an expense, to be allowable, must have been incurred only as a result of an injured insured being cared for in an institutionalized setting was rejected in *Reed*, *supra* at 453. Defendant does not dispute that if Griffith's wife were unwilling or unable to care for him at home, he would require institutionalized care. Under the rule announced in *Reed*, *supra*, the cost of Griffith's food is an allowable expense under MCL 500.3107(1)(a).

[1] In *Manley v DAIIE*, 127 Mich App 444; 339 NW2d 205 (1983), a jury found the defendant insurer liable for payment of food expenses for the injured insured, who was cared for at home by family members. On appeal, this Court stated that food obtained at an institution is an allowable expense because an institutionalized person must obtain food from the institution, and the expense represented an extraordinary cost not analogous to an expense incurred at home. This Court reversed the award of room and board on the ground that it did not distinguish between food expenses and the other services provided by an institution. *Id.*, 454. In *Manley v DAIIE*, 425 Mich 140, 152-153; 388 NW2d 216 (1986), our Supreme Court declared that portion of this Court's opinion to be without precedential effect on the ground that the issue whether food and other maintenance expenses are allowable expenses under MCL 500.3107(1)(a) was not presented in the trial court or argued in this Court.

Defendant's efforts to distinguish *Reed* are unavailing where the *Reed* Court held that if an injured insured would otherwise require institutionalized care were a family member not willing to provide home care, room and board in the home constitutes an allowable expense under MCL 500.3107(1)(a). *Reed*, *supra*.

Affirmed.

/s/ Helene N. White
/s/ Janet T. Neff
/s/ Kathleen Jansen

Opinions listed in 15c, but not 15d

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellant.

UNPUBLISHED
January 18, 2005

No. 245099
Van Buren Circuit Court
LC No. 00-011976-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right, and we reverse and remand for new trial.

This case stems from a homicide that occurred more than fifteen years ago. On the evening of September 12, 1988, Charles Miller disappeared after visiting defendant's Bangor home. On July 10, 2000, Charles Dean Lamp, a co-defendant, led police to a site one-half mile from his home, where the buried remains of a body matching Miller's description were found. Defendant was subsequently arrested and charged in connection with Miller's death.

A jury trial was held in April 2001, and defendant was found guilty of first-degree murder. However, the trial court granted defendant's motion for new trial based on the trial court's misinforming the jury regarding the prosecution's grant of immunity to prosecution witness Guy Carl Simpson in exchange for his testimony. A second jury trial took place in October 2002.

At this second trial, Simpson appeared in court, but resisted giving testimony. He was found to be unavailable, and the court admitted his testimony from the first trial together with an instruction clarifying the prosecutor's grant of immunity. A written statement Simpson had given after the first trial, in which he recanted his testimony, explained why he had testified as he had, and stated that only he and Lamp were with Miller when he was killed, was not admitted.

According to Simpson's testimony at the first trial, which was read to the jury at the second trial, on the evening of September 12, 1988 Simpson was dropped off at the home of defendant and defendant's then girlfriend, Darlene (Rhodes) Zantello, for an unannounced visit sometime between 10:00 and 10:30 p.m. When Simpson arrived, defendant and his one-year-old daughter were at home, and Zantello may have been there at that time as well. Miller also was at defendant's house when Simpson arrived. Between one-half hour and one hour after Simpson arrived, Lamp, who was also a friend of defendant's, and whom Simpson did not like, arrived at defendant's home. Lamp announced that he wanted to steal some marijuana from a field he knew about. Miller was known to have a knack for finding marijuana plants, and Simpson assumed that it had been planned in advance that Miller would go with Lamp and defendant to get the marijuana. Defendant originally stated that he could not go because he had to stay with his daughter, since Zantello had left by then, and suggested that Simpson accompany Lamp and Miller in his stead. Eventually, however, all four men, together with defendant's daughter, left the home to go steal the marijuana.

Lamp drove into the woods, driving around for approximately forty-five minutes before turning off onto an unpaved "two-track" road and stopping. All four men got out, while the child was left sleeping in the car, and Lamp took a rifle out of the trunk of his car and handed it to defendant. Lamp walked off some distance ahead of the others, allegedly to look for the field, while defendant, Miller, and Simpson followed behind. Shortly thereafter, Lamp called out that he had found the field, and at that point defendant turned and shot Miller one time, and Miller fell to the ground, apparently dead. Lamp then rejoined Simpson and defendant, and Simpson and Lamp moved Miller's body to a nearby, pre-dug grave and placed Miller in the grave. Defendant then jumped down into the grave and returned a moment later with something in his hand, which Simpson believed to be one of Miller's ears. Lamp then filled in and disguised the grave, and the three men returned in Lamp's car, along with defendant's daughter, to defendant's home. Approximately one half-hour later Lamp left to go home, while Simpson remained at defendant's home for the remainder of the night.

Simpson testified that several days after the murder Lamp told him that they had killed Miller because Miller had "gotten in over his head with the wrong people." Simpson testified that defendant told him that he needed to show Miller's ear to Benny Williams. Several days after the murder, Simpson was with defendant when he took a bag, which Simpson believed contained Miller's ear, and threw it in a nearby river.

Simpson admitted that in the past he had told several different versions of the events surrounding Miller's disappearance, including that only he (Simpson) and Lamp, and not defendant, were involved in Miller's death; that an entirely different person, Charles Pippin, committed the crime; and that Miller was not really dead, but rather was simply working in another state. Simpson admitted that he had made his statements with an eye to his own personal gain, and further admitted that if he testified to a different set of events at defendant's trial, he would probably lose his grant of immunity and would risk perjury charges. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he gave any information regarding Miller's murder to the police or if he endangered Lamp's own plea-agreement in any way.

Simpson's testimony as to the events surrounding Miller's death was largely corroborated by Lamp. Lamp, who was testifying pursuant to a plea-bargain under which he was permitted to plead guilty of manslaughter and receive a ten to fifteen year sentence in exchange for his testimony, testified that defendant was angry with Miller because he believed Miller was planning to rob Benny Williams, a local drug dealer who supplied defendant with cocaine. As a result, Lamp and defendant had discussed killing Miller three or four times, and ultimately they decided to take Miller out to a pre-selected, isolated area on the pretext of stealing marijuana, and to shoot him and bury his body in a pre-dug grave. The two men located an appropriate area not far from where Lamp then lived, off an unpaved two-track road, and several nights before Miller's murder they prepared a grave at this location, with both Lamp and defendant taking turns digging.

Lamp testified that on the night of Miller's murder, he drove to defendant's house, and when he arrived he found that not only was defendant there, but Simpson was present as well. Lamp was not happy that Simpson was there, because they did not like each other, but defendant took him aside and informed him that Simpson was going to assist in the murder. Approximately a half-hour after Lamp arrived, Miller was dropped off at defendant's house, and then the four men, together with defendant's daughter, got into Lamp's car and drove to the pre-selected site. As previously planned by Lamp and defendant, when they arrived at the site, Lamp handed defendant a rifle, which he took from the trunk of the car, and then Lamp walked alone ahead of the others to find the pre-dug grave. When he found the grave, he shouted back to the others and then he heard a single gunshot. He then went back to the others, where he found Miller lying on the ground with blood seeping from the back of his head and defendant holding the rifle in his hands. Lamp, Simpson, and defendant carried Miller's body to the awaiting grave, defendant jumped in and cut off Miller's ear, and then the three men filled in the grave and disguised it so that it would not be discovered. Lamp stated that he subsequently sold the rifle.

Lamp confirmed that he had once threatened to kill Simpson when he found out Simpson was wearing a hidden wire in an attempt to incriminate Lamp and defendant, but insisted it was merely an idle threat and that he had no intention of ever following through on it.

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and her sister Roxanne (Krause) Barr, who lived with Miller and Mock at the time Miller was killed, both testified that defendant admitted being present at Miller's murder, although their testimony differed with regard to whether defendant admitted shooting Miller.

Darlene Zantello, formerly Darlene Rhodes, who was defendant's girlfriend at the time of Miller's death, was called to the stand by the prosecution, but denied having any memory of the events of the night Miller died, her prior statements to police, her prior testimony, or an affidavit she signed after the first trial. The court established through questioning that Zantello had been an alcoholic for many years, and had suffered head injuries. The court found Zantello to be unavailable as a witness, pursuant to MRE 804, and permitted the prosecution to read Zantello's testimony from defendant's first trial into the record.

At the first trial, Zantello testified that she lived with defendant in September 1988, that she was pregnant at that time, that on the night of Miller's death she had experienced severe stomach pains and had gone to the hospital. Zantello testified that she spent three or four hours at the hospital before returning home to find the house empty. After unsuccessfully trying to locate her daughter at a friend's, she laid down and fell asleep. She was awakened some time later when defendant and Simpson returned to the house. Zantello testified that she heard Simpson say something to defendant like "that was like a movie with all that blood," and that she very vaguely recalled someone saying something regarding someone's ear being cut off. She also had a vague recollection of Simpson saying something about almost blowing someone's whole head off and about a pre-dug hole. Zantello testified that when Miller's girlfriend, Mock, came to the house looking for him, defendant denied any knowledge of his whereabouts. A year or two later, however, after Zantello and defendant had broken up, defendant came over to Zantello's house where Mock was then living. He became weepy and said he was sorry that "they did what they did," but he did not say that he himself had done anything.

Following the reading of her testimony into the record, Zantello was recalled to the stand. On cross-examination she denied any recollection of telling police in 1988 and 1990 that defendant was at home when she returned from the hospital. When defense counsel began to question her regarding the affidavit executed after the first trial in which she stated that her first statement to the police was true and her testimony at trial was not, the trial court stopped the questioning on the basis that the affidavit was executed after the first trial, and therefore was not a *prior* inconsistent statement.

