STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

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INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE

DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S

APPLICATION FOR LEAVE TO APPEAL

AND

PROOF OF SERVICE

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I. INTRODUCTION / PREAMBLE

The Defendant/Appellant, Gelman Sciences, Inc.'s ("Appellant"), Application For Leave To Appeal ("Application") has no merit. The relief sought makes no practical sense as pled to this Michigan Supreme Court. The underlying issues are well settled under the controlling law and the applicant presents no grounds for leave to be granted. This Application For Leave is raw advocacy without legal support and should be declined.

II. COUNTER-STATEMENT OF THE QUESTION INVOLVED

(I) DID THE MICHIGAN COURT OF APPEALS ERR WHEN THE CHIEF JUDGE OF THE MICHGIAN COURT OF APPEALS ACTING UNDER MCR 7.203(F)(1) ISSUED AN ORDER WHICH DISMISSED THE APPELLANT'S CLAIM OF APPEAL FOR LACK OF JURISDICTION.

Appellant Says	**"Yes"**
Intervenors Say	**"No"**
Michigan Court of Appeals Says	**"No"**
Trial Court Says	**"Did Not Answer This Question"**

III. COUNTER-STATEMENT OF THE RELEVANT PROCEDURAL FACTS

The following is the relevant procedural history related to the Appellant's current Application for Leave to Appeal to this Michigan Supreme Court.

On **June 22, 2021**, the Appellant filed a claim of appeal ("Claim of Appeal") with the Michigan Court of Appeals which was assigned Docket No. 357598. (**Exhibit 1** -- Court of Appeals Docket for Docket No. 357598) On **June 22, 2021**, the Appellant also filed an application for leave to appeal with the Michigan Court of Appeals which was assigned the very next sequential Michigan Court of Appeals Docket number of 357599. (**Exhibit 2** -- Court of Appeals Docket for Docket No. 357599)

On June 29, 2021, the Chief Judge of the Michigan Court of Appeals, Christopher M. Murray, acting under MCR 7.203(F)(1), dismissed the Appellant's Claim of Appeal in Docket No. 357598 for want of jurisdiction ("June 29, 2021 Order"). The June 29, 2021 Order of the Michigan Court of Appeals states, in relevant part, the following:

> "Christopher M. Murray, Chief Judge, acting under MCR 7.203(F)(1), orders:
>
> **The claim of appeal and attendant "motion for partial stay of proceedings pending appeal" are DISMISSED for lack of jurisdiction** because the June 1, 2021 postjudgment order is not a final order as defined in MCR 7.202(6). MCR 7.203(A)(1)." (**Exhibit 3** -- June 29, 2021 Order) (Emphasis Added)

Chief Judge Murray stated that the June 1, 2021 order was not the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all of the parties.

> "**Specifically, the June 1, 2021 order was not "the first" judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties**; the October 26, 1992 consent judgment was "the first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case." (**Exhibit 3** -- June 29, 2021 Order) (Emphasis Added)

Chief Judge Murray stated that MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final unless the judgment or order is reversed.

> "**MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed**. See Varran v Granneman (On Remand), 312 Mich App 591, 600-601; 880 NW2d 242 (2015)." (**Exhibit 3** -- June 29, 2021 Order) (Emphasis Added)

Chief Judge Murray further stated that the postjudgment addition of the intervening parties into the case did not change this outcome and, that although the October 26, 1992 consent judgment has been amended or modified several times, it has not been reversed and remains the final order pursuant to MCR 7.202(6)(a)(i). Chief Judge Murray also made it clear that the Appellant's

application for leave to appeal remains pending in Docket No. 357599. (**Exhibit 3** – June 29, 2021 Order)

Approximately one month after the Michigan Court of Appeals issued its June 29, 2021 Order, the Michigan Court of Appeals -- on July 26, 2021 -- granted the Appellant's application for leave to appeal in Docket No. 357599.

> **"The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4)." (Exhibit 4 -- July 26, 2021 Order of the Michigan Court of Appeals in Docket No. 357599) (Emphasis Added)**

On August 23, 2021, the Appellant filed its Brief on Appeal in Docket No. 357599.

IV. COUNTER-STATEMENT OF JURISDICION

MCR 7.305 clearly states that an application for leave to appeal to the Michigan Supreme Court must show one of six possible grounds. As stated in detail below, none of these grounds exist and the application should be denied.

V. THERE ARE NO GROUNDS UNDER MCR 7.305 FOR GRANTING THE APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THIS MICHIGAN SUPREME COURT

MCR 7.305 clearly states that an application for leave to appeal to the Michigan Supreme Court must show one of six possible grounds. This is a mandatory requirement. MCR 7.305 states the following:

> **"(B)** Grounds. The application must show that
>
> **(1)** the issue involves a substantial question about the validity of a legislative act;
>
> **(2)** the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

> **(3)** the issue involves a legal principle of major significance to the state's jurisprudence;
>
> **(4)** in an appeal before a decision of the Court of Appeals,
>
> > **(a)** delay in final adjudication is likely to cause substantial harm, or
> >
> > **(b)** the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid;
>
> **(5)** in an appeal of a decision of the Court of Appeals,
>
> > **(a)** the decision is clearly erroneous and will cause material injustice, or
> >
> > **(b)** the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
>
> **(6)** in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice." (**Exhibit 5** -- MCR 7.305) (Emphasis Added)

Here, none of these grounds exist.

A. <u>Grounds Do Not Exist Under MCR 7.305(B)(1).</u>

Grounds do not exist under MCR 7.305(B)(1) to grant the Appellant's Application For Leave To Appeal to this Michigan Supreme Court. MCR 7.305(B)(1) states that grounds can exist to grant an application where the issue involves a question about the validity of a legislative act. Here, the Appellant's Application does not involve a question about the validity of a legislative act. Therefore, grounds are neither asserted nor do they exist under MCR 7.305(B)(1) for granting the Appellant's Application For Leave to Appeal.

B. Grounds Do Not Exist Under MCR 7.305(B)(2).

Grounds do not exist under MCR 7.305(B)(2) to grant the Appellant's Application For Leave To Appeal to this Michigan Supreme Court. MCR 7.305(B)(2) states that grounds can exist to grant an application where the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity.

The Appellant argues that the deprivation of a party's right to appeal an issue decided against it is a manifest injustice and cites to this Michigan Supreme Court's Opinion in **Rott** v **Rott**, ___ Mich. ____; ____ NW2d ___ (2021) (**Exhibit 6**). There is no indication that the Appellant has been deprived of its right to appeal. In fact, just the opposite is true.

Here, the Appellant is attempting to appeal the Michigan Court of Appeals' June 29, 2021 Order. While that June 29, 2021 Order dismissed the Appellant's claim of appeal due to a lack of jurisdiction, the order expressly stated that the Appellant's application for leave to appeal remains pending in Docket No. 357599.

> "**Appellant's application for leave to appeal and attendant "motion for partial stay of proceedings pending appeal" remain pending** in Docket NO. 357599." (**Exhibit 3** -- June 29, 2021 Order) (Emphasis Added)

This is important because, on July 26, 2021, the Michigan Court of Appeals granted the Appellant's application for leave to appeal in Docket No. 357599. MCR 7.205(E) states that, if an application is granted, the case proceeds as an appeal of right.

> "**(E)** Decision. . . .
>
> **(3) If an application is granted, the case proceeds as an appeal of right**, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the

transcript has not been filed (14 days), run from the date the order granting leave is certified." (**Exhibit 7** -- MCR 7.205) (Emphasis Added)

On August 23, 2021, the Appellant filed its Brief on Appeal in Docket No. 357599.

There is no legal principle of major significance which supports granting an application to this Michigan Supreme Court when an application has already been granted to the Michigan Court of Appeals. Therefore, grounds do not exist under MCR 7.305(B)(2) for granting the Appellant's Application For Leave to Appeal to this Michigan Supreme Court.

C. Grounds Do Not Exist Under MCR 7.305(B)(3).

MCR 7.305(B)(3) states that grounds can exist to grant an application where the issue involves a legal principle of major significance to the state's jurisprudence. Once again, the Appellant argues that the deprivation of a party's right to appeal an issue decided against it is a manifest injustice and cites to this Michigan Supreme Court's Opinion in **Rott** v **Rott**. For the reasons stated in Section V.B., Appellant has not been deprived of its right to appeal and there are no grounds under MCR 7.305(B)(3) to grant Appellant's Application for Leave to Appeal.

D. Grounds Do Not Exist Under MCR 7.305(B)(4).

Grounds do not exist under MCR 7.305(B)(4) to grant the Appellant's Application For Leave To Appeal to this Michigan Supreme Court. MCR 7.305(B)(4) states that grounds can exist to grant an application where the Appellant's Application involves an appeal before a decision of the Michigan Court of Appeals and a delay in final adjudication is likely to cause substantial harm, or the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid. Here, the Appellant's Application does not involve an appeal before a decision of the Michigan Court of Appeals. Instead, the Application involves a decision of the Chief Judge of the Michigan Court of Appeals which is

dated June 29, 2021. Therefore, grounds are neither asserted nor do they exist under MCR 7.305(B)(4) for granting the Appellant's Application For Leave to Appeal to this Michigan Supreme Court.

E. Grounds Do Not Exist Under MCR 7.305(B)(5).

Grounds do not exist under MCR 7.305(B)(5) to grant the Appellant's Application For Leave To Appeal to this Michigan Supreme Court. MCR 7.305(B)(5) states that grounds can exist to grant an application where the Michigan Court of Appeals decision is clearly erroneous and will cause material injustice or where the Michigan Court of Appeals decision conflicts with a decision of the Michigan Supreme Court or the Michigan Court of Appeals. Here, the Michigan Court of Appeals June 29, 2021 Order is not clearly erroneous nor does it conflict with any Michigan Supreme Court or Michigan Court of Appeals opinion.

On June 29, 2021, Michigan Court of Appeals Chief Judge Murray dismissed the Appellant's claim of appeal due to a lack of jurisdiction since the June 1, 2021 postjudgment order appealed was not a final order as defined in MCR 7.202(6). Specifically, Chief Judge Murray stated that the June 1, 2021 Order was not the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all of the parties. Instead, the October 26, 1992 consent judgment was the "first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties. (**Exhibit 3** -- June 29, 2021 Order) In support of this conclusion, Chief Judge Murray examined MCR 7.202(6)(a)(i) and stated that this court rule contemplates that only the first judgment or order meeting the definition will be considered final unless the judgment or order is reversed. (**Exhibit 3** -- June 29, 2021 Order)

Chief Judge Murray is correct. MCR 7.202(6)(a)(i) plainly states that the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties is the final judgment. (**Exhibit 8** -- MCR 7.202(6).)

The Michigan Court of Appeals examined MCR 7.202(6)(a)(i) in **Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015) and concluded that MCR 7.202(6)(a)(i) specifically defines a "final judgment" or "final order" to mean "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. (**Exhibit 9** -- **Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015).)

The Michigan Court of Appeals, in **Varran**, then examined the specific language set forth in MCR 7.202(6)(a)(i) and stated that the court rules use of the singular definite article "the" before "first judgment" within the court rule contemplates one order in a civil action. In support of this analysis, the Michigan Court of Appeals cited to this Michigan Supreme Court's Opinion in **Massey** v. **Mandell**, 462 Mich. 375, 382 n5; 614 NW2d 70 (2000). (**Exhibit 9** -- **Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015).) This Michigan Supreme Court stated in **Massey** that the use of the term "the" represents a definite article used before a noun, with a "specifying" and "particularizing" effect. (**Exhibit 10** -- **Massey** v. **Mandell**, 462 Mich. 375, 382 n 5; 614 NW2d 70, 73 (2000).) As a result, a plain reading of the language set forth in MCR 7.202(6)(a)(i) demonstrates that the use of the singular definite article "the" before "first judgment" within the Court rule does contemplate one order in a civil action.

Here, there is no question that the October 26, 1992 consent judgment was the first judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties. Given that the October 26, 1992 consent judgment was the first order that disposed of the claims and adjudicated the rights and liabilities of all the parties, it is impossible for the June 1, 2021

Order to be a final order under MCR 7.202(6). Chief Judge Murray properly acted under MCR 7.203(F)(1) when he dismissed the claim of appeal due to a lack of jurisdiction because the June 1, 2021 postjudgment order is not a final order as defined in MCR 7.202(6). Chief Judge Murray's June 29, 2021 Order is not clearly erroneous and does not conflict with any Michigan Supreme Court or Michigan Court of Appeals Opinion.

Therefore, grounds do not exist under MCR 7.305(B)(5) for granting the Appellant's Application For Leave to Appeal to this Michigan Supreme Court.

F. Grounds Do Not Exist Under MCR 7.305(B)(6).

Grounds do not exist under MCR 7.305(B)(6) to grant the Appellant's Application For Leave To Appeal to this Michigan Supreme Court. MCR 7.305(B)(6) states that grounds can exist to grant an application where there is an appeal from the Attorney Discipline Board. Here, the Appellant's Application does not involve an appeal from the Attorney Discipline Board. Therefore, grounds are neither asserted nor do they exist under MCR 7.305(B)(6) for granting the Appellant's Application For Leave to Appeal to this Michigan Supreme Court.

VI. COUNTER STATEMENT OF THE STANDARD OF REVIEW

MCR 7.203(F)(1) states that except when a motion to dismiss has been filed, the Chief Judge of the Michigan Court of Appeals may, acting alone, dismiss an appeal for lack of jurisdiction.

> **"(F) Dismissal.**
>
> **(1) Except when a motion to dismiss has been filed, the chief judge or another designated judge may, acting alone, dismiss an appeal or original proceeding for lack of jurisdiction. (Exhibit 11** – MCR 7.203(F)(1).) (Emphasis Added)

MCR 7.203(A)(1) states that the Michigan Court of Appeals has jurisdiction of an appeal of right from a final judgment or final order of the circuit court as defined in MCR 7.202(6). MCR 7.202(6)(a)(i) plainly states that the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties is the final judgment.

> **"(6) "final judgment" or "final order" means:**
>
> **(a) In a civil case,**
>
> **(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;" (Exhibit 8 --** MCR 7.202(6).) (Emphasis Added)

This Michigan Supreme Court has ruled that the interpretation of a court rule is reviewed de novo.

> "The proper interpretation and application of a [***13] court rule is a question of law, which we review de novo. 14 **This court uses the principles of statutory construction when interpreting a Michigan court rule." (Exhibit 12 -- Henry** v. **Dow Chem. Co.**, 484 Mich. 483, 495; 772 NW2d 301, 307 (2009).) (Emphasis Added)

VII. LEGAL ARGUMENTS

A. The Michigan Court of Appeals Did Not Err When Its Chief Judge Acting Under MCR 7.203(F)(1) Dismissed The Appellant's Appeal For Lack of Jurisdiction.

1. MCR 7.203(F)(1) Provides The Chief Judge Of The Michigan Court Of Appeals With The Authority To Dismiss An Appeal For Lack Of Jurisdiction.

The Chief Judge of the Michigan Court of Appeals, Christopher M. Murray, acting under MCR 7.203(F)(1), dismissed the Appellant's claim of appeal for lack of jurisdiction. Chief Judge Murray is correct. MCR 7.203(F)(1) does provide him with the power he invoked. MCR 7.203(F)(1) clearly states:

> **"(F) Dismissal.**
>
> **(1) Except when a motion to dismiss has been filed, the chief judge or another designated judge may, acting alone, dismiss an appeal or original proceeding for lack of jurisdiction."** (**Exhibit 11** – MCR 7.203(F)(1).) (Emphasis Added)

This Michigan Supreme Court has ruled that it uses the principles of statutory construction when interpreting a Michigan Court Rule.

> "The proper interpretation and application of a [***13] court rule is a question of law, which we review de novo. 14 **This court uses the principles of statutory construction when interpreting a Michigan court rule."** (**Exhibit 12** -- **Henry** v. **Dow Chem. Co.**, 484 Mich. 483, 495; 772 NW2d 301, 307 (2009).) (Emphasis Added)

This Michigan Supreme Court has further ruled that, when interpreting court rules, it begins by considering the plain language of the rule in order to ascertain its meaning.