Three of defendant's sisters, Shirley Gargus, Sheila Blackston, and Linda Johnson, each testified as to defendant's whereabouts on the night of Miller's murder and confirmed Zantello's assertion that she went to the hospital that night. Gargus testified that on September 12, 1988 around 11:00 p.m. Sheila Blackston stopped by to leave her children for Gargus to baby-sit. Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. Around midnight, Blackston called her from the hospital and asked her to go check on defendant, since he had been left alone with his and Zantello's one-year-old baby. When she arrived at defendant's house a few minutes later defendant and the baby were at home.

Blackston confirmed Gargus' testimony, stating that on September 12, 1988 she took Zantello to the hospital around 11:00 p.m. for stomach pain, and dropped her own children off with Gargus on the way to the hospital. When she returned Zantello to Zantello's and defendant's home after leaving the hospital, defendant was at home.

Johnson testified that on September 12, 1988 she got into a fight with her husband and went over to defendant's house around 11:30 p.m. to calm down. She stated that when she arrived, defendant and the baby were at the house alone, asserted that the only visitor during the time she was at defendant's house was defendant's friend Lonnie Johnson, who visited for approximately twenty minutes around midnight, and told the court that when she left defendant's home at around 12:45 a.m. defendant was still at home.

Defendant also called Benny Williams. Williams asserted that he had not known Miller, that he had never asked anyone to kill Miller, that he did not know anything about Miller's death, and that no one had ever brought him a human ear. Williams did admit, however, that in 1988 he was a cocaine dealer in Bangor. A police officer had earlier testified that the police concluded that Williams was not involved in the murder.

The prosecution's experts expressed the opinion that Miller died from a gunshot wound to the neck. Defendant's experts expressed the opinion that Miller's injuries were caused by blunt force trauma.

II

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial, which was based on the claim that the court had erred in barring defendant from impeaching the prior recorded testimony of two witnesses with inconsistent statements made after the two had testified in defendant's first trial but before defendant's second trial. The court agreed that the statements were, in fact, admissible under MRE 806, but determined that they were nonetheless properly excluded because the statements were more prejudicial than probative and, thus, were inadmissible under 403. We agree with defendant that the court erred in denying him the right to impeach the witnesses with these statements.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones,* 236 Mich App 396, 404; 600 NW2d 652 (1999). The decision whether to admit evidence also is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider,* 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine,* 467 Mich 242, 250; 650 NW2d 659 (2002). Furthermore, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith,* 243 Mich App 657, 680; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

First, as the trial court recognized, and the prosecution does not contest, MRE 806, rather than MRE 613, governs the use of Simpson's and Zantello's statements for impeachment purposes. MRE 806 provides:

> ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT
>
> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C),(D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Defendant should have been permitted to impeach the witnesses with their statements under MRE 806, which permits the credibility of a declarant of an admitted hearsay statement to be attacked with any inconsistent statement made at any time, and without regard to whether the witness is afforded an opportunity to deny or explain.

MRE 403 provides that evidence that is otherwise relevant may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" means more than merely that the evidence is damaging to the challenging party. *People v Mills,* 450 Mich 61, 75; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Rather, what is meant by the phrase "unfair prejudice" in MRE 403, is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher,* 449 Mich 494, 501; 537 NW2d 168 (1995).

In other words, evidence is said to be " 'unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.' " *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Federal courts have held that Rule 403[1] is an extraordinary remedy, the major function of which is to exclude matters "of scant or cumulative probative force, dragged in by the heels for the sake of their prejudicial effect," and have stated that FRE 403 carries a strong presumption in favor of admissibility. *United States v Grant*, 256 F3d 1146, 1155 (CA 11, 2001), quoting *United States v Utter*, 97 F3d 509, 514-515 (CA 11, 1996), *United States v Cross*, 928 F2d 1030, 1048 (CA 11, 1991), and *United States v Church*, 955 F2d 688, 703 (CA 11, 1992). At the same time, however, federal courts have also noted that a reviewing court must remember that the trial court, and not the appellate court, is in the best position to assess the extent of the prejudice caused to a party by a piece of evidence, and have further stated that when a trial court has given careful attention to a balancing of prejudice and probative value, appellate courts should be particularly mindful of their duty not to reverse absent a clear abuse of discretion. *Vaughn v Willis*, 853 F2d 1372, 1380 (CA 7, 1988), quoting *United States v Long*, 574 F2d 761, 767 (CA 3 1978), and *United States v Garner*, 837 F2d 1404, 1416 (CA 7, 1987).

The general principle that witness credibility is for the jury to determine is not disturbed by FRE 403. Therefore, evidence should not be excluded under FRE 403 because the trial court considers a witness unworthy of belief. Instead, "balancing probative worth against unfair prejudice involves the trial court giving full credit to the [evidence] and then considering probative worth against unfair prejudice." 1 Mueller & Kirkpatrick, Federal Evidence (2d ed), § 94. See *United States v Thompson*, 615 F2d 329, 332 (CA 5, 1980) (reversing trial court because FRE 403 does not authorize judge to "protect" jury from contradictory testimony, nor exclude evidence because judge "does not find it credible"); *Bowden v McKenna*, 600 F2d 282, 284 (CA 1, 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value "if the evidence is believed, not the degree the court finds it believable").

Defendant and the prosecution both discuss *Vaughn, supra*, and *Grant, supra,* as the relevant cases. The trial court relied on *Vaughn, supra,* in concluding that it would have properly barred use of the statements for impeachment under MRE 403. We find *Vaughn* distinguishable and *Grant* on point.

Vaughn involved a civil suit by a prisoner against a guard, alleging that the guard had deliberately or recklessly exposed him to sexual assaults. Another prisoner had given a pretrial

[1] Where a Michigan Rule of Evidence is modeled after its Federal Evidentiary Rule counterpart, this Court can look to federal precedent for guidance. *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996).

deposition in which he corroborated that the plaintiff had been sexually assaulted, and testified that the defendant guard had told him to keep silent about the assaults and to say that he saw nothing. Before trial, the prisoner witness wrote defense counsel a letter stating that he would not testify at trial and that he would not attest to the accuracy of his deposition. At trial, the witness refused to testify, stating that he feared for his life and the lives of his family members. The court admitted the deposition transcript but did not allow the use of the letter for impeachment. On appeal, the Seventh Circuit upheld the admission of the deposition transcript and the trial court's rulings, concluding that the use of the letter for impeachment would have been more prejudicial than probative.

The court agreed with the trial court's conclusion that the letter "could mean anything. . . . It would not enlighten the jury at all to read this letter," and found the letter "very ambiguous."[2] The court stated that read in isolation, it could not determine the letter's significance. The court also observed that parts of the letter apparently dealt with mistakes the witness had made in his deposition and had been permitted to correct after mailing the letter, so that the comments in the letter could be interpreted by the jury in a manner highly prejudicial to the plaintiff. Further, the court noted the trial court's dilemma arising from the fact that the witness refused to testify because "he was scared to death of the people he is going to testify about." The court observed that if the trial court had permitted the jury to consider the letter, it also would have had to permit disclosure that the letter and the refusal to testify were a product of the witness' fear for his safety and that of his family, and that the defendant had made it clear that he did not want such disclosure made. None of these factors were present in the instant case. The statements here were not ambiguous, there was no danger of misinterpreting their meaning, and there was no impediment to full disclosure of the circumstances of their being made.

In contrast, the facts of *Grant, supra,* are analogous. In *Grant*, the prosecution used as evidence against Grant statements made by a co-conspirator in the course of the conspiracy. These statements were admitted under FRE 801(d)(2)(E). Grant attempted to impeach the co-conspirator's statements with an affidavit that his attorney had obtained from the co-conspirator after the co-conspirator was deported to Jamaica. The court did not allow the impeachment, finding that the statements were not inconsistent. The Court of Appeals reversed, finding that the affidavit's statements were admissible for impeachment purposes under FRE 806. The court then addressed the prosecution's argument that the affidavit was inadmissible under FRE 403 because if believed, it would provide a complete defense rather than merely impeaching the co-conspirator's hearsay statements. The court rejected that argument, observing that rule 403 is an "extraordinary remedy" that carries "a strong presumption in favor of admissibility," and that the affidavit could do no more than impeach and could not provide a complete defense if the

---

[2] The letter read:

> I am not going assign this transcript against V. Willis and V. Terry. Two wrong don't make a right.
>
> I am not going to testify in this case I made a lots of mistakes
>
> I would like to see you person. Let me say this V. Terry don't have anything coming by law.

prosecution requested the limiting instruction to which it would have been entitled. *Grant, supra* at 1155. The court also rejected the prosecution's argument that the affidavit statements were properly excluded because they were unreliable:

> Rule 806 made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the witness is too unreliable to be believed on important matters. *See United States v. Graham*, 858 F2d 986, 990 n 5 ([CA5,] 1988) [stating the same proposition]. [*Grant*, *supra* at 1156.]

In the instant case, recognizing the appropriate standard of review, we nevertheless are persuaded that the trial court abused its discretion in denying the motion for new trial on the basis that barring the use of the statements to impeach the witnesses was supported by MRE 403. The court concluded that use of the statements would have been unfairly prejudicial because the statements went beyond mere statements and were arguments for acquittal, and the court believed that the witnesses had deliberately made themselves unavailable and given the statements "to have [their] cake and it too." However, the statements were not offered to prove the truth of what was in them, but to attack the witnesses' credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. Further, the court was free to redact any portions of the statements that did not amount to a statement inconsistent with the witness' hearsay statement.

In a supplemental brief filed in propria persona, defendant raises a similar argument with respect to other witnesses who would have testified to prior inconsistent statements of Simpson in which he stated that only he and Lamp were involved in Miller's murder. Anticipating defendant's calling such witnesses, as was done in the first trial, the prosecutor asked the court to exclude the testimony of any witness who would testify to a prior statement that was not brought to the witness' attention under MRE 613(b). Defense counsel agreed that she intended to call a number of such witnesses, and had affidavits from such witnesses, including some who were not known at the time of the first trial. The court ruled the testimony inadmissible. For the reasons discussed above, this testimony was admissible under MRE 806, and the court erred in excluding it.

We reject the argument that the court's error was harmless because Simpson and Zantello had already been effectively impeached with inconsistent statements at the first trial. The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not.

Regarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement and the testimony of other witnesses regarding other inconsistent statements been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. We conclude that defendant has shown the requisite prejudice - - that upon a review of the entire record, it is more probable than not that the error in denying the admission of substantial impeachment evidence was outcome determinative.[3]

In light of this conclusion, we do not reach defendant's additional claims of error, except to note that if Simpson is again declared to be unavailable, his refusal to testify should be clearly developed on the record.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

---

[3] Defendant asserts that the error denied him his constitutional right to confront witnesses against him. The prosecution concedes

> In reviewing the parallel federal rule of evidence, FRE 806, the federal courts have found that the improper exclusion of impeachment evidence implicates a defendant's right of confrontation where the trial court admitted the testimony of an unavailable hearsay declarant. See *United States v Burton*, 937 F2d 324, 328 (CA 7, 1991); *United States v Moody*, 903 F2d 321, 329 (CA 5, 1990); and *Smith v Fairman*, 862 F2d 630, 638 (CA 7, 1988).

Under standard of review, the prosecution states, "As a preserved claim of constitutional error, this Court must determine whether the people have established beyond a reasonable doubt that any error was harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999)." The prosecution argues that there was no error because the impeachment evidence was more prejudicial than probative, and that even if there was error, the error is harmless in light of the other impeachment evidence. We have rejected these arguments above. Although conceded by the prosecution, we do not decide whether the error is of constitutional magnitude, and instead have analyzed the case under the more stringent standard applied to non-constitutional error.

Court of Appeals, State of Michigan

ORDER

People of the State of Michigan v Clarence C. Hansford, Jr.

Docket # 188370

L.C. # 92 012590

Helene N. White
Presiding Judge

Roman S. Gribbs
David H. Sawyer

Judges

As directed by the Supreme Court, this Court has reconsidered the matter in light of People v Cervantes, 448 Mich 620 (1995). The Court concludes that the 40 to 60 year sentence constitutes an abuse of discretion and ORDERS that the case be remanded for resentencing.

Remanded. We do not retain jurisdiction.

Sawyer, J., would dissent for the reason that he does not feel that the sentence imposed by the trial court constitutes an abuse of discretion.

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Ella Williams, Chief Clerk, on

October 16, 1995
Date

Ella Williams
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GERALD GRONCKI and CHERYL GRONCKI,

Plaintiffs-Appellants,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED

December 27, 1994

No. 153538
LC No. 91-415015-NO

Before: Jansen, P.J., and White and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the Oakland Circuit Court granting defendant's motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff (hereafter plaintiff will refer solely to plaintiff Charles Groncki), a maintenance worker, was working on a condominium unit near the outer perimeter of a condominium complex on April 24, 1989, in Novi. Plaintiff was moving a fully extended twenty-four foot aluminum ladder when he lost control of the ladder and it touched one of defendant's power lines. Plaintiff was electrocuted and he suffered cardiac arrest and burns to his left foot. Fortunately, he was not killed, but his small left toe had to be amputated as a result of the accident.

Plaintiffs filed suit against defendant Detroit Edison Company, alleging that defendant was negligent in locating the power lines too close to the ground and too near the building. Plaintiffs also alleged that defendant was negligent in failing to warn plaintiff and others of the locations and dangerousness of the power lines. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted the motion, ruling that defendant did not owe a duty to plaintiff as a matter of law.

Whether a duty exists is a question of law for the court to determine. Trager v Thor, 445 Mich 95, 105; 516 NW2d 69 (1994). Questions of law are reviewed de novo on appeal. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991). In Schultz v Consumers Power Co, 443 Mich 445, 452; 506 NW2d 175 (1993), our Supreme Court held that in cases involving electrical wires, the "test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any foreseeable activity done on the premises for business, work, or pleasure." Further, electric companies are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. Id.

The facts, taken in a light most favorable to plaintiff, Radtke v Everett, 442 Mich 368, 374; 501 NW2d 155 (1993), show that the power lines were installed in 1972. The condominium complex was completed in 1978. Plaintiff worked for the construction company that built the complex. It is

* Circuit judge sitting on the Court of Appeals by assignment.

undisputed that plaintiff knew of the location of the power lines and the dangers of those lines. The power lines were twenty-one feet high and were located 14.5 feet away from the building. The Michigan Public Safety Commission regulations require power lines to be fifteen feet high and eight feet away from buildings of this type.

Plaintiff was the maintenance supervisor for the condominium complex. On the day of the accident, plaintiff and another worker were fixing the flashing and shingles of a roof. Plaintiff moved a twenty-four foot aluminum extension ladder which came into contact with electrical wires running parallel to the building. Plaintiff suffered the injuries as described.

We believe that the trial court erred in holding that defendant did not owe a duty to plaintiff with regard to the claim that the wires were too close to the ground and too near the building. To the extent that plaintiff alleges that defendant was negligent in failing to properly insulate the lines, failed to erect barriers to prevent contact with the lines, failed to continuously make proper and reasonable inspection of the lines, and was negligent in the selection of the route of the lines, we believe those allegations are part of plaintiff's general negligence claim that the lines were too close to the ground and too near the building. Therefore, we find that plaintiff will be able to present these allegations to the jury as well.

In Schultz, supra, p 454, the Supreme Court held that utility companies must reasonably inspect and repair their electric lines. More importantly, the Supreme Court noted that a company that maintains and employs energized power lines must exercise reasonable care to reduce potential hazards as far as practicable. Id., p 451. Thus, like the utility company and decedent in Schultz, the relationship between defendant and plaintiff in the instant case is sufficient to impose a duty under the circumstances. Electrical energy possesses inherently dangerous properties, and electric utility companies possess expertise in dealing with those properties and delivering electricity. Id., pp 450-451.

Further, it is foreseeable that defendant's conduct may create a risk of harm to the victim. Here, a reasonable person could anticipate that a maintenance worker, doing work on the roof and gutters, could be electrocuted if his aluminum ladder touched an electrical wire carrying approximately 13,200 volts. The Supreme Court has noted that an electric company should realize that homeowners generally maintain their homes, which includes washing windows, repairing the roof, cleaning gutters, cleaning troughs, and painting. Id., pp 452-453. Thus, as the Court in Schultz noted that the lines were twenty-four feet high and fifteen horizontal feet away from the house, we find that considering the proximity of the wire to the condominium unit of twenty-one feet high and 14.5 feet away, it is foreseeable that someone making repairs to the roof could be injured if the aluminum ladder on which he was working came too close to or touched an electrical wire carrying such high voltage electricity. Id., p 453.

Accordingly, the trial court erred in holding that defendant did not owe a duty to plaintiff as a matter of law with regard to the claim that the electrical wires were too near the ground and too near the building.

However, we find that the failure to warn claim was properly dismissed by the trial court. In Koehler v Detroit Edison Co, 383 Mich 224, 231; 174 NW2d 827 (1970), the Supreme Court held that the fact that Edison knew a building was under construction near its power line and that cranes were being used in that construction would not, standing alone, create a duty upon Edison to remove the electrical charge, insulate the line, or notify the parties of the dangerous condition. There was further evidence that the workers fully understood the dangers of the electrical wires and the importance of staying away from them.

In the instant case, it is undisputed that plaintiff knew where the power lines were located and knew of the dangers of those lines. This is not a case where plaintiff did not know of the dangers of the lines. See Wilhelm v Detroit Edison Co, 56 Mich App 116, 130; 224 NW2d 289 (1974). Thus, defendant did not owe a duty to warn plaintiff of the dangerousness of the power lines where defendant was not informed of the maintenance work being done near the lines where plaintiff was admittedly aware of the locations and dangers of the power lines. Carr v Detroit Edison Co, 49 Mich App 332, 340; 212 NW2d 70 (1973).

Finally, the fact that the placement of the power lines complied with the Michigan Public Safety Commission regulations does not preclude plaintiff's claim. As the Supreme Court has held, compliance with industry-wide standards is not an absolute defense to a claim of negligence. Schultz, supra, p 456. Rather, compliance with industry standards or other regulations is evidence of due care and goes to the question of whether a defendant breached its duty of care, not whether a duty existed. Id. Ultimately, whether defendant in this case breached its duty, or acted negligently, is for the trier of fact to determine. Id., p 457; Riddle v McLouth Steel Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992).

Accordingly, we reverse the grant of summary disposition regarding the general negligence claim that the power lines were placed too near the building and too near the ground and we remand for further proceedings on that claim only. The grant of summary disposition with regard to the failure to warn claim is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Michael J. Talbot

STATE OF MICHIGAN
COURT OF APPEALS

GERALD GRONCKI and CHERYL GRONCKI — UNPUBLISHED

Plaintiff-Appellants,

v

No. 153538
LC No. 91-415015-NO

DETROIT EDISON COMPANY,

Defendant-Appellee.

Before: Jansen, P.J., and White and M.J. Talbot,* JJ.

WHITE, J. (concurring)

I join in the majority opinion and observe that to the extent plaintiff's claims regarding the failure to mark the lines are determined by the trial court to be properly presented, these claims are part of the negligence claims as to which summary disposition is reversed.

/s/ Helene N. White

* Circuit judge, sitting on the Court of Appeals by assignment.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS J. RYAN,

Defendant-Appellee.

February 24, 1994

No. 144052
LC No. 87-03365

Before: Jansen, P.J., and White and Hansen,* JJ.

PER CURIAM.

The people appeal by right from the trial court's August 20, 1991 opinion and order setting aside defendant's conviction for possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401; MSA 14.15(7401) on the grounds of governmental vindictiveness. The people challenge the trial court's decision asserting clear error. We affirm.