> "**We begin by considering the plain language of the court rule in order to ascertain its meaning**. 16 "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." 17" (**Exhibit 12** -- **Henry** v. **Dow Chem. Co.**, 484 Mich. 483, 495; 772 NW2d 301, 307 (2009).) (Emphasis Added)

The Michigan Court of Appeals agrees. The Michigan Court of Appeals has ruled that it uses the same principles that govern the interpretation of statutes to interpret the Michigan Court Rules.

> "**This Court interprets court rules using the "same principles that govern the interpretation of statutes.**"10 Our purpose when interpreting court rules is to give effect to the intent of the Michigan Supreme Court." (**Exhibit 13** -- **In re McCarrick/Lamoreaux**, 307 Mich. App. 436, 446; 861 NW2d 303, 309-310 (2014).) (Emphasis Added)

According to the Michigan Court of Appeals, the language of the court rule is the best indicator of intent. If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary.

> "**The language of the court rule itself is the best indicator of intent**.12 [**310] If the plain [***11] and ordinary meaning of a court rule's language is clear, judicial construction is not necessary." (**Exhibit 13** -- **In re McCarrick/Lamoreaux**, 307 Mich. App. 436, 446; 861 NW2d 303, 309-310 (2014).) (Emphasis Added)

Here, the language of MCR 7.203(F)(1) clearly and plainly states that the Chief Judge of the Michigan Court of Appeals may, acting alone, dismiss an appeal for lack of jurisdiction. Thus, there is no question that MCR 7.203(F)(1) provided Chief Judge Murray with the power to issue the June 29, 2021 Order.

2. Chief Judge Murray Properly Found That the June 1, 2021 Order Was Not The First Judgment Or Order That Disposed Of All The Claims And Adjudicated The Rights And Liabilities Of All The Parties.

Within the June 29, 2021 Order, Chief Judge Murray stated that the June 1, 2021 Order was not the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all of the parties. Instead the October 26, 1992 consent judgment was the "first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties. In support of this conclusion, Chief Judge Murray examined MCR 7.202(6)(a)(i) and stated that the court rule contemplates that only the first judgment or order meeting the definition will be considered final unless the judgment or order is reversed.

> "**MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed**. See Varran v Granneman (On Remand), 312 Mich App 591, 600-601; 880 NW2d 242 (2015).
>
> "The postjudgment addition of intervening parties into the case does not change this outcome. Id." (**Exhibit 3** -- June 29, 2021 Order) (Emphasis Added)

Chief Judge Murray is correct. MCR 7.202(6)(a)(i) plainly states that the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties is the final judgment.

> **"(6) "final judgment" or "final order" means:**
>
> **(a) In a civil case,**
>
> **(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;"** (**Exhibit 8** -- MCR 7.202(6).) (Emphasis Added)

The Michigan Court of Appeals examined MCR 7.202(6)(a)(i) in **Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015) and concluded that MCR 7.202(6)(a)(i) specifically defines a "final judgment" or "final order" to mean "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties".

> **"It cannot be ignored, however, that MCR 7.202(6)(a)(i) specifically defines a "final judgment" or "final order" to mean "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ."** (Emphasis added)." (**Exhibit 9** -- **Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015).) (Emphasis Added)

The Michigan Court of Appeals, in **Varran**, then examined the specific language set forth in MCR 7.202(6)(a)(i) and stated that the court rules use of the singular definite article "the" before "first judgment" within the court rule contemplates one order in a civil action. In support of this analysis, the Michigan Court of Appeals cited to this Michigan Supreme Court's Opinion in **Massey** v. **Mandell**, 462 Mich. 375, 382 n5; 614 NW2d 70 (2000).

> **"Use of the singular definite article "the" before "first judgment" contemplates one order in a civil action**. See, e.g., **Massey v Mandell, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). When A's mother initiated the custody case in 2003, the parties to that case were Mother and Father and the first order that disposed of the claims and adjudicated all the rights and liabilities of Mother and Father was the February 2004 consent order regarding custody, parenting time, and support of A. Accordingly, under the definition of MCR 7.202(6)(a)(i), the February 2004 consent order was the "final judgment" or "final order." Because there was no reversal of the February 2004 consent order, no subsequent order in the case could be considered a "final**

> **judgment" or "final order" under MCR 7.202(6)(a)(i)**. The May 31, 2014 order in this case is therefore not a "final judgment" or "final order" under **MCR 7.202(6)(a)(i).**" **(Exhibit 9 -- Varran** v. **Granneman**, 312 Mich. App. 591, 601; 880 NW2d 242, 248 (2015).) (Emphasis Added)

This Michigan Supreme Court stated, in **Massey,** that the use of the term "the" represents a definite article used before a noun, with a "specifying" and "particularizing" effect.

> **"The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect**, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . ." Random House Webster's College Dictionary, p 1382. Moreover, when, as in subd (1)(a), the Legislature has qualified the same word with the definite article "the" in one instance (subd [1][a][i]) and the indefinite article "a" in another instance (subd [1][a][ii]), and both are within the same subsection of a statute, even more clearly there can be no legitimate claim that this Court should read "the" as if it were "a."" **(Exhibit 10 -- Massey** v. **Mandell**, 462 Mich. 375, 382 n 5; 614 NW2d 70, 73 (2000).) (Emphasis Added)

As a result, a plain reading of the language set forth in MCR 7.202(6)(a)(i) demonstrates that the use of the singular definite article "the" before "first judgment" within the Court rule additionally contemplate one order in a civil action.

Here, there is no question that the October 26, 1992 Consent Judgment was the first judgment that disposed of the claims and adjudicated the rights and liabilities of the parties. Given that the October 26, 1992 Consent Judgment was the first order that that disposed of the claims and adjudicated the rights and liabilities of all the parties, it is impossible for the June 1, 2021 Order to be a final order under MCR 7.202(6). Consequently, Chief Judge Murray properly acted under MCR 7.203(F)(1) when he dismissed the appeal due to a lack of jurisdiction since the June 1, 2021 postjudgment order is not a final order as defined in MCR 7.202(6). Any argument to the contrary is without support and without merit.

VIII. CONCLUSIONS AND RELIEF REQUESTED

This application for leave has no merit and the purpose of its filing by the Appellant is a legal mystery. This Appellant, within minutes, filed a Claim of Appeal and an Application for Appeal on the same issue. The application was granted before the current application for leave to this Michigan Supreme Court was filed. Thus, by controlling court rule the application at the Michigan Court of Appeals became an appeal of right. This begs the question of what relief this Michigan Supreme Court could provide to this Appellant given these underlying procedural facts.

WHEREFORE, the Intervenors respectfully request that the Michigan Supreme Court enter an Order:

(I) Denying the Appellant's Application For Leave to Appeal; and

(II) Granting such other relief in favor of the Intervenors-Appellees as this Court deems just, equitable and appropriate under the circumstances presented.

By: **/S/ Robert Charles Davis**
ROBERT CHARLES DAVIS (P40155)
Attorney for Intervenors / Appellees
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer Jimena Loveluck
10 S. Main St., Ste. 401
Mt. Clemens, MI 48043
(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattorneys.com

Dated: October 27, 2021

By: **/S/ Fredrick J. Dindoffer**
FREDRICK J. DINDOFFER (P31398)
Nathen D. Dupes (P75454)
Bodman PLC
Attorneys for Intervenor / Appellee
City of Ann Arbor
1901 St. Antoine, 6th Floor
Detroit, MI 48226
(313) 259-7777

Dated: October 27, 2021

By: **/S/ William J. Stapleton**
WILLIAM J. STAPLETON (P38339)
Hooper Hathaway P.C.
Attorneys for Intervenor/Appellee
Scio Twp.
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(734) 662-4426

Dated: October 27, 2021

By: **/S/ Stephen K. Postema**
STEPHEN K. POSTEMA (P38871)
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Ann Arbor City Attorney's Office
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Dated: October 27, 2021

By: **/S/ Erin E. Mette**
ERIN E. METTE (P83199)
Great Lakes Environmental Law Center
Attorneys for Intervenor/Appellee
HRWC
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Detroit, MI 48201
(734) 782-3372

Dated: October 27, 2021

PROOF OF SERVICE

I served the **Intervenors / Appellees' Answer in Opposition to The Defendant/Appellant's Application For Leave To Appeal** upon the attorneys of record and/or parties in this case on **October 27, 2021. I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

- ☐ **U.S. Mail**
- ☐ Hand Delivered
- ☐ Express Mail Private
- ☐ Fax
- ☐ Messenger
- **X Other: E-file**

/s/ William N. Listman
William N. Listman

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 1 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 1

COA 357598
MSC 163603

ATTORNEY GENERAL V GELMAN SCIENCES INC

Lower Court/Tribunal
WASHTENAW CIRCUIT COURT
Judge(s)
CONNORS TIMOTHY P

Docket Case Documents

Case Information

Case Header

Case Number

COA #357598 MSC #163603

Case Status

MSC Pending on Application

COA Case Concluded; File Open

Parties & Attorneys to the Case - Court of Appeals

1

ATTORNEY GENERAL

Plaintiff - Appellee

Attorney(s)

NEGELE BRIAN J
#41846, Attorney General

2

NATURAL RESOURCES DEPARTMENT OF

Plaintiff

Attorney(s)

Same

3

NATURAL RESOURCES COMMISSION

Plaintiff

Attorney(s)

Same

4

WATER RESOURCES COMMISSION

Plaintiff

Attorney(s)

Same

5

GELMAN SCIENCES INC
Defendant - Appellant

Attorney(s)

TIMMER GREGORY G
#39396, Retained

SHOW 6 MORE PARTIES +

Parties & Attorneys to the Case - Supreme Court

1

ATTORNEY GENERAL
Plaintiff

Attorney(s)

Brian J Negele
#41846

2

NATURAL RESOURCES DEPARTMENT OF
Plaintiff

3

NATURAL RESOURCES COMMISSION
Plaintiff

4

WATER RESOURCES COMMISSION
Plaintiff

5

GELMAN SCIENCES INC

Defendant

Attorney(s)

Gregory G. Timmer
#39396

SHOW 6 MORE PARTIES +

COLLAPSE ALL EXPAND ALL

06/22/2021	1 Claim of Appeal - Civil	+
06/01/2021	2 Order Appealed From	+
06/22/2021	3 Transcript Filed By Party	+
06/22/2021	4 Motion: Stay	+
06/22/2021	5 Transcript Complete Per Parties	+
06/25/2021	7 Notice Of Filing Transcript	+
06/29/2021	8 Submitted on Administrative Motion Docket	+

06/29/2021	9 Order: Dismissal - Administrative - Jurisdiction	+
08/03/2021	10 Motion: Reconsideration of Order	+
08/10/2021	12 Submitted on Quarterly Reconsideration Docket	+
08/23/2021	13 Order: Reconsideration - Deny - Appeal Remains Closed	+
10/04/2021	14 Application for Leave to SCt	+
10/05/2021	15 Supreme Court: SCt Case Caption	+

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 2 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE

DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S

APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 2

COA 357599

ATTORNEY GENERAL V GELMAN SCIENCES INC

Lower Court/Tribunal

WASHTENAW CIRCUIT COURT

Judge(s)

CONNORS TIMOTHY P

Docket Case Documents

Case Information

Case Header

Case Number

COA #357599

Case Status

COA Open

Parties & Attorneys to the Case – Court of Appeals

1

ATTORNEY GENERAL
Plaintiff - Appellee

Attorney(s)

NEGELE BRIAN J
#41846, Attorney General

2

NATURAL RESOURCES DEPARTMENT OF
Plaintiff

Attorney(s)

Same

3

NATURAL RESOURCES COMMISSION
Plaintiff

Attorney(s)

Same

4

WATER RESOURCES COMMISSION
Plaintiff

Attorney(s)

Same

5

GELMAN SCIENCES INC
Defendant - Appellant

Attorney(s)

TIMMER GREGORY G
#39396, Retained

SHOW 6 MORE PARTIES +

COLLAPSE ALL EXPAND ALL

06/22/2021	1 App For Leave to Appeal - Civil	+
06/01/2021	2 Order Appealed From	+
07/16/2021	3 Motion: Stay	+
06/22/2021	4 Transcript Filed By Party	+
06/22/2021	17 Notice Of Filing Transcript	+
06/29/2021	5 Appearance - Appellee	+
06/29/2021	6 Appearance - Appellee	+
06/30/2021	7 Appearance - Appellee	+
07/01/2021	8 Appearance - Appellee	+
07/02/2021	9 Answer - Motion	+

07/09/2021	10 Appearance - Appellee	+
07/13/2021	11 Appearance - Appellee	+
07/13/2021	12 Answer - Application	+
07/20/2021	15 Submitted on Motion Docket	+
07/26/2021	16 Order: Application - Grant	+
08/23/2021	18 Brief: Appellant	+
08/23/2021	19 Docketing Statement MCR 7.204H	+
09/13/2021	20 Stipulation: Extend Time - AE Brief	+
10/25/2021	21 Brief: Appellee	+
10/25/2021	22 Brief: Appellees - Jointly Filed	+
10/26/2021	23 Noticed	+

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 3 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE

DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S

APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 3

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. **357598**

LC No. **88-034734-CE**

Christopher M. Murray, Chief Judge, acting under MCR 7.203(F)(1), orders:

The claim of appeal and attendant "motion for partial stay of proceedings pending appeal" are DISMISSED for lack of jurisdiction because the June 1, 2021 postjudgment order is not a final order as defined in MCR 7.202(6). MCR 7.203(A)(1). Specifically, the June 1, 2021 order was not "*the first*" judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties; the October 26, 1992 consent judgment was "*the first*" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case. MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed. See *Varran v Granneman (On Remand)*, 312 Mich App 591, 600-601; 880 NW2d 242 (2015). The postjudgment addition of intervening parties into the case does not change this outcome. *Id.* Moreover, although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i). Appellant's application for leave to appeal and attendant "motion for partial stay of proceedings pending appeal" remain pending in Docket No. 357599.

Christopher Murray

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 29, 2021
Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 4 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 4

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. 357599

LC No. 88-034734-CE

David H. Sawyer
Presiding Judge

Jane E. Markey

Mark T. Boonstra
Judges

The motion for partial stay of proceedings pending appeal is GRANTED, in part, and enforcement of paragraphs 2 and 3 of the June 1, 2021 order to conduct response activities to implement and comply with revised cleanup criteria are STAYED pending resolution of this appeal or further order of this Court.

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 26 2021
Date

Chief Clerk

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 5 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE

DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S

APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 5

State rules current with changes received through October 15, 2021.

Rule 7.305. Application for Leave to Appeal.

(A) What to File. To apply for leave to appeal, a party must file:

(1)1 signed copy of an application for leave to appeal prepared in conformity with *MCR 7.212(B)* and consisting of the following:

(a)a statement identifying the judgment or order appealed and the date of its entry;

(b)the questions presented for review related in concise terms to the facts of the case;

(c)a table of contents and index of authorities conforming to *MCR 7.212(C)(2)* and (3);

(d)a concise statement of the material proceedings and facts conforming to *MCR 7.212(C)(6)*;

(e)a concise argument, conforming to *MCR 7.212(C)(7)*, in support of the appellant's position on each of the stated questions and establishing a ground for the application as required by subrule (B); and

(f)a statement of the relief sought.

(2)1 copy of any opinion, findings, or judgment of the trial court or tribunal relevant to the question as to which leave to appeal is sought and 1 copy of the opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(3)proof that a copy of the application was served on all other parties, and that a notice of the filing of the application was served on the clerks of the Court of Appeals and the trial court or tribunal; and

(4)the fee provided by *MCR 7.319(C)(1)*.

(B) Grounds. The application must show that

(1)the issue involves a substantial question about the validity of a legislative act;

(2)the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3)the issue involves a legal principle of major significance to the state's jurisprudence;

(4)in an appeal before a decision of the Court of Appeals,

(a)delay in final adjudication is likely to cause substantial harm, or

(b)the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid;

(5)in an appeal of a decision of the Court of Appeals,

(a)the decision is clearly erroneous and will cause material injustice, or

(b)the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6)in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

(C) When to File.

(1) Bypass Application. In an appeal before the Court of Appeals decision, the application must be filed within 42 days after:

(a)a claim of appeal is filed in the Court of Appeals;

(b)an application for leave to appeal is filed in the Court of Appeals; or

(c)an original action is filed in the Court of Appeals.

(2) Application After Court of Appeals Decision. Except as provided in subrule (C)(4), the application must be filed within 28 days in termination of parental rights cases, within 42 days in other civil cases, or within 56 days in criminal cases, after:

(a)the Court of Appeals order or opinion resolving an appeal or original action, including an order denying an application for leave to appeal,

(b)the Court of Appeals order or opinion remanding the case to the lower court or Tribunal for further proceedings while retaining jurisdiction,

(c)the Court of Appeals order denying a timely filed motion for reconsideration, or

(d)the Court of Appeals order granting a motion to publish an opinion that was originally released as unpublished.

(3) Interlocutory Application from the Court of Appeals. Except as provided in subrules (C)(1) and (C)(2), the application must be filed within 28 days after a Court of Appeals order that does not resolve the appeal or original action, including an order granting an application for leave to appeal.

(4) Attorney Discipline Board Decision. In an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board, the application must be filed within the time provided in *MCR 9.122(A)(1)*.

(5) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that

first-class postage was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.

(6) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave to appeal may be filed within 28 days in termination of parental rights cases, 42 days in other civil cases, and 56 days in criminal cases, after the date of

(a)the Court of Appeals order or opinion remanding the case,

(b)the Court of Appeals order denying a timely filed motion for reconsideration of a decision remanding the case, or

(c)the Court of Appeals order or opinion disposing of the case following the remand procedure, in which case an application may be made on all issues raised initially in the Court of Appeals, as well as those related to the remand proceedings.

(7) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(6)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under *MCR 7.215(E)(1)*, an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under *MCR 7.215(E)(1)*, the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(8) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal the decision on the merits.

(D) Answer. A responding party may file 1 signed copy of an answer within 28 days after service of the application. The party must file proof that a copy of the answer was served on all other parties.

(E) Reply. The appellant may file 1 signed copy of a reply within 21 days after service of the answer, along with proof of its service on all other parties. The reply must:

(1)contain only a rebuttal of the arguments in the answer;

(2)include a table of contents and an index of authorities; and

(3)be no longer than 10 pages, exclusive of tables, indexes, and appendixes.

(F) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a party who filed a pleading that does not substantially comply with the requirements of this rule to file a conforming pleading within a specified time or else it may strike the nonconforming pleading. The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading if it has not been corrected within the specified time.

(G) Submission and Argument. Applications for leave to appeal may be submitted for a decision after the reply brief has been filed or the time for filing such has expired, whichever occurs first. There is

no oral argument on an application for leave to appeal unless ordered by the Court under subrule (H)(1).

(H) Decision.

(1) Possible Court Actions. The Court may grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order. The clerk shall issue the order entered and provide either a paper copy or access to an electronic version to each party and to the Court of Appeals clerk.

(2) Appeal Before Court of Appeals Decision. If leave to appeal is granted before a decision of the Court of Appeals, the appeal is thereafter pending in the Supreme Court only, and subchapter 7.300 applies.

(3) Appeal After Court of Appeals Decision. If leave to appeal is denied after a decision of the Court of Appeals, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms. If leave to appeal is granted, jurisdiction over the case is vested in the Supreme Court, and subchapter 7.300 applies.

(4) Issues on Appeal.

(a) Unless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal.

(b) On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal. Permission to brief and argue additional issues does not extend the time for filing the briefs and appendixes.

(I) Stay of Proceedings. *MCR 7.209* applies to appeals in the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under *MCR 7.209* or a stay has been entered or takes effect pursuant to *MCR 7.209(E)(7)*, it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or the Court of Appeals.

History

Rule 7.305 adopted eff September 1, 2015; Rule 7.305 amended September 27, 2017, eff January 1, 2018; Rule 7.305(I) amended imd eff March 21, 2018; Rule 7.305(C)(7) amended eff August 14, 2019.

End of Document

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 6 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 6

Rott v. Rott

Supreme Court of Michigan

April 8, 2021, Argued; July 30, 2021, Decided; July 30, 2021, Filed

No. 161051

Reporter
2021 Mich. LEXIS 1438 *; 2021 WL 3234466

DOREEN ***ROTT***, Plaintiff-Appellant, v ARTHUR ***ROTT***, Defendant-Appellee.

Prior History: [*1] Doreen ***Rott*** brought a negligence and premises-liability action in the Oakland Circuit Court against Arthur ***Rott***, seeking to recover damages for injuries she received after riding defendant's self-installed zip line at his house. Plaintiff attended a family dinner party at defendant's house on the day she was injured. She watched several people successfully use the zip line before riding it herself. Plaintiff injured her knee when she prematurely put her legs down to make contact with the ground thinking that the ride was over. Defendant moved for summary disposition under *MCR 2.116(C)(8)* and *(10)*, arguing that plaintiff's complaint should be dismissed under the recreational land use act (RUA), *MCL 324.73301*, because plaintiff was on his property for the purpose of zip lining, plaintiff did not pay him for use of the zip line, and plaintiff's injuries were not caused by the gross negligence or willful and wanton conduct of defendant. Plaintiff argued that the statute did not apply. The court, Cheryl A. Matthews, J., granted in part and denied in part defendant's motion. The court agreed with defendant that the RUA applied to the facts of the case but denied the request for dismissal, [*2] concluding that a genuine issue of material fact existed regarding whether plaintiff's injuries were caused by defendant's gross negligence or willful and wanton misconduct, precluding application of the RUA.

Both parties sought leave to appeal. In her application, plaintiff argued that the RUA did not apply (Court of Appeals Docket No. 336242). Defendant argued in his application that the trial court should have granted summary disposition in his favor because no genuine dispute of material fact existed about whether his conduct amounted to gross negligence or was willful and wanton (Court of Appeals Docket No. 336240). The Court of Appeals denied plaintiff's application "for failure to persuade the Court of the need for immediate appellate review," but it granted defendant's application for leave to appeal, limited to the issues raised in his application. In an unpublished per curiam opinion issued December 18, 2018 (***Rott*** I), the Court of Appeals, CAVANAGH, P.J., and SERVITTO and CAMERON, JJ., reversed the trial court's order and remanded for entry of an order granting summary disposition in favor of defendant, concluding that there was no genuine issue of material fact that defendant's [*3] conduct did not amount to gross negligence or willful and wanton misconduct. On remand, the trial court entered an order granting summary disposition in favor of defendant. Plaintiff appealed, and the Court of Appeals, K. F. KELLY, P.J., and BORRELLO and SERVITTO, JJ., affirmed. *331 Mich App 102; 951 N.W.2d 99 (2020)* (***Rott*** II). The Court concluded that in ***Rott*** I, it had implicitly decided that the RUA applied because it had determined that plaintiff's factual showing failed to meet the RUA's standards and that plaintiff was therefore barred under the law-of-the-case doctrine from again raising that issue. Nevertheless, the Court addressed the substance of plaintiff's arguments. It applied the last-antecedent rule when

interpreting the RUA to conclude that the statute applies when a person does not pay the owner of the land a valuable consideration for the purpose of the recreational activity, reasoning that the word "for" modified the immediately preceding phrase "a valuable consideration" in the statute. In addition, the Court determined that under *Neal v Wilkes, 470 Mich 661; 685 N.W.2d 648 (2004)*, the RUA barred her suit because although she had originally entered defendant's property for a family party, plaintiff **[*4]** was on the property for the purpose of zip lining at the time of the accident and zip lining fit within the plain meaning of the phrase "any other outdoor recreational use." Plaintiff sought leave to appeal.

Judges: Chief Justice: Bridget M. McCormack. Justices: Brian K. Zahra, David F. Viviano, Richard H. Bernstein, Elizabeth T. Clement, Megan K. Cavanagh, Elizabeth M. Welch.

Opinion by: Elizabeth M. Welch

Opinion

BEFORE THE ENTIRE BENCH

WELCH, J.

This case arises out of a zip-lining accident in defendant Arthur ***Rott***'s backyard. Plaintiff, Doreen ***Rott***, sued defendant after she was injured when she prematurely touched the ground before the end of the ride. To resolve this case, the Court must address the limits of the law-of-the-case doctrine and the scope of the recreational land use act (RUA), *MCL 324.73301(1)*. Defendant raises the RUA as a defense to plaintiff's negligence and premises-liability claims, while plaintiff claims the statute does not apply. On remand from an interlocutory appeal, the circuit court dismissed plaintiff's claims. In resolving plaintiff's subsequent appeal by right, the Court of Appeals held that plaintiff's arguments concerning the applicability of the RUA had already been decided against **[*5]** her as a part of defendant's interlocutory appeal and that those arguments were, therefore, barred by the law-of-the-case doctrine. Despite this holding, the Court of Appeals reached the merits of plaintiff's RUA arguments and held that the RUA applies and bars plaintiff's claims against defendant.

For the reasons that follow, we reverse the Court of Appeals' application of the law-of-the-case doctrine and its interpretation of the catchall phrase in *MCL 324.73301(1)*. We hold that plaintiff can contest the RUA's applicability on appeal because her prior claim on the merits was never reviewed, and we hold that zip lining is not an activity covered by the RUA. We also reverse the Oakland Circuit Court's order granting summary disposition to defendant and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The events in question occurred in May 2015 while plaintiff attended a weekend social party at defendant's home in West Bloomfield. The defendant, plaintiff's brother, had installed a zip line in his backyard about a year earlier with the assistance of his neighbor. Before the May 2015 party, plaintiff **[*6]** had repeatedly declined to ride the zip line. According to plaintiff, after watching others ride the zip line and in response to continued pressure from defendant, plaintiff agreed to take a single ride on the zip line. Near the end of the ride, while still in motion, plaintiff put her legs down to reach the ground thinking that "the ride was over." The resulting impact with the ground caused two meniscal tears in plaintiff's left knee that required surgery.

Plaintiff sued defendant on theories of negligence and premises liability. Following discovery, defendant moved for summary disposition under *MCR 2.116(C)(8)* and *(10)*, arguing that the RUA applied and barred plaintiff's claims unless she could prove that defendant's "gross negligence or willful and wanton misconduct" caused the injury. *MCL 324.73301(1)*. In November 2016, the circuit court agreed that the RUA applied but denied

defendant's motion, finding that genuine issues of material fact existed as to whether he engaged in "gross negligence or willful and wanton misconduct" under the RUA.

Both parties sought leave to appeal in the Court of Appeals on an interlocutory basis. In her application, plaintiff argued that the RUA did [*7] not apply and also filed a motion for peremptory reversal (Court of Appeals Docket No. 336242). Defendant argued in his application that the circuit court should have granted summary disposition in his favor because no genuine dispute of material fact existed about whether his conduct amounted to gross negligence or was willful and wanton (Court of Appeals Docket No. 336240). While defendant did not respond to plaintiff's motion for peremptory reversal, the Court of Appeals special motion panel rejected plaintiff's argument, denied her motion for peremptory reversal, and denied her application "for failure to persuade the Court of the need for immediate appellate review." ***Rott*** *v* ***Rott***, unpublished order of the Court of Appeals, entered May 4, 2017 (Docket No. 336242).

On the same day, the Court of Appeals granted defendant's application "limited to the issues raised in the application and supporting brief." ***Rott*** *v* ***Rott***, unpublished order of the Court of Appeals, entered May 4, 2017 (Docket No. 336240). In her responsive brief in Docket No. 336240, plaintiff noted the scope of the appeal as defined by the Court of Appeals' prior orders and stated, "Accordingly, this appeal addresses only [*8] those issues raised by Defendant/Appellant." Plaintiff also noted that she had not conceded the applicability of the RUA, stating, "Plaintiff/Appellee vehemently maintains that the RUA does not attach to the instant case."

More than a year later, the Court of Appeals issued an unpublished opinion reversing the circuit court. The Court of Appeals acknowledged that the circuit court had held that the RUA applied and then discussed the RUA, stating, "Absent gross negligence or willful and wanton misconduct on the part of defendant, plaintiff cannot recover for damages resulting from the zip line." *Rott v Rott, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 336240), 2018 Mich. App. LEXIS 3728, *9* (***Rott*** *I*), p 4. The court thus presumed, without any analysis or explanation, that the RUA applied. While the court agreed with the circuit court that summary disposition was inappropriate under *MCR 2.116(C)(8)*, it went on to hold that no genuine dispute of material fact existed as to whether defendant's conduct was grossly negligent. Accordingly, the Court of Appeals held that defendant was entitled to summary disposition under *MCR 2.116(C)(10)* and remanded the case to the circuit [*9] court "for entry of an order granting summary disposition for defendant." *2018 Mich. App. LEXIS 3728, *13*.

On remand, the circuit court followed the Court of Appeals' instructions and entered an order on February 8, 2019, granting defendant summary disposition. Plaintiff then exercised her right to appeal, arguing that the RUA did not apply because (1) she was not on the land "for the purpose of" zip lining and (2) zip lining is not a recreational activity covered by the RUA.

The Court of Appeals disagreed in a published opinion, holding that its earlier decision "implicitly decided . . . that the RUA applied to the facts of the case, and plaintiff's arguments on appeal stemming from whether the RUA applies are therefore subject to the law-of-the-case doctrine." *Rott v Rott, 331 Mich App 102, 107; 951 NW2d 99 (2020)* (***Rott*** *II*). Despite this holding, the Court addressed the merits of plaintiff's appeal and rejected both of her arguments. *Id. at 108-111*. Purporting to apply the "last-antecedent rule of statutory construction," the court held:

> Plaintiff argues that the statute should be read so that a cause of action only arises for injuries to a person who has entered another's land "*for the purpose* of" the statutorily [*10] enumerated activities or any other outdoor

recreational use. (Underlining omitted.) However, the statute actually reads that a cause of action does not arise for injuries to a person "on the land of another *without paying . . . a valuable consideration for the purpose of*" the enumerated activities or any other outdoor recreational use. MCL 324.73301(1) (emphasis added). Under the plain and unambiguous language of the statute and the last-antecedent rule the word "for" in the statute modifies "a valuable consideration." [*Hardaway v Wayne Co*, 494 Mich 423, 427; 835 NW2d 336 (2013).] Therefore, the statute applies if a person does not pay the owner of the land a valuable consideration for the purpose of the recreational activity. MCL 324.73301(1). Defendant testified that neither he nor his wife collected money from anyone to ride the zip line. A plain reading of the statute does not lend itself to plaintiff's interpretation that the statute requires a person to be on the property for the purpose of the recreational activity for the statute to apply. Plaintiff's assertions that she was harassed by defendant into riding the zip line are irrelevant. [***Rott* II**, 331 Mich App at 108-109.]

The **[*11]** panel went on, however, to apply *Neal v Wilkes*, 470 Mich 661, 670-73; 685 NW2d 648 (2004), in which this Court had rejected a similar argument that the RUA did not apply if the purpose for entering the land was a "social visit" as opposed to a recreational use. ***Rott* II**, 331 Mich App at 109-110. Relying on *Neal*, the Court of Appeals held that while plaintiff's initial purpose for being on defendant's land may have been a family gathering, at the time of the accident, she was on the land for the purpose of using the zip line. *Id.* at 110. Finally, the Court held that "zip lining is of the same kind, class, character, or nature of the recreational activities enumerated in the" RUA, and it affirmed summary disposition for defendant. *Id.* at 110-111.

Plaintiff then sought leave to appeal in this Court. We scheduled oral argument on the application, MCR 7.305(H)(1), and directed the parties to address: (1) whether the Court of Appeals erred in its application of the law-of-the-case doctrine; (2) the proper interpretation of the "for the purpose of" language in the RUA MCL 324.73301(1); and (3) whether zip lining is within the scope of the RUA. ***Rott* v *Rott***, 506 Mich 951; 950 NW2d 56 (2020).