On March 21, 1987, defendant Thomas Ryan was arrested in Livonia by federal police agents, in the act of transferring one kilogram of cocaine to an undercover Federal Drug Enforcement Administration (DEA) agent. Defendant was charged in state court with possession with intent to deliver 650 grams or more of cocaine, and was convicted by a jury as charged on June 2, 1988. He was sentenced to life imprisonment without parole.

Defendant appealed his conviction. This Court affirmed, but held that his assertions concerning the manner in which the DEA had chosen to bring charges in Michigan set forth a prima facie case of governmental vindictiveness, and remanded for an evidentiary hearing on that question, without retaining jurisdiction. People v Ryan, No. 113547 (unpublished per curiam opinion, rel'd May 9, 1991).

After an evidentiary hearing on June 19 and 27, 1991, the trial court found that

> surrendering the defendant to State prosecution under the circumstances was vindictive governmental action which not only denied defendant his right to counsel but violated his rights under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution as well."

The court then set aside defendant's conviction and ordered him discharged. The prosecutor appealed. This Court granted the prosecutor's motion for a stay of proceedings and for immediate consideration. We note that the prosecutor's brief on appeal misstates the issue as "Did the trial court clearly err in dismissing the instant case on the ground that the prosecution should have been brought in federal court?". The trial court did not dismiss the case on the ground that the prosecution should have been brought in federal court,[1] but, rather, on the ground that the decision to bring it in state court was a vindicative governmental response to defendant's request to consult with counsel.

As with any finding of fact by the trial court, we review a finding of governmental vindictiveness for clear error. MCR 2.613(C); see also United States v Schoolcraft, 879 F2d 64, 67 (CA3 1989); United States v Meyer, 258 US App DC 263; 810 F2d 1242, 1244 (1987). In so doing, we give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it. MCR 2.613(C).

* Circuit judge, sitting on the Court of Appeals by assignment.

Our review of the evidence persuades us that the facts found by the trial court are not clearly erroneous. While the evidence lends itself to different interpretations, we are not prepared to say that the trial court clearly erred in finding governmental vindictiveness. The trial court carefully considered all the evidence and set forth sound reasons for crediting defendant's account of the conversations and events. Moreover, the evidence established that this was a federal investigation and that there was no state involvement until the Livonia Police Department was called in to provide back up for the arrest. A DEA agent testified that she could recall no case involving over 650 grams, in her six years as an agent, that had been turned over for state prosecution. The court's findings that after defendant requested an opportunity to consult with counsel and his initial attempt to obtain the advice of counsel failed, the federal authorities referred the case to the state without providing defendant "any additional and reasonable opportunity to consult with counsel," and that they did so out of vindictiveness, were not clearly erroneous.

Affirmed.

/s/ Kathleen Jansen
/s/ Helene N. White
/s/ Kurt N. Hansen

[1] The court stated "The court does not wish to be understood as saying that the mere fact that (sic) state prosecution under a harsher statute simply because the defendant would not cooperate would necessarily amount to vindictiveness. The agents did not merely choose to go to the State court. Had they done that merely to see that defendant, if convicted, would have received a harsher sentence even to punish the defendant, that would not have been a denial of due process."

H
People v. Watroba
Mich.App.,1996.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,
v.
John Michael WATROBA, Defendant-Appellant.
No. 192072.

Dec. 17, 1996.

Before: HOLBROOK, P.J., and WAHLS, and WHITE, JJ.

UNPUBLISHED

PER CURIAM.
*1 This case is before us for the second time. We initially reversed and remanded for a new trial, concluding that the trial court reversibly erred by summarily denying the jury's request to review testimony. *People v. John Michael Watroba,* unpublished opinion per curiam of the Court of Appeals, issued June 9, 1995 (Docket No. 160373). In lieu of granting leave to appeal, the Supreme Court peremptorily reversed and remanded to this Court for consideration of the remaining issues defendant raised. We affirm.

I

Defendant was convicted following a jury trial of one count of possession with intent to deliver less than fifty grams of cocaine, M.C.L. § 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and two counts of possession with intent to deliver over fifty, but less than 225, grams of cocaine, M.C.L. § 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced to two to twenty years on the count involving less than fifty grams, and to ten to twenty years on each count of over fifty grams, consecutively.

Defendant was charged and bound over with a fourth count, conspiracy to deliver over 225, but less than 650, grams of cocaine, M.C.L. § 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), M.C.L. § 750.157a; MSA 28.354. This count was voluntarily dismissed by the prosecutor.

II

Defendant first argues that he was denied the effective assistance of counsel by counsel's (1) failure to file a motion to quash, (2) failure to conduct discovery, (3) failure to pursue an entrapment defense, (4) ineffective cross-examination on the search warrant affidavit, (5) failure to argue a defense theory in closing, and (6) failure to request instructions on the credibility of police witnesses and identification.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v. Pickens,* 446 Mich. 298, 303;521 NW2d 797 (1994). We conclude that defendant was not denied the effective assistance of counsel.

Defendant first asserts that defense counsel was ineffective in failing to file a motion to quash. However, defendant has not explained what the motion would have argued, to which charges it would have pertained, and why it would have been successful. Further, to the extent the motion would have addressed the conspiracy charge, defendant was not prejudiced, as that charged was dismissed.

Defendant further contends that counsel was inef-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

fective in failing to conduct discovery and in failing to raise an entrapment defense. Defendant offers no support for either contention and simply requests a *Ginther*[FN1] hearing. However, the record does not support defendant's contention regarding discovery,FN2 and defendant has made no offer of proof indicating that he had a viable entrapment defense or that a *Ginther* hearing is appropriate.

FN1.*People v. Ginther,* 390 Mich. 436;212 NW2d 922 (1973).

FN2. During the September 4 hearing, defense counsel stated:

> I've probably spent between 30 and 40 hours on this case, with [defendant], visiting him two times, once with her [defendant's mother's] husband, who would be the stepfather of [defendant]. I gave her all pleadings, all the information, the transcripts. She read it over, didn't understand it, came back again. [Defendant's sister] came to the office with all the pleadings, again. We discussed this matter ...

> On the morning of trial, defense counsel explained to the court that he had all the necessary discovery in this matter:

> ... I've talked to [the prosecution] about all this evidence. I've had all this evidence.

> Additionally, defense counsel stated:

> ... I spent 7 hours yesterday, I documented it, going from top to bottom, made copious [sic] of search warrant, tapes, affidavits of search warrants, preliminary exam transcript, and I will do the best I can ...

***2** Defendant also contends that he was denied the effective assistance of counsel when defense counsel elicited damaging testimony and opened the door to other testimony during cross-examination of Officer Grant. Counsel sought to impeach Officer Grant's testimony by cross-examining him regarding statements made in his affidavit in support of a search warrant. On redirect, the prosecution was permitted to read the selected paragraphs in their entirety over the objection of defense counsel. As evidenced by cross-examination, counsel was trying to undermine Officer Grant's credibility by demonstrating an inconsistency between his trial testimony and the affidavit. To establish ineffective assistance, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v. Lavearn,* 448 Mich. 207, 216;528 NW2d 721 (1995). Defendant has not done so.

Defendant next asserts, without elaboration, that trial counsel failed to argue a defense theory in closing. During closing argument, counsel sought to undermine Officer Grant's credibility by reminding the jury of the inconsistencies between his testimony and the search warrant affidavit. Additionally, counsel argued that if defendant actually knew Officer Grant, as Officer Grant contended, defendant would not have involved himself in a drug transaction with him. Further, counsel asserted that defendant was merely present at the apartment but was not involved in the transaction. It is clear that trial counsel argued the defense of mere presence during closing.

Lastly, defendant argues that he was denied effective assistance of counsel by counsel's failure to request instructions on identification and the credibility of police witnesses. However, defense counsel specifically stated that identification was not an issue in the case. Moreover, counsel was not arguing that someone else was at the apartment rather than defendant, but that defendant was merely present when the transaction occurred. As for the instruction on credibility, the trial court explained to the jury the factors to be used in determining whether a witness should be believed or not. Defendant has shown no prejudice.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

We conclude defendant was not denied the effective assistance of counsel.

III

Defendant next argues that the trial court erred in failing to grant his request for substitution of counsel. We disagree.FN3

FN3. We observe that the trial court did not technically deny defendant's motion for substitution of counsel, and would have allowed substitute counsel, who was present, to enter an appearance and proceed with trial. The court, however, stated that the trial would go forward that day.

After carefully reviewing the record, including defendant's letter to the Chief Judge, the transcript of the aborted plea-taking proceeding, and the colloquy before the trial court on the day of trial, we conclude that the court did not abuse its discretion in refusing to adjourn the trial to allow defendant to proceed with substitute counsel. We observe that substitute retained counsel was present, but never indicated an intent to appear and never requested an adjournment. Further, the trial court gave defendant ample opportunity to explain his differences with counsel and his desire for substitute counsel, and fully explored defendant's expressed dissatisfaction. The trial court's implicit conclusion that defendant's disagreement with counsel lacked foundation was not unreasonable. Applying *People v. Williams,* 386 Mich. 565;194 NW2d 337 (1972), we conclude defendant has failed to demonstrate that the court abused its discretion in denying a continuance so that defendant could proceed with substitute counsel.

IV

*3 Defendant next asserts he was denied a fair trial by the admission of hearsay testimony. During direct examination of Officer Grant, the prosecution questioned him regarding his conversations with Curtis Van, the main participant in the drug sale. Defense counsel objected on the ground that the testimony would constitute hearsay not subject to a valid exception. The prosecution indicated it would fall under the present sense impression and/or declaration against interest exceptions. The trial court allowed the testimony under the declaration against interest exception.

A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted is hearsay. MRE 801(c); We first observe that many of the objected to statements were not hearsay because not offered for the truth of the matter asserted. Van's statements regarding the weight and quality of the cocaine fall into this category. Further, we reject defendant's argument that the testimony was not relevant.