II. STANDARD **[*12]** OF REVIEW

We review de novo questions of statutory of interpretation and a trial court's decision to grant or deny summary disposition. *DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020). Whether the law-of-the-case doctrine was properly invoked and to what extent it applies to a case are questions of law that we also review de novo. See, e.g., *Lemmvee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013).

III. LAW-OF-THE-CASE DOCTRINE

The law-of-the-case doctrine is a judicially created, self-imposed restraint designed to promote consistency throughout the life of a lawsuit. The idea is that " 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' " *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), quoting *CAE Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). "Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent **[*13]** appeals." *Lopatin*, 462 Mich at 260. The purpose of the doctrine is "primarily to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.' " *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4478, p 788.

In *Lopatin* we made clear that the doctrine applies

"only to issues *actually decided*, either implicitly or explicitly, in the prior appeal." *Lopatin, 462 Mich at 260* (emphasis added). We have specifically held that the law-of-the-case doctrine also does not apply to orders denying leave to appeal when those orders "were not rulings on the merits of the issues presented." *People v Poole, 497 Mich 1022; 862 N.W.2d 652 (2015)*. See also *Brownlow v McCall Enterprises, Inc, 315 Mich App 103, 112; 888 NW2d 295 (2016)* (holding that the law-of-the-case doctrine does "not apply to claims that were not decided on the merits"). This case presents a different situation—one in which the previous ruling was on an interlocutory appeal and the interlocutory ruling presumed a certain decision on the merits but did not actually decide the issue.

In this case, the Court **[*14]** of Appeals held in ***Rott*** *II* that it had implicitly decided the applicability of the RUA against plaintiff by ruling in favor of defendant in the ***Rott*** *I* interlocutory appeal. We disagree.

> To straightjacket proceedings subsequent to a decision on a case by an appellate court by making assumptions regarding the disposition of arguments which the appellate court did not see fit to consider is not, in our opinion, the wisest of policies. [*People v Fisher, 449 Mich 441, 447; 537 NW2d 577 (1995)* (quotation marks and citation omitted).]

The law-of-the-case doctrine " 'merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*.' " *Locricchio, 438 Mich at 109* (emphasis added), quoting *Messenger v Anderson, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912)*. We also heed the United States Supreme Court's astute observation that the "doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Pepper v United States, 562 US 476, 506-507; 131 S Ct 1229; 179 L Ed 2d 196 (2011)* (quotation marks, citations, and brackets omitted).

Invocation of the law-of-the-case doctrine **[*15]** in a manner that would effectively deprive a party of its right to appeal an issue decided against it by a trial court would be a manifest injustice. While not as extreme as the risk of manifest injustice in a death penalty habeas corpus case, see *Dobbs v Zant, 506 US 357; 113 S Ct 835; 122 LEd2d 103 (1993)*, the deprival of the right to appeal is at least as much an injustice as holding a party to an erroneous concession of law, see *United States v Miller, 822 F2d 828, 831-833 (CA 9, 1987)*. We further believe that the goal of promoting consistency in judgments would not be furthered by application of the law-of-the-case doctrine to legal questions that were *presumed without mention but not decided in an interlocutory appeal*. Accordingly, we hold that the law-of-the-case doctrine should not be invoked to preclude appellate review of a contested question of law that was presumed but not decided against a party in an interlocutory appeal if doing so would deprive the party of their right to appeal an unfavorable trial court decision on that issue.[1]

The Court of Appeals erred by invoking the law-of-the-case doctrine in ***Rott*** *II*. At no point during this litigation did plaintiff concede, waive, **[*16]** or forfeit her challenge to the applicability of the RUA. The Court of Appeals' May 4, 2017 order denying plaintiff's interlocutory application for leave to appeal in Docket No. 336242 did not decide the applicability of the RUA, nor was it a decision on the merits. See *Poole, 497 Mich at 1022*; *People v Willis, 182 Mich App 706, 708; 452 NW2d 888 (1990)* (holding that denial of an interlocutory appeal " 'for failure to persuade the Court of the need for immediate appellate review' . . . does not foreclose the parties from pursuit of the same or related issues on later appeals of right"). Because the May 4, 2017 order entered in Docket No. 336240 was "limited to the issues raised in the application and supporting brief," ***Rott***, unpub order at 1 (Docket No. 336240), whether the RUA

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[1] Our ruling should not be read as requiring judicial review of an issue that a party waived or conceded before filing its appeal by right.

applied was not a question properly before the court in ***Rott*** *I*. Stated differently, deciding that issue was outside the scope of the appeal as framed by the Court of Appeals in ***Rott*** *I*.[2]

Having framed the case as it did in its two May 4, 2017 orders, the Court of Appeals did not leave itself the option of deciding that the RUA *did not apply*. Taking the **[*17]** Court at its word, it had committed to resolving defendant's arguments in the interlocutory appeal, and also committed to not resolving plaintiff's arguments in that appeal, instead expressing a preference to resolve her arguments on the appeal of right to which she was entitled after the trial court entered a final judgment. Thus, while ***Rott*** *I* analyzed the case as if the RUA applied, it did so under the unstated presumption that the trial court's ruling as to the applicability of the RUA was correct. Based on this presumption, ***Rott*** *I* determined that the evidence could not support a finding of gross negligence and accordingly held that defendant was entitled to summary disposition on remand. The procedural history of this case, coupled with the ***Rott*** *I* opinion, lead us to conclude that ***Rott*** *I* presumed but did not decide, expressly or implicitly, that the RUA applied to the facts of this case.[3]

Under these facts, the Court of Appeals' application of the law-of-the-case doctrine in ***Rott*** *II* was incorrect. The court could not have implicitly decided the applicability of the RUA in ***Rott*** *I* because that issue was outside the **[*18]** scope of the interlocutory review that was granted and because plaintiff's request for interlocutory review of the trial court's decision on that issue was denied. The Court of Appeals then, despite having invoked the law-of-the-case doctrine, went on to review the merits of plaintiff's arguments. While the merits were ultimately reviewed in this matter, there is no way to know the extent to which the panel's view of the law-of-the-case argument informed its analysis of the merits, so we conclude that the issue is not moot. We further conclude that the Court of Appeals' application of the law-of-the-case doctrine was incorrect and that similar application in different cases could result in future litigants being unjustly deprived of their right to appeal a trial court's adverse rulings on the merits. Therefore, we reverse the Court of Appeals' holding regarding the law-of-the-case doctrine.

IV. INTERPRETATION AND APPLICATION OF THE RUA

This case requires us to once again consider the scope and application of the RUA. In *Wymer v Holmes*, 429 Mich 66, 77; 412 NW2d 213 (1987), overruled on other grounds by *Neal*, 470 Mich 661, we stated that the general purpose of the RUA was "to encourage **[*19]** owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[4] While in *Neal* we subsequently reversed portions of *Wymer*, the broader statement of the RUA's purpose remains true today. See *Neal*, 470 Mich at 666 n 6.

The RUA has a long history in Michigan that is tied to the use of our state's land and water. The RUA was first introduced in 1953 as a standalone piece of legislation (1953 HB 241), the first of its kind in

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[2] While not binding, we note that at least one federal appellate court has held that the law-of-the-case doctrine is not applicable to legal questions that were outside the scope of the earlier appeal. *Transamerica Leasing, Inc v Institute of London Underwriters*, 430 F3d 1326, 1332 (CA 11, 2005) ("Our case law could not be clearer that the law of the case doctrine cannot apply when the issue in question was outside the scope of the prior appeal.").

[3] Long ago, this Court recognized that a point of law "assumed without consideration is of course not decided." *Allen v Duffy*, 43 Mich 1, 11; 4 NW 427 (1880). See also *People v Douglas (On Remand)*, 191 Mich App 660, 662; 478 NW2d 737 (1991) ("[D]efendant's reliance on *People v Phelon*, 173 Mich App 157; 433 NW2d 394 (1988), is misplaced, because in *Phelon* a panel of this Court assumed, but did not decide, that the sentencing guidelines applied to safe breaking. *Phelon* has no precedential value with respect to the issue before us.").

[4] In *Neal*, we overruled *Wymer* to the extent that it had held that the RUA was applicable to only large tracts of undeveloped land suitable for outdoor recreational uses and not to urban, suburban, or subdivided lands. See *Neal*, 470 Mich at 667-668.

the nation that "applied only to persons coming upon the lands of another for the purpose of 'hunting.' " *Wymer, 429 Mich at 74*, quoting 1953 House Journal 374, 483. When actually enacted, the law applied only to those coming upon the land of another " 'for the purpose of fishing, hunting or trapping[.]' " *Wymer, 429 Mich at 74*, quoting 1953 PA 201 (emphasis omitted). The RUA was expanded in 1964 to add " 'camping, hiking, sightseeing or other similar outdoor recreational use.' " *Wymer, 429 Mich at 74*, quoting 1964 PA 199. Then, in another expansion, " 'motorcycling, snowmobiling, or any other outdoor recreational use' " was added by 1974 PA 177. **[*20]** *Wymer, 429 Mich at 75*, quoting 1974 PA 177. Through 1995 PA 58, the Legislature incorporated the RUA into the *Natural Resources and Environmental Protection Act (NREPA)*,[5] the purpose of which is to "protect the environment and natural resources of the state." 1994 PA 451, title. See also *Neal, 470 Mich at 674* (CAVANAGH, J, dissenting). Since 1995, the RUA has been codified as *MCL 324.73301(1)*, alongside other provisions related to other uses of the land, such as entering or exiting a Michigan trailway or engaging in certain farming or agricultural activities. See *MCL 324.73301(2) through (7)*. The substance of *MCL 324.73301(1)* has not been further amended since 1995.[6]

When properly invoked, *MCL 324.73301(1)* immunizes the "owner, tenant, or lessee of the land" from liability for injuries occurring on the land, "unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee." When plaintiff was injured in 2015, the relevant portion of the RUA provided: Except as otherwise provided in this section, a cause of action shall

> not arise for injuries to a *person who is on the land of another without paying* to the owner, tenant, or **[*21]** lessee of the land a valuable consideration *for the purpose of* fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, *or any other outdoor recreational use or trail use*, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. [*MCL 324.73301(1)*, as amended by 2007 PA 174 (emphasis added).]

In this case, we are focused on the meaning of the language "for the purpose of" and on the meaning of the catchall phrase "any other outdoor recreational use[.]"

As we have often stated, the purpose of statutory interpretation is to understand and give effect to the intent of the Legislature. See, e.g., *Bisio v Village of Clarkston, 506 Mich 37, 44; 954 NW2d 95 (2020)*; *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality, 502 Mich 349, 360-361; 917 NW2d 603 (2018)*. We must consider "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Speicher v Columbia Twp Bd of Trustees, 497 Mich 125, 133-134; 860 NW2d 51 (2014)* (quotation marks and **[*22]** citation omitted). Each word and phrase in a statute "must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense." *Honigman Miller Schwartz & Cohn LLP v Detroit, 505 Mich 284, 295; 952 NW2d 358 (2020)* (quotation marks and citation omitted). When the language of the statute remains obscure or doubtful, we may also consider the historical context surrounding its enactment. See *People v Hall, 391 Mich 175, 191; 215 NW2d 166 (1974)*.

A. "FOR THE PURPOSE OF"

The RUA is only triggered when someone is injured while on the land of another for certain purposes and under certain conditions. Plaintiff

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[5] *MCL 324.101 et seq.*

[6] See 2007 PA 174 (indicating no amendments of *§ 324.73301(1)*); 2017 PA 39 (changing the word "shall" to "does" in *§ 324.73301(1)*, adding a new *subsection (3)* to the statute, and renumbering the remaining subsections).

argues that she was not on defendant's property for the purpose of using the zip line or for any other outdoor recreational use. Rather, she argues that she was on defendant's property for the purpose of a family gathering and that she was coerced into riding the zip line. In rejecting this argument, the Court of Appeals rendered two holdings—one based on the last-antecedent canon of statutory construction and one based on a footnote in *Neal*.

The Court of Appeals attempted to apply the last-antecedent canon to the phrase "for the purpose **[*23]** of" and concluded that it modified the preceding phrase of "a valuable consideration." *Rott II*, 331 Mich App at 108-109. The Court of Appeals held that "the statute applies if a person does not pay the owner of the land a valuable consideration for the purpose of the recreational activity." *Id.* at 109. Conversely, plaintiff argues that "for the purpose of" modifies the subsequent list of activities and catchall provision in MCL 324.73301(1), such that the RUA applies if a person is injured while on the land of another, without paying consideration, for the purpose of engaging in outdoor recreational activities.

It is not clear why the Court of Appeals performed its last-antecedent analysis, given that the interpretation of the "for the purpose of" text was resolved in *Neal*, which the lower court acknowledged.[7] In *Neal*, we rejected an argument quite similar to plaintiff's here; specifically, that the plaintiff had not entered the property to participate in recreation but, rather, for the purpose of "a social visit." *Neal*, 470 Mich at 670 n 13. We explained that the RUA limited liability "for injuries to a person who is 'on the [owner's] land' 'for the purpose of' a specified activity," **[*24]** by which we meant the enumerated list of recreational uses ending in the catchall "any other outdoor recreational use." *Id.* (citation omitted; alteration in original); see also *id.* at 668 n 10. We held that the initial purpose for which one "enter[s]" the land was not the proper focus. *Id.* at 670 n 13 (emphasis omitted). Instead, the RUA applies "to individuals who, *at the time of the injury, are on the land* of another *for a specified purpose*." *Id.* (emphasis added). No party has asked us to reconsider this holding from *Neal*, and we decline to do so at this time.

Applying this rationale, we affirm in part and vacate in part the Court of Appeals' analysis of the language "for the purpose of" in MCL 324.73301(1). The Court of Appeals' ruling conflicted with *Neal* by stating that the RUA does not "require[] a person to be on the property for the purpose of recreational activity . . . ." *Rott II*, 331 Mich App at 109. We reaffirm *Neal* in holding that MCL 324.73301(1) applies when an individual is injured while on another's land, without paying consideration for access, and his or her *purpose at the time of [*25] the accident* is participation in an "outdoor recreational use or trail use" that is covered by the statute. See *Neal*, 470 Mich at 667-668, 670 n 13.

B. "ANY OTHER OUTDOOR RECREATIONAL USE"

This Court has not previously defined the outer limits of what activities and uses the RUA covers. While the diversity of the recreational uses and activities listed in MCL 324.73301(1) makes it difficult to pluck a single unifying characteristic, the task is not insurmountable. The statute is worded to cover "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, *or any other outdoor recreational use or trail use*[.]" MCL 324.73301(1) (emphasis added). As we stated in *Neal*, "the RUA does not apply to *any* outdoor recreational activity" and is

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[7] Despite our cautioning advice, see *Nordaway*, 494 Mich at 427-429, the last-antecedent canon is often misapplied or improperly invoked. Generally speaking, only pronouns, relative pronouns, or demonstrative adjectives can have antecedents, and none of these is present in the portions of MCL 324.73301(1) at issue. At least one scholar has questioned the value of the last-antecedent canon and opined that it "contradicts other linguistic principles; it contradicts the historical use of the comma; and . . . [it has] created as much confusion and disagreement as the ambiguous modifier its drafter set out to clarify." LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 Tex J Bus L 199, 207 (2004) (sentence structure omitted).

limited to include "only those outdoor recreational uses 'of the same kind, class, character, or nature' " as those specifically enumerated in MCL 324.73301(1). Neal, 470 Mich at 669. *Neal* did not require us to elaborate on the boundaries of those limitations. More recently, we focused on the word "recreational," defining that term as " 'a means of refreshment or diversion[.]' " *Otto v Inn at Watervale, Inc*, 501 Mich 1044, 1045; 909 N.W.2d 265 (2018), **[*26]** quoting *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "recreation"). We also rejected the notion that "all of the listed activities involve any particular heightened degree of physical intensity or inherent risk" and held, without adopting any overarching limitations, that beach play—" 'building sand castles, throwing stones in the water, and splashing around' "—is covered by the RUA's catchall phrase. *Id.* at 1044-1045.