Defendant challenges an additional colloquy wherein Officer Grant testified:

Q (By the Prosecutor, continuing): Did you make arrangements on that conversation to purchase a quantity of cocaine?

A I did.

Q And what quantity of pur-what quantity of cocaine did you agree to buy?

A Curt Van indicated that he and John [defendant] had three ounces of cocaine -

Q Okay.

A-in their possession, right now, that they would give me for $1,200.00 apiece.

Q Okay. He said, he being Curt Van and John, had three ounces?

A Clearly is what he stated to me, that he and John had three ounces ready.

Defendant did not specifically object to the introduction of this testimony, and never responded to the argument that the earlier statements were ad-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

missible under MRE 804(b)(3) as declarations against interest. Hearsay by an unavailable declarant is admissible if the statement, at the time it was made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, that a reasonable person in his position would not have made the statement unless he believed it to be true. MRE 804(b)(3); *People v. Petros,* 198 Mich.App 401;499 NW2d 784 (1993); *People v. Poole,* 444 Mich. 151, 159;506 NW2d 505 (1993). Where the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement including portions that inculpate another, is admissible pursuant to MRE 804(b)(3).*Poole, supra* at 161.The trial court did not abuse its discretion in concluding that Van's statement to Officer Grant falls within this exception.

V

Defendant next asserts he was denied a fair trial by the trial court's allowance of the impermissible bolstering of Officer Grant's testimony by the reading into the record of large portions of the search warrant affidavit. We disagree.

***4** On cross-examination of Officer Grant, defense counsel sought to impeach him by inquiring why he testified defendant was named in a certain portion of the search warrant when in fact he was not named. On redirect, the prosecutor sought to read the two paragraphs of the search warrant affidavit to show that the remainder of the material was consistent with Officer Grant's testimony. Defense counsel objected on hearsay grounds.

The trial court did not abuse its discretion in allowing portions of the affidavit to be read. As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness' testimony by referring to prior consistent statements of the witness. *People v. Rosales,* 160 Mich.App 304, 308;408 NW2d 140 (1987). However, a prior consistent statement is admissible if the declarant testifies at trial, the declarant is subject to cross-examination concerning the statement, the statement is consistent with the witness' testimony and the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. MRE 801(d)(1)(B).

Here, defense counsel sought to impeach Officer Grant with his sworn search warrant affidavit by demonstrating inconsistencies between Officer Grant's testimony and the affidavit, specifically focusing on the omission of defendant's name in particular sentences of certain paragraphs in the affidavit. In doing so, defense counsel attempted to demonstrate fabrication by implicitly arguing if defendant was actually involved in the drug transactions, Officer Grant would have included his name in the search warrant affidavit, and his testimony at trial is therefore not true.

To rebut defense counsel's charge of recent fabrication, i.e., to show that Officer Grant's testimony was consistent with the prior statements contained in the search warrant affidavit in that defendant's name was within the affidavit, the prosecution sought to read to the jury prior consistent statements contained within the two paragraphs of the same document that defense counsel used on cross-examination. Pursuant to MRE 801(d)(1)(B), the trial court allowed the prosecution to read to the jury the prior consistent statements to show that Officer Grant was not testifying differently than his sworn affidavit. Under MRE 801(d)(1)(B), the trial court did not abuse its discretion.

VI

Defendant next asserts he was prejudiced by Officer Grant's references to past contacts with defendant and that his motion for a mistrial should have been granted. We disagree.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Defendant contends that he was prejudiced on two separate occasions when Officer Grant stated that he knew defendant from previous contacts. Officer Grant testified that when he first went to Van's apartment and defendant opened the door he recognized defendant because he had had face to face contact with him on numerous occasions. Officer Grant also testified that he recognized defendant's voice on the phone because of his numerous contacts with him. After the jury was excused, defense counsel objected and moved for a mistrial, arguing that the logical inference to be drawn from the statements is that Office Grant had contact with defendant in his official capacity. The prosecution argued that those statements could also mean that since defendant had several meetings with Officer Grant, Officer Grant was referring to those meetings as previous contacts with defendant. The trial court concluded that the previous contacts could have taken place anywhere, and not necessarily in Officer Grant's official capacity, and found the statements more probative than prejudicial. Thereafter, during recross examination, defense counsel reopened the issue by asking Officer Grant if he was in police uniform when he had these previous contacts with defendant, and Officer Grant replied "yes." Defense counsel then attempted to use the previous contacts to his advantage by arguing in closing argument that if defendant actually knew Officer Grant, he would not have then engaged in a drug transaction with a police officer.

*5 We conclude the trial court did not abuse its discretion in admitting the testimony and in declining to grant a mistrial. *People v. McAlister,* 203 Mich.App 495, 503;513 NW2d 431 (1994).

VII

Defendant next asserts that prosecutorial misconduct denied him a fair and impartial trial. Defendant asserts the prosecutor improperly shifted the burden of proof to defendant to prove his innocence.

Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from this Court's failure to review the alleged misconduct. *People v. Allen,* 201 Mich.App 98, 104;505 NW2d 869 (1993). Here, defendant failed to object or request a curative instruction. Therefore, this Court's review is for egregious misconduct resulting in prejudice which could not have been cured by a curative instruction or would result in manifest injustice. *Id.*

We have reviewed the arguments challenged on appeal in the context in which they were made, and conclude that the arguments were not improper and that defendant was not denied a fair trial.

VIII

Defendant next asserts that he was denied a fair trial by the inclusion on the jury of a juror who was equivocal about her ability to exercise independent judgment in rendering a verdict.

A party who has not exhausted all peremptory challenges, and has expressed satisfaction with the jury, waives issues regarding jury selection on appeal.*People v. Taylor,* 195 Mich.App 57, 59-60;489 NW2d 99 (1992). Defendant exercised two out of the five peremptory challenges and twice stated his satisfaction with the jury. Thus, defendant has waived this issue on appeal.

Further, the trial court did not abuse its discretion when it failed to excuse the juror. The unidentified juror stated that she might have a conflict because a person sitting on the jury was considered "family." The juror said they might have "too much of the same mind set."The trial court did an extensive voir dire of the juror regarding her ability to be fair and impartial. Ultimately, the juror did state that she could be fair and render an independent judgment. A potential juror's self-analysis as to whether she

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

has formed an opinion need not necessarily control the determination of the potential juror's impartiality; rather, that determination is reserved for the trial judge after sufficient inquiry. *People v. Tyburski,* 196 Mich.App 576, 580;494 NW2d 20 (1992), aff'd. 445 Mich. 606 (1994).

IX

We next address whether defendant was denied a fair trial by the trial court's failue to instruct the jury, sua sponte, regarding the credibility of police witnesses and identification. Defendant did not specifically object to the lack of jury instructions on these issues. Therefore, this Court's review is for manifest injustice.

*6 Jury instructions are reviewed as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. We conclude the trial court did not deny defendant a fair trial when it failed to sua sponte instruct the jury on identification and the credibility of police witnesses. The general instruction on credibility was sufficient to preserve defendant's rights.

X

Defendant next asserts that the trial court erred in ruling that a tape recording made by the police of conversations during the negotiations of the narcotics transactions was inadmissible. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Davis,* 199 Mich.App 502, 516;503 NW2d 456 (1993).

Defendant was originally charged with four counts, the last count being conspiracy to deliver over 225 grams, but less than 650 grams, of cocaine. Prior to trial, the prosecutor dismissed the conspiracy count and indicated he was not planning to introduce the tape, as it pertained to the conspiracy count and was irrelevant to the remaining counts. Defense counsel was of the opinion that the tape was more prejudicial than probative, and tried to convince defendant that it should not be introduced. Defendant, however, wanted portions of the tape introduced to impeach Officer Grant. The court undertook to review the tape. The following day, after reviewing the tape, the trial court concluded that the tape had no probative value as it was useful for limited impeachment purposes regarding the dismissed conspiracy count, and ruled it inadmissible. The court expressed its willingness to reevaluate its ruling should defendant take the stand.

Defendant identified only one area of impeachment. At the preliminary examination, Officer Grant testified:

Q. Okay. Did he-did Mr. Watroba ever tell you he didn't want to sell 12 ounces of cocaine to you?

A. No, he did not.

A. He just said, stated they were a little worried about selling the 12 ounces and he went into the charges for deliveries of 50 and over 25[sic] and over 625.

Defendant contended that the tape would establish that he did state he did not want to participate in the transaction.

Based on the record presented, we conclude that the trial court did not commit reversible error in ruling the tape inadmissible. Defendant never established that the tape was relevant to the charges being tried, or that the tape had more than marginal impeachment value.

XI

Defendant next argues that the trial court's erroneous admission of a "narcotics ledger" denied him a fair trial.

We find no reversible error in the admission of this

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

evidence. To the extent the ledger, which included Officer Grant's address and pager number, tended to show that the transactions occurred, they were relevant. To the extent that the prosecutor failed to connect the ledger to defendant, the failure was evident and the admission of the evidence did not prejudice defendant's mere presence defense.

XII

*7 Lastly, defendant asserts he was denied due process by the trial court's failure to require a unanimous verdict. He asserts that the trial court erred in not requiring the jury to unanimously find him guilty as either an aider and abettor, or a principal. We find no error.

A jury verdict must be unanimous. MCR 6.410(B); *People v. Yarger,* 193 Mich.App 532, 537;485 NW2d 119 (1992). If a case involves a single offense that could be committed by alternative means, a unanimous verdict as to the means is not required. *Id.* (citing *People v. Johnson,* 187 Mich.App 621, 629-630;486 NW2d 307 (1991)). However, if the case involves two distinct offenses and each could have been committed by an alternative method, then a unanimous verdict is required as to the method. *Yarger, supra.*

Here, the distinction between an accessory and a principal has been abolished. One who aids or abets the commission of an offense may be prosecuted, indicted, tried, and on conviction shall be punished, as if he had directly committed the offense. MCL 767.39; MSA 28.979; *People v. Flowers,* 191 Mich.App 169, 175;477 NW2d 473 (1991). The trial court's instruction was not erroneous.*People v. Paintman,* 92 Mich.App 412;285 NW2d 206 (1979), rev'd on other grounds412 Mich. 518 (1982). The court required unanimity on the ultimate issue of guilt.