Building on the statutory text, our prior decisions, and the historic evolution of the RUA, we hold that the most reasonable unifying characteristics shared by the activities listed in MCL 324.73301(1) are that (1) the activity traditionally could not be engaged in indoors[8] and (2) the activity requires nothing more than access to the land—i.e., permission to be present and not trespassing—to engage in the activity or use.[9] The listed activities—fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, and snowmobiling—are things that traditionally could only be performed outdoors and that one can enjoy with nothing more than access to the land or water. While enjoyment of the listed activities may be enhanced or accompanied by modifications **[*27]** to the land, such as the construction of a deer blind, a dock, or a neatly cleared trail,[10] these modifications are not prerequisites to engaging in the activity. Additionally, some of the listed activities require or imply that recreational users bring their own equipment, vehicle, or other personal property (for example, a tent or motorcycle), but this is not a uniform requirement. And bringing equipment does not require that the user modify the land.

This construction is consistent with our longstanding view that "the purpose of the RUA is to encourage owners of private land to make their land available to the public[.]" Neal, 470 Mich at 666, n 6. See also Ballard v Ypsilanti Twp, 457 Mich 564, 576-577; 577 NW2d 890 (1998) ("The [RUA] passed in 1953 in response to fears that potential negligence liability would discourage property owners from allowing others to use their property for recreational purposes. . . . The act limited liability in order to encourage landowners to open their property to others for recreation.") (paragraph structure omitted); Wymer, 429 Mich [*28] at 77 (noting that the statute exists "to

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[8] Determining whether a recreational use that is not enumerated in the RUA traditionally could not be engaged in indoors will require consideration of the history of the activity in question and whether it was, as a matter of customs and norms, a primarily outdoor venture for all or much of its existence. While the dissent criticizes this limitation by calling attention to the birth of Supercross, a high-octane competitive motorcycling sport held primarily in large open-air arenas for *paying* audiences beginning in the 1970s, the encyclopedia and magazine article referred to by the dissent appear to acknowledge that before that time motorcycling as a form of *recreation* was primarily (if not exclusively) an outdoor activity. The first Supercross event was held in the Los Angeles Coliseum in 1972. *The History of Supercross – 40th Anniversary* <https://www.motosport.com/blog/the-history-of-supercross-40-years> (accessed July 23, 2021) [https://perma.cc/VM9SXUBR]. which was (and still is) an open-air outdoor sports stadium. See *The Los Angeles Coliseum History* <http://lamcc.lacounty.gov/History> (accessed July 23, 2021) [https://perma.cc/M5FP-DAYW]. But the evolution of motorcycling as a sport does not change its traditional and historical roots.

[9] This Court opined in Neal, 470 Mich at 669, that the interpretive principle that forms the basis of the *ejusdem generis* canon is applicable to the RUA and strongly suggested that the catchall phrase should not be read literally. We have never retracted this statement, but until now the Court has declined to take on the difficult task of determining what limitations are applicable to the RUA's catchall phrase. We now rise to the occasion, and while the dissent disagrees with the limitations we adopt today, it does not offer broader, narrower, or different limitations.

[10] While not applicable to this case, we note that the RUA's catchall phrase has a second component that covers trail uses. See MCL 324.73301(1) ("any other outdoor recreational use *or trail use*") (emphasis added).

encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes"). The RUA has long existed so that landowners will make their land open and available for a variety of recreational activities that traditionally could only be engaged in outdoors. Stated differently, the RUA was intended to increase Michigander's *access* to privately owned lands so the lands could be *used* for certain forms of recreation by decreasing a landowner's exposure to liability. The RUA was not intended to shield landowners from all liability from every form of recreation that could conceivably occur outdoors.

C. ZIP LINING DOES NOT FALL WITHIN THE RUA'S CATCHALL PROVISION

The next question is whether zip lining falls within the RUA's catchall provision of "any other outdoor recreational use[.]" The Court of Appeals held that "zip lining is of the same kind, class, character, or nature of the recreational activities enumerated in the [RUA]" and therefore "the trial court properly granted summary disposition" to defendant. *Rott II*, 331 Mich App at 110-111. **[*29]** *Rott II* purported to rely on the interpretive canon *ejusdem generis*[11] and our decisions in *Neal* and *Otto*. Plaintiff argues that zip lining is distinguishable because it requires construction of an artificial feature on the land whereas all of the enumerated activities can be accomplished through direct interaction with flora and fauna in their unaltered state. Plaintiff further compares zip lining to amusement park rides and asserts that it is an activity undertaken for adrenaline-pumping and thrill-seeking purposes, not refreshment and diversion. To the contrary, defendant asserts that zip lining is an outdoor activity done for refreshment and diversion, like the beach play at issue in *Otto*, and that it thus fits within the RUA's catchall provision. We agree with plaintiff that zip lining is not a use of the land covered by MCL 324.73301(1), but for slightly different reasons.

While the zip line at issue was not commercialized and was constructed by defendant for his own personal recreation, we find that zip lining itself does not constitute "any other outdoor recreational use" as that phrase is used in the RUA. This is because zip lining **[*30]** meets only one of the two unifying characteristics that we have identified. Despite being an activity that traditionally could only be performed outdoors,[12] zip lining is not an activity or use that requires only access to the land to enjoy. As argued by plaintiff, one is required to construct zip-lining facilities or install zip-lining equipment on the land as a prerequisite to engaging in the activity. But it is not the presence of an artificial construct itself that takes zip lining beyond the scope of the RUA; instead, it is the fact that zip lining cannot be performed without such modifications or enhancements to the land. Stated differently, it is not possible to use a zip line without installing human-made zip-lining equipment on the land, and this distinguishes the activity from any of those enumerated in MCL 324.73301(1). Without such construction, a zip line cannot exist. While it is true that many hunters may use a tree stand or a blind, one is perfectly capable of hunting without making any changes to the land. Similarly, riding a motorcycle off road may be easier or more enjoyable when there is a human-made track or trail, but it is not a prerequisite for engaging in the **[*31]** activity.

Our analysis should not be confused as undermining the principal holding of *Neal*. The RUA continues to apply to large and small tracts of

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[11] "'[Ejusdem generis] is a rule whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.'" *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000), quoting *People v Brown*, 406 Mich 215, 221; 277 NW2d 155 (1979) (alteration in original).

[12] There are now hundreds of for-profit indoor zip-line facilities throughout the United States, but it is clear from the history of zip lining that it was exclusively an outdoor land use until relatively recently.

land, both developed and undeveloped, as we previously held. *Neal*, 470 Mich at 671-672. Once one moves beyond those activities specifically listed in the RUA, however, one must consider whether the unlisted activity or use is something that (a) traditionally could only occur outdoors and (b) can be engaged in by merely having access to the land without needing to change it. Riding a zip line does not fit within these parameters because it requires, at a minimum, the construction of launching and stopping points/platforms and the rigging of a cable or wire to support riders. These things must be installed onto the land (and may even become fixtures). This is distinguishable from a hunting tree stand because, as already noted, a tree stand is not a prerequisite to engaging in hunting, even if it may enhance hunting.

We further note that zip lines were not established as a form of outdoor recreation at the time of the last two amendments of the RUA. When the language "motorcycling, snowmobiling, or any other outdoor recreational use" was added **[*32]** to the RUA by 1974 PA 177, zip lining was not considered a recreational activity.[13] When the RUA was made a part of the NREPA and codified at *MCL 324.73301(1)* in 1995, see 1995 PA 58, zip lining was still an emerging, novel form of tourism-oriented recreation that was not established in Michigan. The parties have provided nothing to suggest that the Legislature was aware of zip lining as a form of recreation in 1974 or 1995 or that it considered zip lining to be a form of outdoor recreation covered by the RUA. The Legislature also did not expand the activities or uses enumerated in *MCL 324.73301(1)* when it amended other portions of the statute in 2007 and 2017, see 2007 PA 174 and 2017 PA 39, nor has it amended the scope of the catchall provision. Our review of the text and the history of *MCL 324.73301(1)* thus reveals no support for defendant's argument that the Legislature intended zip lining to be an "outdoor recreational use" covered by the RUA.

As a result, the Court of Appeals erred when it held that "zip lining fits the plain meaning of 'any other outdoor recreational use' and is not excluded by any interpretation of the general provision **[*33]** in the RUA under *ejusdem generis* . . . ." *Rott II*, 331 Mich App at 111. As discussed, zip lining is not of the same kind, class, character, or nature as "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [or] snowmobiling," and there is no evidence that the activity was known to the Legislature or intended to fall under the RUA.[14] Accordingly, the Court of Appeals' interpretation of the RUA's catchall provision to include the zip-lining activities at issue is reversed.

V. CONCLUSION AND RELIEF

We hold that the law-of-the-case doctrine did not preclude plaintiff from challenging the applicability of the RUA, *MCL 324.73301(1)*, to the facts of this case. We vacate the Court of Appeals' analysis of "for the purpose of" in *MCL 324.73301(1)* to the extent it relied on the last-antecedent canon of statutory interpretation and affirm its analysis of the same language under *Neal*. We further hold that the RUA's catchall phrase "any other outdoor recreational use" does not apply to plaintiff's use of defendant's property for zip lining. Accordingly, we

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[13] The modern use of zip lines as a form of ecotourism or recreation can be linked to a tree canopy study conceived by Donald Perry, a California State University graduate student who was studying rainforest canopies in Costa Rica in 1974. See generally, Perry, *Life Above the Jungle Floor* (Simon & Schuster, 1986). In the 1990s, a Canadian businessman, Darren Hrenink, sought to transform this method of treetop transportation into a profitable tourism business by opening the first-of-its-kind Original Canopy Tour between 1994 and 1997 in Costa Rica and patenting the tree-canopy zip-line technology. Loose, *What's That Line?*, The Washington Post (November 13, 2005), p P01. Since then, the use of zip lines as a form of ecotourism has grown into a global industry, and as this case demonstrates, has expanded into backyard recreation.

[14] We further note that if zip lining were within the scope of the RUA, it would be difficult to conceive how the RUA's catchall provision could have any reasonable limitations. Would that statute apply to jumping on a trampoline or, as the dissenting opinion in *Neal* speculated, a game of hopscotch or jump rope? See *Neal*, 470 Mich at 674 (CAVANAGH, J., dissenting). Future cases may be more difficult to resolve than this one, and it may be beneficial for the Legislature to revisit the RUA to clarify the intended scope of the statute.

reverse the judgment of the Court of Appeals, reverse the Oakland Circuit Court's February 8, 2019 order granting summary [*34] disposition in favor of defendant, and remand this case to the circuit court for further proceedings consistent with this opinion.

Elizabeth M. Welch

Bridget M. McCormack

Richard H. Bernstein

Elizabeth T. Clement (except for the discussion of the law-of-the-case doctrine in Part III)

Megan K. Cavanagh

Concur by: Elizabeth T. Clement (In Part); David F. Viviano (In Part)

Concur

CLEMENT, J. (*concurring in part and concurring in the judgment*).

I concur in the result reached by the Court, and I concur in the analysis of all portions of the majority opinion except for its discussion of the law-of-the-case doctrine in Part III. Both parties filed interlocutory applications for leave to appeal in the Court of Appeals challenging the trial court's rulings, and in addressing those applications, the Court of Appeals agreed to resolve defendant's issues but declined to resolve plaintiff's. I agree with the majority that the Court of Appeals' opinion in ***Rott*** *I* must be construed as resolving only those issues the Court of Appeals had agreed to resolve when it granted defendant's application and that it ought not be construed as implicitly resolving issues the Court of Appeals had expressly declined to resolve when it denied [*35] plaintiff's application. However, I believe this is an adequate basis for our decision, and therefore, I would not also invoke equitable principles in addressing the Court of Appeals' treatment of the law-of-the-case doctrine in ***Rott*** *II*.

Elizabeth T. Clement

Dissent by: David F. Viviano (In Part)

Dissent

VIVIANO, J. (*concurring in part and dissenting in part*).

The majority opinion contains three holdings: (1) the Court of Appeals improperly applied the law-of-the-case doctrine; (2) it misinterpreted the phrase "for the purpose of" in the recreational land use act (RUA), *MCL 324.73301(1)*; and (3) zip lining is excluded from the scope of the RUA under the canon of interpretation known as *ejusdem generis*. I agree with the majority's second holding, specifically that the Court of Appeals' construction of "for the purpose of" was inconsistent with our decision in *Neal v Wilkes, 470 Mich 661, 670 n 13; 685 NW2d 648 (2004)*. But I disagree with the majority's other holdings. I would not address the law-of-the-case doctrine but, instead, would vacate that portion of the Court of Appeals' opinion. In my view, because the Court of Appeals reached the merits and correctly concluded that the RUA applies, there is no need [*36] to decide the applicability of the law-of-the-case doctrine. Finally, I would hold that zip lining falls within the purview of the RUA because I disagree that the *ejusdem generis* canon supports the majority's interpretation of the statute.

I. LAW OF THE CASE

Plaintiff, Doreen ***Rott***, first challenges the Court of Appeals' application of the law-of-the-case doctrine in its second opinion in this case to bar her arguments.[1] The majority is troubled by the Court

[1] The doctrine provides that "'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.'" *Grievance Administrator v Lopatin, 462 Mich 235, 259; 612 NW2d 120 (2000)* (citation omitted).

of Appeals' invocation of the law-of-the-case doctrine, and rightly so. The combination of the Court of Appeals' order denying plaintiff's interlocutory appeal on the grounds that it did not warrant immediate attention and its later opinion applying the doctrine would have deprived plaintiff of the opportunity to have her appellate arguments heard and decided on the merits. But the Court of Appeals did not need to reach this issue and, consequently, neither would I. Because the Court of Appeals fully addressed the merits of plaintiff's statutory arguments and correctly decided the case on those grounds, it had no reason to opine on the law-of-the-case doctrine. I would therefore vacate its discussion of the doctrine as unnecessary **[*37]** and leave the matter for another day.[2]

II. THE RUA

With regard to the issues of statutory interpretation, at the time of plaintiff's accident the RUA stated:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. [*MCL 324.73301(1)*, as amended by 2007 PA 174.][3]

A. "FOR THE PURPOSE OF"

Plaintiff first focuses on the phrase "for the purpose of." She argues that the RUA "turns upon *the reason* an individual is on the land of another . . . ." If she enters for recreation, plaintiff explains, the statute applies. In this case, she claims that she went to defendant Arthur ***Rott***'s house for a party, not to ride on a zip line.

The Court **[*38]** of Appeals rejected this argument in a two-part analysis. The first part attempted to apply the last-antecedent canon to the phrase "for the purpose of." ***Rott v Rott***, *331 Mich App 102, 107; 951 NW2d 99 (2020)* (***Rott*** *II*). Under that canon, "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Stanton v Battle Creek, 466 Mich 611, 616; 647 NW2d 508 (2002)*. The Court of Appeals explained that plaintiff reads "for the purpose of" as modifying the earlier phrase, "on the land of another." ***Rott*** *II, 331 Mich App at 108*. In other words, her interpretation requires that the plaintiff be "on the land of another . . . for the purpose of" engaging in recreational activities. See *MCL 324.73301(1)*. Not so, the Court ruled. Because the last-antecedent canon applied—the Court never explained why—the word "for"

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[2] In reaching the issue, the majority suggests that the Court of Appeals did not implicitly decide the RUA's applicability in its first opinion in this case. As a factual matter, this is incorrect. The Court of Appeals' 2018 opinion specifically recognized the trial court's determination that the RUA applied to these facts; expressly stated that "[a]bsent gross negligence or willful and wanton misconduct on the part of defendant, plaintiff cannot recover for damages resulting from the zip line"; concluded that defendant's conduct at most amounted to ordinary negligence, which is "insufficient to create a material question of fact as to whether the RUA's exception applies"; and remanded "for entry of an order granting summary disposition for defendant" because there was no question of material fact that plaintiff had failed to make the showing required by the RUA. ***Rott v Rott***, *unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 336240), 2018 Mich App LEXIS 5728 (**Rott** I), pp 4-6*. In other words, the Court of Appeals' decision ended the case based on its conclusion that the RUA barred plaintiff's claim. It cannot, therefore, be denied that the Court of Appeals indeed decided the RUA's applicability in its initial decision. And because an implicit decision is enough to trigger the law-of-the-case doctrine, *Loppatto, 462 Mich at 260*, it would appear to me that the doctrine applies unless some exception exists in these circumstances. We have no case directly on point, and so finding an exception here requires the development of the doctrine. For the reasons stated, I do not believe that decision is necessary and would not reach this issue.