Affirmed.

Mich.App.,1996.
People v. Watroba

Not Reported in N.W.2d, 1996 WL 33347652 (Mich.App.)

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Westlaw.

Not Reported in N.W.2d
Not Reported in N.W.2d, 1996 WL 33357569 (Mich.App.)
(Cite as: Not Reported in N.W.2d, 1996 WL 33357569)

H

Master v. City of Detroit
Mich.App.,1996.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Charles MASTER, Jr. and Alfred Pare', for themselves and on behalf of all retirants or beneficiaries of the Police and Firemen Retirement System of the City of Detroit, Plaintiff-Appellees,
v.
CITY OF DETROIT, Defendant-Appellant,
andTHE BOARD OF TRUSTEES OF THE POLICEMEN and Firemen's Retirement System of the City of Detroit, Defendant-Appellee.
Charles MASTER, Jr. and Alfred Pare', for themselves and on behalf of all retirants or beneficiaries of the Police and Firemen Retirement System of the City of Detroit, Plaintiff-Appellees,
v.
CITY OF DETROIT, Defendant-Appellee,
andTHE BOARD OF TRUSTEES OF THE POLICEMEN and Firemen's Retirement System of the City of Detroit, Defendant-Appellant.
No. 191421, 191422.

Oct. 11, 1996.

Before: JANSEN, P.J., and WHITE and SAAD, JJ.

UNPUBLISHED

ON REMAND

PER CURIAM.
*1 This case is before us on remand from the Supreme Court for consideration of a single issue: whether the circuit court's ruling that the Act 312 FN1 arbitrator's award was a recognition by the arbitrator of a prior improper practice in computing benefits, by which pension benefits were improperly reduced to pre-1990 retirees, was erroneous. In our first opinion we concluded that this issue was unpreserved. *Master et al v. City of Detroit,* unpublished opinion per curiam of the Court of Appeals, issued February 23, 1995 (Docket Nos. **154681** , 154984), p 3. On cross applications for leave to appeal, the Supreme Court concluded that defendants sufficiently preserved the issue and, by order dated November 17, 1995, remanded the matter to this Court for consideration on the merits, denying the applications for leave to appeal and cross appeal in all other respects. Because the record on this issue is sparse and the circuit court's reasoning is not clear, we remand for development of the record on this issue prior to our consideration of the merits.

FN1.MCL 423.231*et seq.;* MSA 17.455(31) *et seq.*.

Plaintiff argues that

[t]he contract of November 20, 1974, does not provide for the reduction of pensions on the interest accumulated on the contributions. It only provides for a reduction of annuity on the accumulated contributions. There is no mention of the word "interest" in the 1974 provision. On July 1, 1990, the arbitrator recognized this discrepancy and clarified the issue.

Plaintiffs-Appellees maintain that the ordinance of November, 1974, states that the annuity shall be based upon the accumulated contributions. Defendants-Appellants freely acknowledge that the term "accumulated contributions" means the sum of all the amounts deducted from the compensation of a member and does not include interest. (See Trial Court transcript p. 22, lines 3-6 attached hereto as Exhibit I). The City has taken the employees' funds and invested them and used the interest on those funds to reduce their portion of the total pension. Since the 1974 pension provision calls only for the reduction of pensions by the contributions and does

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

not mention any deduction on the interest, the City has been illegally reducing the pension benefits for retirees.

The portion of the trial transcript that plaintiff attached to its appellate brief in support of this argument states:
MR.BOVE [*counsel for defendant Trustees*]: The Charter specifically says accumulated contributions shall mean the sum of all amounts deducted from the compensation of a member. Interest is not deducted.

THE COURT: I hear you.

MR. BOVE: Shall be credited to his individual account in the annuity savings fund.

THE COURT: You don't need to make that argument again, I understood your argument the first time ...

However, that transcript of defendants' motion for summary disposition hearing also contains the following argument by defendant Trustees' counsel:
... Now, accumulated contributions aren't outlined in the pension provision in the collective bargaining provision and that collective bargaining agreement also incorporates by reference the Charter of the City of Detroit, specifically Title 9, Chapter 7, Article 2, Section 26. And Section 13 of that section of the Charter reads:

***2** "Accumulated contributions shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the Annuity Savings Fund, together with regular interest."

Now, it would appear that counsel's argument is certainly misphrased, because "accumulated contributions" is in fact defined. It's defined as the employee's contributions in his annuity fund with regular interest. Thats the entire package that was in the 1974 Optional Annuity Withdrawal, accumulated contributions including interest. In 1990 accumulated contributions including interest. Except, the arbitrator in 1990 said we will not consider the interest credit for your reduction. Now, I, I think the argument has got to fail.

THE COURT: Or did he say just that it has been improperly computed?

MR. BOVE: No, no he never said that, Your Honor, never said there was anything improper or that it was improperly computed.

Counsel also argued that the pension provision had been applied in the same manner for over twenty years without objection by the union or retirees. Later, plaintiff's counsel responded:
... As to the merits o[sic] it, he mentioned accumulated contribution. Accumulated contribution in the sections in question here are not the same as accumulated contributions in the pension chart provisions, and he specifically pointed that out by saying that these contributions went into a pension fund, deferred pension fund. He named two types, and it was not the same thing. This deals with the contributions that had been accumulated that are contributed by the members while they are in active services. That's all that means to say. Now, what we are doing is confusing interest and principal here and there should be no confusion here...

The Charter of the City of Detroit is not before us, except a copy of the page on which the term accumulated contributions is defined.

The Act 312 Arbitration "Opinion and Award of Panel" is before us and states in pertinent part:

Union Issue # 10

OPTIONAL ANNUITY WITHDRAWAL

UNION PROPOSAL:

The Union has proposed that employees who retire on or after July 1, 1990 and have elected to receive their total or partial refund of accumulated contributions to the Defined Contribution Plan suffer no

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

actuarial reduction in their Defined Benefit Plan benefits with respect to withdrawn interest earnings, but only with respect to actual contributions which the employee withdraws.

The following is the language proposed by the Union as adding to Article 48 of the collective bargaining agreement entitled *OPTIONAL ANNUITY WITHDRAWAL*, a new Section H.

New Section:

H. For employees who retire on or after July 1, 1990, and who have made or make an election to receive a total or partial refund of his or her accumulated contributions to the Defined Contribution Plan, there shall be no reduction of retirement allowances due to the portion of withdrawal representing interest credits.

CITY RESPONSE:

*3 The present language of the collective bargaining agreement requires that an employee who exercises his/her option to withdraw all or part of his/her accumulated contributions to the defined contribution shall be subject to an actuarial reduction in the benefits provided or to be provided by the Defined Benefit Plan to the extent of the amounts withdrawn whether such amounts consist of principal or interest or both.

DISCUSSION:

1. It is the position of the City that the historically collectively bargained for provision with respect to all such amounts withdrawn, i.e. both the original amount of employee contributions together with interest earned thereon in the Defined Contribution Plan should cause an actuarial reduction in the benefits to be received by the employee from the Defined Benefit Plan notwithstanding that additional earnings in excess of the actuarially assumed interest rate are sufficient to fund the proposed benefit. The City further argues that the current funding features of the retirement system are in excess of that required by the State Constitution, any applicable law and the Retirement System provisions.

2. It is the position of the Union that only the actual contributions made to the Defined Contribution Plan and withdrawn and not the interest earned thereon should be the base for the actuarial reduction in the benefits to be received from the Defined Benefit Plan.

The Union argues that such amounts as are contributed by or for the benefit of employees to the Defined Contribution Plan are mandatory contributions and that the interest earnings on such amounts should not be part of the basis for the reduction in the benefits paid from the Defined Benefit Plan as the result of the partial or total withdrawal of such interest earnings and that the retirement system has the ability to provide such benefit with no increase in employer percent of payroll contribution rates.

The City further argues that in the event this Panel awards the benefit to the Lieutenants and Sergeants Association, historically, because of parity, the benefit will be extended to all firefighter and police officers and there is no safeguard that such benefit extension will not result in increased cost. The City appears to argue that if it is determined that the retirement system can provide the proposed benefit without increased cost to the employer, that the Retirement System can further provide for reduced employer contributions without violating the established constitutional and other legal funding requirements.

AWARD:

The Panel is persuaded by the Union's arguments in favor of adopting the proposal. However, the Panel also recognizes the validity of the City's concerns. Therefore, this Panel orders the adoption of the Union's proposal with the following provisions to become a part of the collective bargaining agree-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ment.

Provisions indicated in the following paragraphs which will be added to Section H and which along with Said Section H will be made part of the retirement system provisions as applicable to employees affected by this award. The above paragraph is expressly subject to the following requirements.

*4 1. That this award will not result in an increase in the Employer contribution precentage [sic] of payroll as determined in the June 30, 1989 actuarial valuation.

2. That the board of Trustees of the Policemen and Firemen Retirement System of the City of Detroit determines after assurance from the retirement system's actuary that the cost associated with the implementation of this award can be borne by the retirement system earnings without violation of the constitutional requirements of Article 9, Section 4 of the Michigan Constitution or the funding provisions of the retirement system.

3. That the Board of Trustees of the Policemen and Firemen Retirement System, and its actuary review the actuarial valuation of June 30, 1989 in light of the new updated financial information and adopt the appropriate resolutions consistent with the above provisions.

4. This award with respect to Issue 10 will not be operative unless the Board of Trustees of the Policemen and Firemen Retirement System receives written concurrence from the City with the resolutions of the Board of Trustees as referred to in the preceding paragraph.

Finally, defendant Board of Trustees attached to its appellate brief a document entitled "ACTUARIAL ASSUMPTION CHANGES" which states that the 1990 Board of Trustees forwarded the provisions of the Act 312 arbitration award to the Board's actuary; received the actuary's recommendation that "certain economic assumptions be revised to 7.0% with respect to investment return and 5.0% with respect to wage inflation;" that the Board's actuary submitted to the Board of Trustees those amendments of the June 30, 1989 valuation report resulting from the alternative economic assumptions recommended by the Board's actuary; and that the actuary has assured the Board of Trustees that the adoption of the alternative economic assumptions are consistent with the requirements of Article 9, Section 24 of the Michigan Constitution and the funding requirement provisions of the Policemen and Firemen Retirement System. The following resolutions are then set forth: that the Board of Trustees adopts the arbitrator's award as part of the provisions of the Retirement System, Defined Contribution Plan and Defined Benefit Plan; and that the Board of Trustees adopts and certifies to the City of Detroit that the employer contribution as recommended and determined by the Board's actuary pursuant to the June 30, 1989 actuarial valuation for the fiscal year July 1, 1990 through June 30, 1991 is 36.52% of payroll of those members of the Policemen and Firemen Retirement System of the City of Detroit.

In addressing the issue, the circuit court stated only:

Defendant seek summary disposition on three grounds:

I. Plaintiffs are not entitled to any contractual improvements in pensions received by active employees *after* plaintiffs retired.

Defendants cite persuasive case law for this proposition and plaintiffs do not argue with it.

*5 However, plaintiffs argue that defendant had been reducing pensions, not only by the amount of employee contributions withdrawn, but, improperly, by the amount of interest thereon since November 20, 1974.

It is plaintiff's argument that the July, 1990, arbitration award is not merely a newly-bargained-for-benefit awarded to active employees. Rather, plaintiffs suggest that it was also a recogni-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

tion by the arbitrator that defendants had improperly reduced pension benefits to pre-1990 retirees by the amount of the interest credits.

This Court will HOLD that plaintiffs' interpretation of the 1990 arbitration award is the correct one. Plaintiffs cite *Grand Rapids Schools v. City of Grand Rapids,* 146 Mich.App 652 for the proposition that, "Interest on public funds designated for a specific purpose follows those funds... In general, interest is merely an incident of the principal making it the property of the party owning the principal."Even if one views the arbitration award as a new form of compensation bargained for and awarded to 1990 active employees ... and thus not available to pre-1990 retirees by operation of law... it then CLEARLY becomes available to those retirees pursuant to the terms of the *YANK/GENTILE* consent judgment which required that retirees receive a proportionate share of any new form of compensation granted to active employees.

We conclude that the record before us contains insufficient information from which we can address this issue on the merits. The arbitration opinion and order does not state on its face that it is rectifying a prior improper practice, and the circuit court's opinion and order does not make clear its reasons for concluding that plaintiff's position to that effect is a proper interpretation of the arbitration award.[FN2]We therefore remand for further development of this issue. The court shall consider the matter anew, entertaining whatever additional testimony, proofs or argument it deems appropriate, and shall clearly set forth its findings and the reasons for its decision. The amplified record and the court's decision shall be transmitted to this court within ninety-one days of the release of this opinion. We retain jurisdiction.

FN2. We do not find the circuit court's reliance on *Grand Rapids Schools v. City of Grand Rapids,* 146 Mich.App 652 (1985), and the proposition quoted therefrom illuminating without further explication.

Mich.App.,1996.

Master v. City of Detroit
Not Reported in N.W.2d, 1996 WL 33357569 (Mich.App.)

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

STATE OF MICHIGAN

COURT OF APPEALS

IRIS E. WEISGERBER, personal representative of the estate of CAROLYN SUE WEISGERBER, deceased,

Plaintiff-Appellant,

v

ANN ARBOR CENTER FOR THE FAMILY, a/k/a ANN ARBOR CENTER FOR THE FAMILY, INC., a Michigan corporation; and KENNETH R. SILK, M.D.; jointly and severally,

Defendants-Appellees.

November 29, 1993

No. 139321
LC No. 87004443 NH

Before: Neff, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Washtenaw Circuit Court denying her motion for new trial. On appeal, plaintiff argues that the trial court erred in refusing to investigate allegations of juror misconduct. She asserts, also, that the court erred in failing to grant a new trial. We reverse and remand for an evidentiary hearing.

I

Plaintiff filed a medical malpractice action against defendants, after decedent committed suicide while under defendant Silk's care. The jury returned a verdict in defendants' favor. It indicated on the verdict form that defendant Silk had met the applicable standard of care. Shortly thereafter, the court received a telephone call from juror Clara Debreczeny. She alleged that two of the jurors acted improperly during jury deliberations. The court instructed Debreczeny to write a letter, documenting the alleged misconduct.

Debreczeny claimed that she and juror Gordon Macomber initially voted "no" to the question whether defendant Silk had met his standard of care. The four other jurors on the panel voted yes. Then, juror Marie Conn stated that she could never award money for death, and Macomber agreed. During the second vote, Macomber changed his initial vote and concluded that Silk had met his standard of care. Debreczeny eventually changed her vote. During voir dire, plaintiff's attorney had asked whether any juror would be uncomfortable with the idea of awarding money damages for loss of life; none of the jurors responded.

The trial judge instructed the attorneys to present him with law and arguments as to whether the matters set forth in Debreczeny's letter warranted an investigation or a new trial. He also instructed the attorneys not to contact any of the jurors until he ruled. In finding that neither an investigation nor a new trial was warranted, the court concluded:

> This is not a situation where a juror lied during voir dire as to knowing a witness, or having been in an accident previously, etc. The statements of the two jurors can well be interpreted as meaning that they would not vote for a verdict for damages for death in the case before them. It doesn't appear that they were necessarily talking about what they would do in other cases. They were stating that they could not find the damages for death in the

case before them. . . . When the jury was asked by the Jury Clerk, after they read their verdict, that they solemnly swore "that the verdict as read by the foreperson was a verdict of each of you, so help you God," they answered in the affirmative. Ms. Debreczeny at no time objected to the reading of the verdict or stated that she had a different verdict. If, as claimed by the plaintiff's attorney, the two jurors who had an opinion that no one should get money for the death of a person, they could well have answered Question No. 1 of the verdict form that Defendant Silk did not meet his standard of care and could have answered Question No. 2 that his failure to meet the standard of care was a proximate cause of the injury and as to the total amount of plaintiff's damages in Question No. 3, could have answered zero. They did not do this. The jurors found that Defendant Silk met the standard of care.

II

Initially, plaintiff argues that the trial court abused its discretion in failing to conduct an investigation into the allegations raised by juror Debreczeny. Once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Hoffman v Spartan Stores Inc, 197 Mich App 289, 293; 494 NW2d 811 (1992), citing Hoffman v Monroe Public Schools, 96 Mich App 256, 260-261; 292 NW2d 542 (1980). However, affidavits or testimony impeaching the verdict are proper if they concern an overt act which is accessible to the knowledge of all the jurors. It must not involve matters inherent in the verdict. People v Vettese, 195 Mich App 235, 244; 489 NW2d 514 (1992), citing People v Graham, 84 Mich App 663; 270 NW2d 673 (1978). Moreover, a new trial must be granted when it appears that a juror gave untruthful answers during voir dire, whereas truthful answers would have allowed a successful challenge for cause. Collier v Westland Arena Inc, 183 Mich App 251, 254; 454 NW2d 138 (1990).

The allegations raised by juror Debreczeny do not involve matters inherent in the verdict. Instead, they challenge the truthfulness of certain jurors' answers on voir dire. See People v Kage, 193 Mich App 49, 53; 483 NW2d 424 (1992), vacated on other grounds 439 Mich 1022 (1992). Therefore, affidavits or testimony impeaching the verdict were appropriate to determine if the two jurors could have ever awarded damages for death. MCR 2.611(A)(2).

The trial court abused its discretion by speculating that the jurors refused to award money in the case before them but might award money damages for death in other cases. The judge's assumption is not supported by anything in the record. He should have conducted an investigation into the allegations.

On remand, we instruct the judge to conduct a hearing to investigate the allegations contained in juror Debreczeny's letter. MCR 2.611(A)(2); People v Kage, 439 Mich 1022; 486 NW2d 667 (1992). He must determine whether the jurors gave untruthful answers during voir dire and whether truthful answers would have revealed grounds for a successful challenge for cause. Collier, 254. If so, a new trial must be granted. Id; Gustafson v Morrison, 57 Mich App 655, 664; 226 NW2d 681 (1975).

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Marilyn Kelly
/s/ Helen N. White

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNY SUGGS,

Defendant-Appellant.

UNPUBLISHED
August 11, 1995

No. 179928
LC No. 85-1729
ON REMAND AND REHEARING

Before: MacKenzie, P.J., and Hood and White, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court as on rehearing granted. Defendant was convicted by jury in 1985 of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and sentenced to 30 to 50 years. This Court reversed the conviction for prosecutorial error. Prior to his retrial, defendant dismissed his appointed counsel because he was dissatisfied and apparently indicated he wanted to represent himself. The trial court permitted trial counsel to withdraw on March 17, 1989.[1] At the start of trial on June 19, 1989, in the course of being advised by the trial court of the pitfalls of self-representation, defendant said

> Your Honor, you recall when I dismissed the attorney . . ., I sent a letter to the Court besides the letter I sent to [him] explaining to the Court why I was dismissing [him]. It's not that I don't want an attorney to represent me, it's just that [appointed counsel] never spoke to me. I had a trial date and never had a chance to talk to my attorney.

The trial court accepted the waiver and defendant proceeded in pro per with advisory counsel. During trial, defendant conducted his own voir dire and cross-examinations, and made his own closing argument. Defendant's advisory counsel was permitted to object as necessary. Defendant took the stand and was examined by advisory counsel. Defendant's request to permit advisory counsel to cross-examine the complainant was denied.