[3] *MCL 324.73301* was amended after plaintiff filed this action in 2015. See 2017 PA 39.

modifies the immediately preceding phrase "a valuable consideration." *Rott II, 331 Mich App at 109*. "Therefore, the statute applies if a person does not pay the owner of the land a valuable consideration for the purpose of the recreational **[*39]** activity." *Id.*

But, in the second part of its discussion, the Court of Appeals properly applied our decision in *Neal* as an independent reason to reject plaintiff's argument that she was not at defendant's house "for the purpose of" zip lining. *Id. at 109-110*. There, we rejected an argument quite similar to plaintiff's here; specifically, that the plaintiff had not entered the property to participate in recreation but, rather, for the purpose of "a social visit." *Neal, 470 Mich at 670 n 13*. We explained that the RUA limited liability "for injuries to a person who is 'on the [owner's] land' 'for the purpose of' a specified activity," by which we meant the statutory list of recreational uses ending in the catchall: "any other outdoor recreational use . . . ." *Id.* (alteration in original); see also *id. at 668 n 10*. "Nothing in the act's language limits its application to individuals who *enter* the land for the purpose of a specified activity." *Id. at 670 n 13*. That initial purpose was irrelevant. "Rather, the act clearly applies to individuals who, at the time of the injury, are on the land of another for a specified purpose." *Id.* Applying *Neal*'s holding in this case, the Court of Appeals **[*40]** upheld the trial court's determination that the statute applied because, although she originally entered defendant's property for a family gathering, at the time of the accident, plaintiff was on the land for the purpose of zip lining. *Rott II, 331 Mich App at 110*.

I agree with the majority here that the second rationale given by the Court of Appeals is consistent with *Neal* and represents the correct resolution of plaintiff's argument: she was on the land for the purpose of zip lining when the injury occurred. The Court's reliance on the last-antecedent canon was therefore unnecessary to its holding. Moreover, in stating that the RUA did not "require[] a person to be on the property for the purpose of the recreational activity," *Rott II, 331 Mich App at 109*, the Court's interpretation clashed with *Neal*'s statement that the RUA indeed applies when an individual is on another's land at the time of the accident for the purpose of participating in a "recreational use," *Neal, 470 Mich at 670 n 13*. See also *id. at 667-668* ("The RUA simply states that an owner of the land is not liable [absent gross negligence or willful and wanton misconduct] to a person who injures himself on the owner's **[*41]** land if that person has not paid for the use of the land and that person was using the land for a specified purpose, [i.e., recreation]."). For these reasons, I agree with the majority that we should vacate the first part of the Court of Appeals' discussion of this issue.

B. "ANY OTHER OUTDOOR RECREATIONAL USE OR TRAIL USE"

1. THE *EJUSDEM GENERIS* CANON

I disagree, however, that zip lining falls outside the scope of the phrase "any other outdoor recreational use . . . ." *MCL 324.73301(1)*. Generally, when interpreting a statute, we start with the ordinary meaning of the terms at issue. *TOMRA of North America, Inc v Dep't of Treasury, 505 Mich 333, 339; 952 NW2d 384 (2020)*. In this case, the key word is "recreational." The definition we have applied to this statutory term in the past is "'a means of refreshment or diversion[.]'" *Otto v Inn at Watervale, Inc., 501 Mich 1044, 1045; 909 N.W.2d 265 (2018)*, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "recreation"). It is clear, as the Court of Appeals concluded, that the zip lining was done for refreshment or diversion, and it therefore fits within the ordinary meaning of "recreational." If that were all there is to it, the answer would **[*42]** be clear.

But a wrinkle arises when we consider the context in which the phrase "any other outdoor recreational use" is used. In particular, the phrase consists of general words that follow a list of specific recreational uses. When a statute is set up that way, the general terms sometimes bear a restricted

meaning—one that is less comprehensive than their literal meaning. This interpretive principle is known as the *ejusdem generis* canon:

> "[Ejusdem generis] is a rule whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." [*Sands Appliance Servs, Inc v Wilson, 463 Mich 231, 242; 615 NW2d 241 (2000)*, quoting *People v Brown, 406 Mich 215, 221; 277 NW2d 155 (1979)* (alteration in original).]

Put differently, the list of similar items leads a reasonable reader to expect any catchall to apply only to things that resemble the items on the list. *United States v Daddato, 996 F2d 903, 904 (CA 7, 1993)*. Otherwise, "when the tagalong general **[*43]** term is given its broadest application, it renders the prior enumeration superfluous." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 199-200; see also 2A Sutherland, Statutory Construction (7th ed), § 47:17 ("If the general words are given their full and natural abstract meaning, they would include the objects designated by the specific words, making the latter superfluous."). *Ejusdem generis* thus addresses the situations in which the ordinary meaning of the catchall—the meaning a reasonable reader would discern—is different than the literal, definitional meaning of the catchall. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015), pp 186-187. For instance, consider two different signs: (a) "No dogs, cats, birds, or other animals allowed" and (b) "No animals allowed." *Id.* at 197. Both signs have the same literal meaning, but the "other" clause in (a) "has a conventional meaning that is stereotypically exemplified through the other items on the list." *Id.* at 198. Had the drafter wanted the full literal meaning, he or she could have simply used (b) without the list. *Id.*

Although the canon **[*44]** might reflect linguistic realities, the gap between ordinary and literal meanings poses a significant problem for courts, one that cautions against overuse of the canon. This gap means that the restrictions on the general term are unexpressed. By failing to be explicit, a legislature leaves courts with the challenging task of inferring the implicit limitations on the scope of the catchall. See Hills, *The Problem of Canonical Ambiguity in* Ali v. Federal Bureau of Prisons, *44 Tulsa L Rev 501, 504 (2009)* (observing that the doctrine requires a court "to infer some unwritten limiting principle from a series of specific terms").

Discovering a limiting principle often proves difficult. At a broad level, a court might ask itself why, if the list of enumerated items is meant to display a characteristic or category that the legislature meant to capture, did the legislature not expressly mention the characteristic or category? See *Ordinary Meaning*, p 191; Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, *46 U Pitt L Rev 373, 411-412 (1985)*. As then Judge Brett Kavanaugh has noted, the absence of a legislatively prescribed limitation cautions against reading too much **[*45]** into the statute. See Kavanaugh, *Fixing Statutory Interpretation*, *129 Harv L Rev 2118, 2160 (2016)* (book review) ("It seems to me that we have to be wary of adding implicit limitations to statutes that the statutes' drafters did not see fit to add."). More concretely, what makes the canon tricky is the need to discern a relevant commonality among the specific items. *Ordinary Meaning*, p 187. Judges must undertake the "very indeterminate task" of "com[ing] up with their own sense of the connective tissue that binds the terms in the statute," i.e., what characteristics make the enumerated items similar. *Fixing Statutory Interpretation*, *129 Harv L Rev at 2160-2161*. Usually, there are "multiple ways in which the general catchall term . . . can be given limited meaning." *Ordinary Meaning*, p 187. On top of that, nothing in the canon's usage specifies how

broadly or narrowly to characterize the common class embraced by the enumerated items. See generally *Reading Law*, p 207.

As a result, courts have substantial "flexibility to frame the classification . . . ." *Ordinary Meaning*, p 198. A close examination of the listed items and the general terms is necessary, but not often sufficient. Cf. *Reading* **[*46]** *Law*, p 207. Consequently, courts are forced to consider the purpose of the statute. See *id.* at 208 ("Often the evident purpose of the provision makes the choice [of classification] clear."); Eskridge, *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (St. Paul: Foundation Press, 2016), pp 77-78 (noting that application of the canon can be "tricky" and might require resort to "statutory purpose"); *The Problem*, 44 Tulsa L Rev at 501 (arguing that interpretive canons like *ejusdem generis* "require[] inquiry into extra-textual statutory purpose"). And while purpose can sometimes be gleaned from a careful reading of the text, see *People v Wood*, 506 Mich 114, 146 & n 44; 954 NW2d 494 (2020) (VIVIANO, J., dissenting), it can easily lead to sweeping assertions of legislative goals that bear little relation to the text itself, cf. *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017) (noting that reliance on a statute's "perceived purpose . . . runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language"). In light of these concerns, some have suggested "tossing the ejusdem generis canon into **[*47]** the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation." *Fixing Statutory Interpretation*, 129 Harv L Rev at 2161.

I would not jettison the canon because, as discussed, it rests on a sound linguistic footing. But the difficulties in applying it should make us cautious. That is why even its proponents recognize that the canon is not always applicable to a list followed by a catchall. In this vein, we have noted that even when a statute contains this formulation, the canon should apply to restrict the scope of the general phrase "only where the specific words relate to subjects of a single kind, class, character or nature[.]" *In re Mosby*, 360 Mich 186, 192; 103 NW2d 462 (1960). "Where the language used, considered in its entirety, discloses no purpose of limiting the general words used, the rule of *ejusdem generis* may not be invoked to defeat or limit the purpose of the enactment." *Id.* Moreover, it is not always necessary to find the relevant limiting similarity in order to resolve the case at hand. *Reading Law*, p 208. For example, the last time the Court considered the canon's application to the RUA, we decided it was "unnecessary to define the **[*48]** outer parameters of the common class" because the activity at issue—beach play—fit within the catchall no matter how the catchall could be reasonably limited by the list. *Otto*, 501 Mich at 1045 n 1.

2. APPLICATION

The majority recognizes that the "diversity" of the enumerated activities in MCL 324.73301(1)—"fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use"—makes it difficult to discern a common characteristic. Nonetheless, the majority offers two limitations: "(1) the activity traditionally could not be engaged in indoors and (2) the activity requires nothing more than access to the land—i.e., permission to be present and not trespassing—to engage in the activity or use." I would first note that the limitation to traditional outdoor activities is irrelevant to this case given that the majority concludes that zip lining is a traditional outdoor activity.[4] Moreover, this limitation is vague. At what point in time do we consider the activity's traditional form, and how do we know what is traditional versus nontraditional?[5]

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[4] Consequently, the majority's discussion of this limitation is unnecessary to its decision, and it is therefore nonbinding dicta. See *People v Pelchat*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

[5] I question, too, whether this limitation accurately captures a common characteristic among all the enumerated items. Motorcycle races were occurring indoors by at least the early 1970s. see

With regard to the second limitation, the majority **[*49]** opines that the enumerated items are activities "that one can enjoy with nothing more than access to the land or water" and that while structures such as deer blinds or docks might enhance the activities, "these modifications are not prerequisites to engaging in the activity." The majority cannot possibly mean what it says here. One cannot go motorcycling or snowmobiling simply by accessing land—one needs to bring a motorcycle or snowmobile onto the land. Nor does one typically hunt without a weapon, fish without a pole, or camp without a tent (or other equipment). The majority instead seems to mean that these activities do not require artificial structures be constructed on the land, nor do they require modifications or enhancements to be made upon the land. It is under this rationale that the majority resolves the case, finding that zip lining does not fall within the catchall because it requires the installation of "human-made zip-lining equipment on the land . . . ."

I cannot agree with the majority's contrived limitation. To be sure, it has some superficial appeal in that all the enumerated activities can, generally speaking, be undertaken without any artificial structures on or **[*50]** modifications to the land. But the *ejusdem generis* canon does not task courts with finding *any possible* commonality among the enumerated items but only those that would occur to a reasonable reader as sensibly applying to and limiting the catchall. Cf. *Daddato, 996 F2d at 904*. There may be many unifying characteristics of the listed items that, like the majority's proffered limitation, do not translate to a coherent limitation on the catchall. Under the majority's interpretation, extensive structures and modifications to the land are allowed as long as, in some theoretical sense, they are not necessary. But if they are needed to engage in the activity, then even the most minor modifications—like the ones here—operate to exclude the activity from the RUA.

For example, motorcycling has long used tracks that required relatively elaborate construction. See, e.g., Schonauer, *The Early, Deadly Days of Motorcycle Racing*, Smithsonian Magazine (April 2011) (discussing board-track courses and other motorcycle riding venues), available at <https://www.smithsonianmag.com/arts-culture/the-early-deadly-days-of-motorcycle-racing-787614/> [https://perma.cc/W8CL-BE4B]. Even less-formal tracks might **[*51]** contain groomed trails, artificial mounds, or boundary markers. Indeed, given that the RUA applies to, among other things, large, undeveloped tracts of land, one wonders how a person can go motorcycling or snowmobiling unless a path is cleared. Anglers often cast their lines from large docks, and hunters frequently are camouflaged by deer blinds.

Presumably, under the majority's view, the RUA would apply to injuries that occur in those places even though they might involve artificial structures being affixed to the land or modifications being made to the land. But, by contrast, the majority would not extend the RUA to someone injured gliding along a rope attached to two trees. The juxtaposition of these two scenarios is, to my mind, jarring. Activities such as motorcycling and snowmobiling involve significant artificial structures or modifications to the land and dangerous "human-made" equipment, while zip

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Encyclopedia Britannica, Inc., *Motocross* <https://www.britannica.com/sports/motocross> (accessed July 21, 2021), contemporaneously with the amendment adding motorcycling to the RUA, see 1974 PA 177. If "tradition" is measured simply by the relevant practices at the time of enactment, then it is not the case that motorcycling was traditionally performed outdoors. Of course, by "tradition," the majority might mean that the activity *usually* had to occur outdoors with a certain frequency at the relevant point in time. And perhaps under this construction, not enough indoor motorcycling occurred. But if so—and I wonder how such a thing could even be measured—this demonstrates how vague the "traditional" requirement is and how far this interpretation is from the statute's text. The majority notes that the fact that indoor races occurred in the 1970s does not change motorcycling's "traditional and historical roots." Yet since motorcycling was added to the RUA in 1974, it would seem that the practices occurring in that decade would form part—perhaps the key part—of the relevant history and tradition.

lining involves, in essence, a cable and the equipment needed to attach it to natural features of the land.

Under the majority's logic, the distinction is that the motorcycling and snowmobiling could have occurred without the artificial features or modifications but the zip lining **[*52]** could not. But this is not a very persuasive distinction when one compares the actual "artificial" features and modifications. To motorcycle on land, one needs at least a motorcycle. To zip line, one needs a rope or cable and equipment to glide on it. The scope and danger of the artificial materials required to motorcycle on land vastly exceed those needed to zip line, and the need for a path clear of debris is the same for both activities.

Nor can I see why it matters that the zip line is attached to trees on the land. The majority's reasoning would seem to mean that a person who hangs a hammock or puts a homemade tire swing around a tree branch—recreational activities that closely resemble beach play, are done as a means of refreshment or diversion, and would seemingly be covered under the RUA, see *Otto, 501 Mich at 1044*—has installed an artificial structure upon the land to engage in an activity (hammocking or swinging) that could not be done without the structure, i.e., purely by accessing the land. Putting up a zip line might be moderately more involved than a hammock or swing, but the difference is one of degree. The pictures of the zip line here show a cable stretched between **[*53]** two trees, with a thin belt of wood circling the tree where the cable is wrapped around it. Defendant testified that he ordered a zip-line kit online containing a bungee cord stop, a trolley, hardware, and a cable; additional pieces were added over time, some for aesthetics. It required a few rudimentary tools to put up and a mechanism for measuring the slope of the line. There is no indication that the installation was lengthy, and neither building permits nor city inspections were required according to defendant. Nothing indicates that the zip line would be difficult to remove.

From this perspective, the zip line at issue here is not much different, in kind, from the types of tree swings or hammocks long used for recreation. No permanent structures were erected, and little more was done than would be required to hang a hammock or a swing. Although zip lining perhaps requires more artificial materials, the zip line relied on the land just as much, if not more than, a hammock or swing. The zip line was anchored to trees and used the land's natural elevation to propel the individual. The activity, in other words, could not occur without the natural surroundings, and the artificial equipment **[*54]** had no use or function without the land itself.