Defendant was again convicted, and again sentenced to 30 to 50 years. On his second appeal, defendant raised three issues, one of which was that the trial court acted arbitrarily and denied him a fair trial by refusing to permit his advisory counsel to cross-examine complainant. This Court identified a further issue after hearing oral argument, and directed the parties to provide supplemental briefs addressing the question whether defendant's waiver of counsel was adequate under MCR 6.005(E) and case law.[2] In response to this Court's order, defendant, through counsel, stated he did not wish to pursue that issue and wished to stand on the brief as filed. Plaintiff filed a supplemental brief arguing defendant had abandoned the issue and that defendant's waiver of his right to counsel was effective.

This Court therefore addressed only the three issues raised in defendant's appellate brief and affirmed defendant's convictions in an unpublished per curiam opinion, People v Suggs, No. 122775, dated January 27, 1994.

Defendant's appellate counsel then filed a motion for rehearing on February 7, 1994, realizing he had overlooked matters of self-representation which became apparent on his reviewing this Court's opinion.[3] This Court denied defendant's motion for rehearing on March 23, 1994, the panel splitting two to one. Defendant appealed this Court's denial to the Supreme Court which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on rehearing granted. We reverse and remand for a new trial.

I

Defendant first argues that the trial court abused its discretion and denied defendant's right to counsel when it granted defendant's equivocal, involuntary and unintelligent waiver of counsel without adequate warning of the hazards of self-representation. We agree.

Although a criminal defendant has a right, guaranteed by both federal and state constitution and state statute, to decline representation by a lawyer and conduct his own defense, it is a right contingent upon the accused voluntarily and intelligently electing to do so. Farretta v California, 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975), US Const, Am VI, Const 1963, art 1, sec 13, MCL 763.1; MSA 28.854. To be effective, a defendant's waiver of the constitutionally guaranteed right to counsel must be voluntary, and must constitute a knowing and intelligent relinquishment of that right. Farretta, 422 US at 835, People v Holcomb, 395 Mich 326, 335; 235 NW2d 343 (1975).

The Michigan Supreme Court in People v Anderson, 398 Mich 361; 247 NW2d 857 (1976), set forth three stringent requirements to be met before a trial court may grant a defendant's request to dismiss counsel and proceed in propria persona: first, the defendant's request must be unequivocal; second, once the defendant has unequivocally declared his desire to proceed pro se, the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. Id. at 367, 368. As part of the second requirement, the trial court

> must make the pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. [Anderson at 368, quoting Holcomb, supra at 335.]

Third, the trial court must determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. Anderson at 368.

Here, the pertinent exchanges between the trial court and defendant are:

> THE COURT [In the context of a discussion regarding defendant's request for discovery]: Let me say there are some rules to play by when you, the same as yourself or anyone acting as a lawyer.
>
> First of all, you are not allowed anymore than what the lawyer is allowed. You don't get any kind of special privileges when you represent yourself. Part of that, you don't interrupt the Court when the Court is speaking. I will give you a chance to make your statement and what you have to say. When I respond to them, you sit and be quiet and don't interrupt me.
>
> More than that, I hope you discuss the issues regarding the rules of evidence and matters of procedure with Mr. Moore [advisory counsel] to get some guidelines on how to present those and I think we all can save some time on this.

* * *

THE COURT: Now, you do have the U S Supreme Court by way of the Sixth Amendment that says in the case of Florida v California (ph) here, found at 411, 806, a 1975 decision, there is an explicit guarantee for one to represent oneself. It is also found in the Michigan Constitution.

Now there is, and I think there should be some things you should understand, okay.

Do you fully understand you have a right to have a lawyer represent you throughout the proceedings and if you cannot afford to retain counsel, that the Court will appoint counsel for you?

THE DEFENDANT: You asked did I understand?

THE COURT: Yes.

THE DEFENDANT: Yes, I do.

THE COURT: Now, do you further understand that I must make a determination throughout what would disrupt and inconvenience and unduly burden the Court and the Court's business, I realize it is that of judgment call and it depends on your conducting yourself in the proper manner. I realize you are not trained in the law and won't be able to represent yourself the same as a lawyer would represent you. There are some procedure [sic] rules and you have to follow the rules.

THE DEFENDANT: Yes, I do.

THE COURT: Do you further understand there is an inherent danger in you representing yourself. Those include not asking proper questions. It may include not being able to make a proper statement or misstatement about the manner in which you represent yourself or cross-examine a witness. There may be a lot of inherent possibilities there in representing yourself. Do you understand that those things do exist and that you will not be able to raise issues, you know, later on that were matters that might have been better handled by an attorney representing you, do you understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: You still wish to represent yourself?

THE DEFENDANT: Yes.

Your Honor, you recall when I dismissed the attorney, Mr. Craig Daily, I sent a letter to the Court besides the letter I sent to Craig Daily explaining to the Court why I was dismissing Craig Daily. It is not that I don't want an attorney to represent me, it's just that Craig Daily never spoke to me. I had a trial date and never had a chance to talk to my attorney. I couldn't understand it, it's unprofessional.

THE COURT: Look, I am telling you I do not have a problem with you representing yourself and recognizing the fact that there is case law that says you can. I am also obligated to tell you the problems and pitfalls of that and have you unequivocally indicate on the record you understand those and you do wish to represent yourself.

THE DEFENDANT: I understand -- I understand what you said, yes.

THE COURT: Okay, fine.

Do you have any other preliminary issue that you want to bring up?

That defendant's waiver was not unequivocal is evidenced in his statement to the trial court that "it's not that I don't want an attorney to represent me, it's just that [appointed trial counsel] never spoke to me. I had a trial date and never had a chance to talk to an attorney." The first requirement of Anderson was thus not met.

Defendant also asserts that the trial court failed to adequately make defendant aware of the dangers and disadvantages of self-representation. The trial court stated defendant would not be able to represent himself the same as a lawyer would, that there were some procedural rules he would have to follow, and that there was an inherent danger in defendant representing himself which included not asking proper questions or making misstatements, and asked defendant if he understood that he would not be able to later raise as issues matters that might have been better handled by an attorney. The trial court did not, however, inform defendant that he would be opposed by an experienced prosecutor and that he would get no help from the court. Nor did the trial court make clear that defendant must follow all the technical rules of substantive law, criminal procedure and evidence, although it did indicate in a different context that defendant would get no special privileges and that the court hoped defendant would discuss "issues regarding the rules of evidence and matters of procedure" with appointed advisory counsel. We conclude that under People v Blunt, 189 Mich App 643, 649-650; 473 NW2d 792 (1991), the trial court's compliance with the second requirement of Anderson was marginal at best.

Defendant further argues that the trial court did not meet the requirements of MCR 6.005(D) before permitting defendant to represent himself. MCR 6.005(D)[4] imposes requirements additional to Anderson's three-part inquiry:

> (D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to waive the right to be represented by a lawyer without first
>
> > (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
> >
> > (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The record does not indicate that defendant was apprised of the charge or the range of permissible punishment.

As the record does not establish an affirmative showing of defendant's unequivocal or informed choice to waive his right to counsel, Holcomb, supra at 335, we must reverse and remand for a new trial. While we have observed that compliance with the second requirement of Anderson was marginal and that defendant was not apprised of the charge and penalty, the real gravamen of the case is the equivocal nature of defendant's waiver, and it is on this basis that we reverse.

In light of our disposition, we need not address defendant's overlapping second argument, that appellate counsel's failure to obtain the critical transcript of trial counsel's motion to withdraw and raise a meritorious and critical issue deprived defendant of his rights to effective assistance of appellate counsel and due process.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Harold Hood
/s/ Helene N. White

[1] We were recently provided with a copy of the hearing transcript, dated March 17, 1989, where defendant's appointed trial counsel was permitted to withdraw. This transcript was not previously before us, but was before the Supreme Court when it remanded to this Court as on rehearing granted.

Appellate counsel attached to his brief letters establishing his unsuccessful earlier attempts to secure this transcript dating back to March 27, 1991.

At the hearing, trial counsel indicated defendant had written him and said he did not want counsel to represent him and that defendant wanted to represent himself. Trial counsel indicated he was not interested in representing defendant either as his attorney or second chairing a case in which defendant represented himself. The trial court excused trial counsel from further responsibility in the case. The only colloquy involving defendant was:

THE COURT:

> Mr. Suggs, I'm going to--you can represent yourself if you want to. I will give you--I'm sure you are aware of the hazards of doing that--I'm going to appoint at least advisory counsel to assist you and you can, you and that counsel can discuss whatever you might want to do in representing yourself. I hope to be able to do that today.
>
> Defendant responded: "Okay. Thank you, Your Honor." This was defendant's only statement at the hearing.

[2] The Order stated:

> It appears to the panel that it cannot adequately address the issues in this case without supplemental briefs addressing the issue whether defendant's waiver of counsel was sufficient under MCR 6.005(E) and pertinent case law.
>
> Therefore, the Court orders that pursuant to MCR 7.216(A)(3) and (9) the parties are directed to file supplemental briefs addressing this issue . . .

[3] In retrospect, it appears that our order requesting further briefs would have been clearer had it referred to MCR 6.005(D) as well as 6.005(E). At the time the order was issued, this Court had the transcript of the court's colloquy with defendant on June 19, 1989, immediately before trial and did not have the earlier transcript. It appeared from the June 19 transcript that defendant had previously waived his right to counsel and so this Court focused on 6.005(E), referring to the need to waive counsel at any subsequent proceedings.

[4] MCR 6.005(D) was modified effective October 1, 1989, and held to apply retroactively in People v Blunt, supra at 648 (1991), because "the modified court rule redresses an existing right." The commentary to MCR 6.005(D) states in pertinent part that "it pertains to the defendant's initial waiver of the right to be represented by a lawyer and addresses the defendant's constitutional right to self-representation," citing Farretta, supra.