For these reasons, I cannot agree that the RUA contains the majority's second limitation regarding activities that require only bare access to the land. This limitation does not arise from a relevant common feature of the enumerated items. With the possible exception of sightseeing and hiking, all the listed activities involve the use of artificial equipment or some modifications made to the land.[6] Imposing this limitation leads to the head-scratching result that the RUA covers motorcycling, snowmobiling, or hiking on a human-made course or cleared trail, but would not cover swinging from a rope slung over a tree branch simply because one could conceivably ride or hike without the course or trail but could not swing without attaching the rope to a tree or other natural feature.[7]

I would instead conclude that zip lining falls within the RUA's catchall and is not excluded from any conceivable limitation arising from the enumerated

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[6] And even then, many people hike or sightsee using marked trails.

[7] As evidence that zip lining is not covered by the RUA, the majority notes that zip lining was not established as a recreational activity when the most recent amendments were made to the statute. It goes without saying, however, that the law's expected applications at the time of its enactment do not exhaust its meaning. See *Oncale v Sundowner Offshore Servs, Inc, 523 US 75, 81-82, 118 S Ct 998, 140 L Ed 2d 201 (1998)*. Under the majority's logic, the RUA's protections would be frozen in the recreational world of the mid-1970s, at the latest.

list of recreational activities. The parties have not offered any plausible limitation, and the majority—which adopts an interpretation not put forward by any party—has not either. **[*55]** The backyard zip lining that occurred here is no more removed from the land than is fishing on a dock or hunting in a deer blind. In fact, as noted, the zip lining here used the land in ways that fishing and hunting do not. Thus, in this case, as in many others involving the *ejusdem generis* canon, it is unnecessary to decide whether any such limitation on the catchall exists. See *Otto, 501 Mich at 1045 n 1*. Because no limitation applies and zip lining falls within the meaning of "any other outdoor recreational use or trail use," I would conclude that the statute applies here.

In reaching the opposite conclusion, the majority seems to construct its limitation out of concerns that the RUA would otherwise be too expansive. The majority says that "if zip lining were within the scope of the RUA, it would be difficult to conceive how the RUA's catchall provision could have any reasonable limitations." It then trots out a parade of horribles—the RUA's potential extension to trampoline jumping, hopscotch, and jumping rope—which do not seem so horrible. But in any event, we are not in the business of constructing "reasonable limitations" to statutes—rather, we must interpret the limitations **[*56]** the Legislature imposed. And when those limitations arise, if at all, from a list of specific items preceding a general catchall, we should be chary of leaning too heavily on the *ejusdem generis* canon. That canon does not always provide determinate results, and consequently, its use calls for more circumspection than the majority has shown today.

III. CONCLUSION

For the reasons above, I do not believe we need to decide whether or how the *ejusdem generis* canon applies in the present case because, under any conceivable limitation, zip lining would fall within the plain meaning of the RUA's catchall. And because the Court of Appeals appropriately resolved the merits of the interpretive issues, I would simply vacate as unnecessary its application of the law-of-the-case doctrine. Because the majority takes a different approach, I dissent.

David F. Viviano

Brian K. Zahra

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STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 7 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 7

MCR 7.205

State rules current with changes received through October 15, 2021.

Rule 7.205. Application for Leave to Appeal. [Effective September 1, 2021]

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule, "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) Except as otherwise provided in this rule, an application for leave to appeal must be filed within:

(a)21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(b)21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

(2) In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:

(a)6 months after entry of the judgment or order; or

(b)42 days after:

(i)an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(ii)the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(iii)the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed;

(iv)an order deciding a timely filed motion to withdraw plea under *MCR 6.310(C)*, motion for directed verdict under MCR 6.419(C), motion to correct an invalid sentence under *MCR 6.429(B)*, or motion for new trial under *MCR 6.431(A)*; or

(v)an order deciding a timely filed motion for reconsideration of an order described in subrule (A)(2)(b)(iv).

A defendant relying on subrule (A)(2)(b) must provide a statement, supported by relevant documentation, explaining how the application meets the requirements of the subrule.

(3) In an appeal from an order terminating parental rights, an application for leave to appeal must be filed within 63 days, as provided by *MCR 3.993(C)(2)*.

(4) Delayed Application for Leave to Appeal.

(a) For appeals governed by subrule (A)(1), when an application is not filed within the time provided by that subrule, a delayed application for leave to appeal may be filed within 6 months of the entry of a judgment or order described in that subrule.

(b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may also be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that:

(i)the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii)the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

A delayed application under this rule must contain a statement of facts explaining the reasons for delay. The appellee may challenge the claimed reasons in the answer. The court may consider the length of and the reasons for delay in deciding whether to grant the delayed application.

(5) In a criminal case, except as provided in subrule (4)(b), the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1)5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to *MCR 7.212(C)*, in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2)5 copies of the judgment or order appealed from, of the register of actions of the lower court, tribunal, or agency, of the opinion or findings of the lower court, tribunal, or agency, and of any opinion or findings reviewed by the lower court, tribunal, or agency.

(3)if the appeal is from an administrative tribunal or agency, or from a circuit court on review of an administrative tribunal or agency, evidence that the tribunal or agency has been requested to send its record to the Court of Appeals;

(4)1 copy of certain transcripts, as follows:

(a)in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court which conducted the hearing;

(b)in an appeal from the circuit court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court;

(c)in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(d)in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;

(e)in an appeal from an order granting or denying a new trial, such portion of the transcript of the trial as, in relation to the issues raised, permits the court to determine whether the trial court's decision on the motion was for a legally recognized reason and based on arguable support in the record;

(f)in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion relating to sentencing;

(g)in an appeal raising any other issue, such portion of the transcript as substantiates the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge.

If the transcript is not yet available, or if there is no record to be transcribed, the appellant shall file a copy of the certificate of the court reporter or recorder or a statement by the appellant's attorney as provided in *MCR 7.204(C)(2)*. The appellant must file the transcript with the Court of Appeals as soon as it is available.

(5)proof that a copy of the filed documents was served on all other parties; and

(6)the entry fee.

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1)5 copies of an answer to the application (one signed) conforming to *MCR 7.212(D)*, except that transcript page references are not required unless a transcript has been filed; and

(2)proof that a copy was served on the appellant and any other appellee.

(D) Reply. A reply brief may be filed as provided by *MCR 7.212(G)*.

(E) Decision.

(1) There is no oral argument. The application is decided on the documents filed and, in an appeal from an administrative tribunal or agency, the certified record.

(2) The court may grant or deny the application; enter a final decision; grant other relief, or request additional material from the record.

(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.

(4) Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief.

(F) Expedited Decision. When a party requires a decision on an application by a date certain, the party may file a motion for immediate consideration of the application as provided in *MCR 7.211(C)(6)*. When a motion for immediate consideration is filed, the time for submission of the application and motion is governed by *MCR 7.211(C)(6)*. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

History

Rule 7.205(F) amended December 28, 1987, eff January 1, 1988; Rule 7.205 amended March 30, 1989, eff October 1, 1989; Rule 7.205(B), (C) and (D) repealed and replaced December 15, 1993, eff February 1, 1994; Rule 7.205 amended imd eff December 30, 1994; Rule 7.205 amended February 23, 1995, eff November 1, 1995; Rule 7.205 clarified March 31, 1995, to apply to crimes committed on or after December 27, 1994, and extended until June 30, 1995; Rule 7.205 extended June 19, 1995, until October 15, 1995; Rule 7.205 extended October 13, 1995, until August 15, 1996; Rule 7.205 amended January 26, 1996, eff April 1, 1996; Rule 7.205(B)(4) amended eff April 1, 1996; Rule 7.205(E) amended eff September 1, 1997; Rule 7.205(B), (C) amended eff September 1, 1998; Rule 7.205(F)(3) amended eff September 1, 2002; Rule 7.205(F)(5) adopted eff September 1, 2003; Rule 7.205(A) amended eff May 1, 2004; Rule 7.205(F)(4) amended eff January 1, 2006; Rule 7.205(B)(2), (F)(4) amended eff May 1, 2006; Rule 7.205(F)(4) amended eff May 1, 2006; Rule 7.205(A), (F)(3)(b), (4) amended eff September 1, 2008; Rule 7.205(F) amended eff May 1, 2009; Rule 7.205(A)(3) adopted eff May 1, 2010; Rule 7.205(F) amended eff September 1, 2011; Rule 7.205(E)(3) adopted eff January 1, 2012; Rule 7.205(D)–(H) amended eff January 1, 2014; Rule 7.205(A)(3), (B)(4)(b), (G) amended eff May 7, 2014; Rule 7.205(F)(2) amended imd eff March 9, 2016; Rule 7.205(B) amended June 21, 2017, eff June 21, 2017; Rule 7.205(G)(4) amended imd eff March 21, 2018; Rule 7.205(G) amended April 19, 2018, eff May 1, 2018; Rule 7.205(G)(4)(b) amended August 30, 2018, eff September 30, 2018; amended eff Jan 1, 2021; amended eff September 1, 2021.

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STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 8 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 8

State rules current with changes received through October 15, 2021.

Rule 7.202. Definitions.

For purposes of this subchapter:

(1)"clerk" means the Court of Appeals clerk, unless otherwise stated;

(2)"date of filing" means the date of receipt of a document by a court clerk;

(3)"entry fee" means the fee required by law or, in lieu of that fee, a motion to waive fees or a copy of an order appointing an attorney;

(4)"filing" means the delivery of a document to a court clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court;

(5)"custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, a child protective proceeding, or a delinquency case in which a dispositional order removing the minor from the minor's home is an issue;

(6)"final judgment" or "final order" means:

(a) In a civil case,

(i)the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;

(ii)an order designated as final under *MCR 2.604(B)*,

(iii)in a domestic relations action, a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile;

(iv)a postjudgment order awarding or denying attorney fees and costs under *MCR 2.403*, 2.405, 2.625 or other law or court rule; or

(v)an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under *MCR 2.116(C)(7)* or an order denying a motion for summary disposition under *MCR 2.116(C)(10)* based on a claim of governmental immunity.

(b) In a criminal case,

(i)an order dismissing the case;

(ii)the original sentence imposed following conviction;

(iii)a sentence imposed following the granting of a motion for resentencing;

(iv)a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; or

(v)a sentence imposed following revocation of probation.

History

Rule 7.202(6)–(8) amended October 19, 1995, eff January 1, 1996; Rule 7.202 amended eff September 1, 1999; Rule 7.202(7)(b)(iv) amended eff April 1, 2001; Rule 7.202(7)(a) amended eff September 1, 2002; Rule 7.202(3)–(7) amended eff May 1, 2004; Rule 7.202(5) amended eff May 1, 2007; Rule 7.202(6)(a)(v) amended eff January 1, 2009; Rule 7.202(6) amended September 20, 2018, eff January 1, 2019; amended eff Jan 1, 2021; amended eff March 24, 2021.

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STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 9 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 9

Varran v. Granneman

Court of Appeals of Michigan

October 13, 2015, Decided

Nos. 321866; 322437

Reporter
312 Mich. App. 591 *; 880 N.W.2d 242 **; 2015 Mich. App. LEXIS 1882 ***

EMILY R. VARRAN, by next friend, JULIA M. VARRAN, Plaintiff, v PETER J. GRANNEMAN, Defendant-Appellant, and DEBORA GRANNEMAN and JAMES GRANNEMAN, Interveners-Appellees.

Prior History: [***1] Washtenaw Circuit Court. LC No. 03-000271-DC.

Varran v. Granneman, 497 Mich. 929, 856 N.W.2d 555, 2014 Mich. LEXIS 2422 (2014)
Varran v. Granneman, 497 Mich. 928, 856 N.W.2d 555, 2014 Mich. LEXIS 2419 (2014)

Counsel: For PETER J. GRANNEMAN (No. 321866, 322437), DEFENDANT-APPELLANT: TRACY E. VAN DEN BERGH, ANN ARBOR, MI.

For DEBORAH GRANNEMAN (No. 321866, 322437), INTERVENOR-MISCELLANEOUS-APPELLEE: DANIEL R. VICTOR, CLARKSTON, MI.

For MICHIGAN COALITION OF FAMILY LAW APPELLATE ATTORNEYS (No. 321866, 322437), AMICUS CURIAE: ANNE ARGIROFF, FARMINGTON HILLS, MI.

Judges: Before: RONAYNE KRAUSE, P.J., and MURPHY and SERVITTO, JJ. MURPHY, J. (dissenting).

Opinion by: Deborah A. Servitto

Opinion

[**245] [*595] ON REMAND

SERVITTO, J.

These matters are before us on remand from our Supreme Court for further consideration of our June 20, 2014 order dismissing Peter Granneman's claim of appeal in Docket No. 321866 for lack of jurisdiction and our July 16, 2014 order dismissing his [*596] claim of appeal in Docket No. 322437 for the same reason. The Supreme Court directed us to "issue an opinion specifically addressing the issue of whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Varran v Granneman, 497 Mich 928; 856 NW2d 555 (2014); Varran v Granneman, 497 Mich 929; 856 NW2d 555 (2014).*

Plaintiff, Emily Varran (Mother), who is deceased, and defendant, Peter Granneman, (Father) are the parents of a minor child (referred to as "A" hereafter), born in 2002, when the parents were both minors. The parents never married. Mother initially had custody of A, but when A was 8 months old he went to live with [**246] Father, who resided with his parents, intervening petitioners (Grandparents). This arrangement continued until 2005 when A was 2 1/2 years old. At that time, Grandparents asked Father to leave their home [***2] because of hostility and conflicts. A continued to reside with Grandparents, and Father initially visited A once a week at

Grandparents' home. Within a few months, Father had A with him on Saturday nights at his apartment.

Mother passed away in 2007. In 2007, Father began having A stay with him on Friday and Saturday nights. In the summer of 2012, A began living with Father during the week and visiting with Grandparents every weekend. In the spring of 2013, Father reduced A's visits with Grandparents to every other weekend. In May 2013, Father advised Grandparents that they would no longer have overnight visits with A and that any contact between them and A would be under Father's supervision.

Grandparents, as intervening petitioners, filed a motion for grandparenting time with A in June 2013. **[*597]** In a July 2013 order, the trial court awarded Grandparents temporary visitation with A every other weekend from Saturday at 10:00 a.m. to Sunday at 6:00 p.m. and set the matter for an evidentiary hearing. At the conclusion of the evidentiary hearing, the trial court issued a written opinion on April 25, 2014, wherein it determined that A would suffer a substantial risk of future harm to his mental and **[***3]** emotional health if grandparenting time were not granted. The trial court additionally applied the best-interest factors set forth in *MCL 722.27b(6)* and found that it was in A's best interest to allow grandparenting time. The trial court thereafter, on May 30, 2014, entered an order providing Grandparents with visitation with A every other Saturday from 10:00 a.m. until Sunday at 6:00 p.m. Father claimed an appeal from the trial court's April 25, 2014 opinion granting grandparenting time (Docket No. 321866) and its May 30, 2014 order setting a specific grandparenting-time schedule (Docket No. 322437). As previously indicated, this Court initially dismissed both appeals, but our Supreme Court remanded the appeals, directing us to address "whether an order regarding grandparenting time may affect custody within the meaning of *MCR 7.202(6)(a)(iii)*, or otherwise be appealable by right under *MCR 7.203(A)*." The Supreme Court further directed that if this Court determines that the lower court order is appealable by right, we must take jurisdiction over Father's claims of appeal and address their merits. *Varran, 497 Mich 928, 856 N.W.2d 555; Varran, 497 Mich 929, 856 NW2d 555.* We consolidated the appeals.

I. APPLICATION OF *MCR 7.202(6)(a)(iii)*

The first issue for resolution is, as directed by the Supreme Court, whether an order for grandparenting **[*598]** time affects custody within **[***4]** the meaning of *MCR 7.202(6)(a)(iii)*, making it appealable as of right under *MCR 7.203(A)*. Whether this Court has jurisdiction to hear an appeal is an issue reviewed de novo. *Wardell v Hincka, 297 Mich App 127, 131; 822 NW2d 278 (2012)*. The interpretation and application of a court rule is a question of law that this Court reviews de novo. *Halbw v Sterling Heights, 471 Mich 700, 704; 691 NW2d 753 (2005)*.

MCR 7.203(A) provides:

> The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, or court of claims, as defined in *MCR 7.202(6)*, except a judgment or order of the circuit court
>
> **[**247]** (a) on appeal from any other court or tribunal;
> (b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;
>
> An appeal from an order described in *MCR 7.202(6)(a)(iii)-(v)* is limited to the portion of the order with respect to which there is an appeal of right.
> (2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.

MCR 7.202(6)(a) defines a "final judgment" or

"final order" in a civil case as the following:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment **[***5]** or order,
>
> (ii) an order designated as final under MCR 2.604(B),
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,
>
> **[*599]** (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,
>
> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity[.]

The rules of statutory interpretation apply to the interpretation of court rules. *Reed v Breton, 279 Mich App 239, 242, 756 NW2d 89 (2008)*. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co, 274 Mich App 584, 591; 735 NW2d 644 (2007)*. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. *Id.* Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. *TMW Enterprises Inc v Dep't of Treasury, 285 Mich App 167, 172; 775 NW2d 342 (2009)*.

On appeal, Father and Grandparents limit their arguments to whether an order regarding grandparenting time is a postjudgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii). However, this Court was not tasked by the Supreme Court with only determining whether an order **[***6]** regarding parenting time was a "final judgment" or "final order" under MCR 7.202(6)(a)(iii). It was also tasked with determining whether an order regarding grandparenting time would otherwise be appealable by right under MCR 7.203(A). *Varran, 497 Mich at 929*; *Varran, 497 Mich at 928*. Under MCR 7.203(A)(1), this Court has jurisdiction of an appeal of right from a final judgment **[*600]** or order of the trial court, as defined in MCR 7.202(6), while under MCR 7.203(A)(2), this Court has jurisdiction of an appeal of right from a judgment or order for which an appeal of right has been established by law or court rule. There is no law or court rule providing an appeal by right from an order regarding grandparenting time. Therefore, under MCR 7.203(A), there is only an appeal by right from an order regarding grandparenting time if the order is a "final order" or "final judgment" as defined in MCR 7.202(6). MCR 7.203(A)(1).

Two definitions of a "final judgment" or "final order" are potentially applicable to **[**248]** the present case: (1) "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment." MCR 7.202(6)(a)(i), and (2) "a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(iii). We will address each in turn.

The grandparenting-time statute provides two ways that an action for grandparenting time can be commenced. **[***7]** MCL 722.27b(3) states:

> A grandparent seeking a grandparenting time order shall commence an action for grandparenting time, as follows:
>
> (a) If the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction.
>
> (b) If the circuit court does not have continuing

> jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a complaint in the circuit court for the county where the child resides.

[*601] In this case, Grandparents did not commence their action for grandparenting time by filing a complaint. Instead, a child custody dispute concerning A was initiated by A's mother in the trial court in 2003. Grandparents sought grandparenting time by filing a motion with the trial court in that case. The trial court found that entry of a grandparenting-time order would be in the best interests of A and entered such an order on May 30, 2014. Because the May 30, 2014 order provided a grandparenting-time schedule, it disposed of Grandparents' claim for grandparenting time and adjudicated the rights and liabilities **[***8]** of Father and Grandparents. It cannot be ignored, however, that MCR 7.202(6)(a)(i) specifically defines a "final judgment" or "final order" to mean "*the* first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." (Emphasis added). Use of the singular definite article "the" before "first judgment" contemplates *one* order in a civil action. See, e.g., Massey v Mandell, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000). When A's mother initiated the custody case in 2003, the parties to that case were Mother and Father and the first order that disposed of the claims and adjudicated all the rights and liabilities of Mother and Father was the February 2004 consent order regarding custody, parenting time, and support of A. Accordingly, under the definition of MCR 7.202(6)(a)(i), the February 2004 consent order was the "final judgment" or "final order." Because there was no reversal of the February 2004 consent order, no subsequent order in the case could be considered a "final judgment" or "final order" under MCR 7.202(6)(a)(i). The May 31, 2014 order in this case is therefore not a "final judgment" or "final order" under MCR 7.202(6)(a)(i).

[*602] We next turn to whether an order regarding grandparenting time is a postjudgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii) **[***9]**. Helpful to this Court's resolution is a review of the few cases that have addressed MCR 7.202(6)(a)(iii). In *Thurston v Escamilla, 469 Mich 1009; 677 NW2d 28 (2004)*, our Supreme Court determined that a postdivorce order granting a parent's motion for a change of domicile was an order affecting the custody of the minors and was thus a final order, appealable by right. In that case, the divorce judgment had previously awarded joint legal and physical custody to both parties and the change of domicile allowed one of the parties to move, with the children, to New York.

[249]** In Wardell v Hineka, 297 Mich App at 132-133, a panel of this Court took a close look at the definition of "affect" when determining whether the denial of a postjudgment motion for change of custody was an order "affecting the custody of a minor" under MCR 7.202(6)(a)(iii) and thus appealable as of right:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, **[***10]** a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable **[*603]** by right

> demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [Alteration in original.]

In *Rains v Rains*, 301 Mich App 313, 315; 836 NW2d 709 (2013), the trial court awarded the parties joint legal and physical custody of their child in a judgment of divorce. The judgment also established a parenting-time schedule. Approximately two years later, the mother moved for a change in domicile, seeking to move the child with her to Traverse City and to modify the parenting-time schedule. The father, in response, moved for primary physical custody. The trial court denied the **[***11]** mother's request for a change in domicile, *id. at 319*, and this Court held that the mother presented an appeal from a final order under *MCR 7.202(6)(a)(iii)*, despite the father's claim that because the trial court's decision effectively left the parties' custody arrangement as it was, it did not affect the custody of the minor child, *id. at 321-324*. The *Rains* Court based its decision, in part, on *297 Mich App 127*, noting that under *Wardell*, a trial court need not change a custodial arrangement in order for its decision to affect custody. *Rains*, *301 Mich App at 323*. Rather, the inquiry was "whether the trial court's order denying plaintiff's motion for a change of domicile influences where the child will live, regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.'" *Id. at 321* (quotation marks omitted). From *Rains* and *Wardell*, it can be gleaned that when a motion addresses the amount of time a parent spends with a child such that it would potentially cause a change in the established custodial **[*604]** environment, an order regarding that motion is a final order under *MCR 7.202(6)(a)(iii)*.

MCR 7.202(6)(a)(iii) requires that the order, to be considered a final order appealable by right, affect the "custody" of the minor child. "Custody," like "affect," is not defined in Chapter 7 of the Michigan Court Rules. The term "custody," as used in **[***12]** the family law context is, however, defined **[**250]** in *Black's Law Dictionary* (10th ed) as follows:

> The care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody [usually] grants both rights. [Formatting altered.]

Further, "the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare." *Grange Ins Co of Mich v Lawrence*, *494 Mich 475, 511; 835 NW2d 363 (2013)*. We recognize that the Michigan cases thus far addressing *MCR 7.202(6)(a)(iii)* have addressed physical custody and have thus focused their inquiries on the effect of the challenged order on where the child would live. It would thus be tempting to conclude that this Court rule only comes into play when the physical custody of a child is at issue. Although there is a distinction between physical and legal custody, *MCR 7.202(6)(a)(iii)* contains no distinguishing or limiting language. Based on the plain language of the terms used in *MCR 7.202(6)(a)(iii)* then, a "postjudgment order affecting the custody of a minor" **[***13]** is an order that produces an effect on or influences in some way the legal custody *or* physical custody of a minor.

[*605] The grandparenting-time statute, *MCL 722.27b*, does not *grant* legal custody or physical custody of a child to a grandparent who has obtained a grandparenting-time order. Thus, an order for grandparenting time cannot alter or change the legal custody or physical custody of a child. But that does not mean that an order for grandparenting time cannot affect (i.e., produce an effect on or influence) the custody of a child. In *Thurston*, *469 Mich at 1009*, for example, despite

the fact that the trial court's order that granted the mother's motion for change in domicile did not alter the award of joint legal and physical custody, the Supreme Court still held that the order was one affecting the custody of a minor.

According to Father, an order for grandparenting time is one that affects the custody of a minor because it interferes with a parent's right to determine the care, custody, and control of his or her child. A parent has a fundamental right, one that is protected by the *Due Process Clause of the Fourteenth Amendment*, to make decisions concerning the care, custody, and control of his or her child. *Troxel v Granville, 530 U.S. 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000)* (opinion by O'Connor, J.); *In re Sanders, 495 Mich 394, 409; 852 NW2d 524 (2014)*. It cannot be disputed that **[***14]** a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child. Although a parent has denied grandparenting time, a grandparent may obtain an order for grandparenting time if the grandparent proves by a preponderance of the evidence that the denial of grandparenting time will create a substantial risk of harm to the child and if the trial court finds by a preponderance of the evidence that a grandparenting-time order is in the child's best interests. *MCL 722.27b(4)(b)* and *(6)*. Because a grandparenting-time order overrides a parent's **[*606]** legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. Thus, when a parent has legal custody of the child, an order regarding grandparenting time is a postjudgment order affecting the custody of a minor. **[**251]** *MCR 7.202(6)(a)(iii)*. Because Father had legal custody of A, we hold that the May 30, 2014 order was a "final judgment" or "final order" under *MCR 7.202(6)(a)(iii)* and, therefore, appealable by right, *MCR 7.203(A)(1)*. [Citations omitted.]

It is true, as the dissent points out, that the award or denial of grandparenting time did not **[***15]** change the legal-custody arrangement between Father and now deceased Mother and did not deprive Father of sole legal custody of A. But a "change" in custody is not what is required under *MCR 7.202(6)(a)(iii)*—the language of the rule requires only an order "affecting" custody, which is materially different. Furthermore, it cannot be ignored that this dispute does not concern a motion to resolve a postjudgment dispute between two parents. Generally, when postjudgment custody issues warrant the trial court's involvement it is because the two people who have the same fundamental rights to the care and custody of the same child (including decision-making authority) are at odds and the court is required to resolve a stalemate. In this case, however, the dispute concerns the trial court's award of visitation to third parties—who are not vested with the fundamental rights that are ordinarily reserved for parents—against the express decision of A's only living parent and, thus, the only parent with legal and physical custody. Moreover, during those periods of visitation, A's Grandparents will impliedly have at least some of the rights generally reserved for parents with legal or physical custody (e.g., whether **[***16]** and how to **[*607]** treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child). Thus, the award of grandparenting time affected the custody of A.

In accordance with the foregoing analysis and pursuant to the Supreme Court's remand order in Docket No. 322437, we take jurisdiction over Father's claim of appeal and address the merits of the arguments raised by Father. We will also treat the claim of appeal in Docket No. 321866 as an application for leave to appeal and grant it.

II. CONSTITUTIONALITY OF THE GRANDPARENTING-TIME STATUTE

Father argues on appeal that the grandparenting-time statute is unconstitutional. We disagree.

This Court reviews constitutional issues de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). Statutes are presumed constitutional, and this Court has a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014). The burden of proving that a statute is unconstitutional is on the party challenging the statute. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

The *Fourteenth Amendment of the United States Constitution*, US Const, Am XIV, prohibits a state from depriving any person of life, liberty, or property without due process of law. *In re Sanders*, 495 Mich at 409. This promise of due process includes **[***17]** "a substantive component that provides heightened protection against government interference with certain fundamental **[*608]** rights and liberty interests." *Id.* (quotation marks and citation omitted). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. **[**252]** *Id.* In other words, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

MCL 722.27b(4) provides:

> All of the following apply to an action for grandparenting time under [*MCL 722.27b(3)*]:
> * * *
>
> (b) In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not **[***18]** overcome the presumption, the court shall dismiss the complaint or deny the motion.
>
> (c) If a court of appellate jurisdiction determines in a final and nonappealable judgment that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b).

[*609] Father argues that the grandparenting-time statute is unconstitutional because of the use of the preponderance-of-the-evidence standard. He contends that use of a clear-and-convincing-evidence standard is necessary to protect a parent's fundamental right to make decisions concerning the care, custody, and control of his or her children. While Father contends that the statute is unconstitutional both on its face and as applied to the present case, his argument, as presented, is actually only a facial challenge. "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." **[***19]** *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998). (quotation marks and citations omitted; alteration in original). In contrast, an as-applied challenge "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (quotation marks and citation omitted).

"The function of a standard of proof, as that

concept is embodied in the *Due Process Clause* and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Cruzan v Director, Missouri Dep't of Health, 497 U.S. 261, 282; 110 S Ct 2841; 111 L Ed 2d 224 (1990)* (quotation marks and citations omitted). "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v Kramer, 455 U.S. 745, 755; [*610] 102 S Ct 1388, 71 L Ed 2d 599 (1982)*. "Thus, while private parties may be interested intensely **[**253]** in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'" *Id.* (citation omitted). The United States Supreme Court has mandated an intermediate standard of proof—clear and convincing evidence—when **[***20]** the individual interests at stake are both "particularly important" and "more substantial than mere loss of money." *Id. at 756* (quotation marks and citation omitted). In *Santosky*, the United States Supreme Court held that a state, before it may terminate parental rights, must support its allegations by clear and convincing evidence. *Id. at 747-748, 768-770*.

Father is correct that the United States Supreme Court has observed that one of the oldest recognized liberty interests is that of a parent to determine the care, custody, and control of his or her children, including the children's associations. See *Troxel, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49*. While the Supreme Court in *Troxel* did address a grandparent-visitation statute and rule that it was unconstitutional, the statute in this case is not contrary to *Troxel*.

In *Troxel, 530 U.S. 61* (opinion by O'Conner, J.), a Washington statute provided that "'[a]ny person may petition the court for visitation rights'" and that "'[t]he court may order visitation rights for any person when visitation may serve the best interest of the child . . . .'" (Citation omitted.) Under this statute, the grandparents moved for greater visitation with their two granddaughters than the children's mother would allow. The trial court granted the requested visitation. **[*611]** The United States Supreme Court held that the Washington statute was unconstitutional. Justice O'Connor, writing for a plurality of the Court, concluded that the Washington **[***21]** statute when applied to the case, infringed on the mother's fundamental rights as a parent. *Id. at 67-68, 72-73*. It was never alleged, and there was no finding, that the mother was an unfit parent. *Id. at 68*. This was important, Justice O'Connor stated, because "there is a presumption that fit parents act in the best interests of their children." *Id. at 68*. She explained that the problem was not that the trial court intervened but that when it did, it gave no special weight to the mother's determination of her daughters' best interests. *Id. at 69*. "[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id. at 70*. Justice O'Connor also noted that there was no allegation that the mother ever sought to preclude all visitation, and the trial court gave no weight to the mother's acquiescence to some visitation. *Id. at 71*. She concluded that the Washington statute was unconstitutional as applied because it failed to accord the determination of the mother, a fit parent, any material weight. *Id. at 72*. According to the plurality opinion in *Troxel*, then, in order to protect a parent's fundamental right to raise his or her children, a visitation statute must **[***22]** require that the trial court accord deference to the decisions of a fit parent regarding third-party visitation.

The grandparenting-time statute at issue in this case requires that the trial court accord deference to a fit parent's decision to deny grandparenting time. There is a presumption that a fit parent's decision to

deny grandparenting time does not create a substantial risk of harm to the child. MCL 722.27b(4)(b). To rebut this presumption, a grandparent must prove by **[**254]** a **[*612]** preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child. *Id.* Thus, the grandparenting-time statute does not allow a trial court to grant grandparenting time simply because it disagrees with the parent's decision. It thus abides by the *Troxel* deference requirement. The *extent* of deference that must be accorded, however, was not discussed in *Troxel* and forms the heart of Father's argument—that the amount of deference required by the statute is inadequate, rendering the statute unconstitutional.

On this issue, Father relies principally on *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009). In *Hunter*, 484 Mich 247, 771 N.W.2d 694, the Supreme Court addressed the conflicting presumptions that arise under the Child Custody Act (CCA), MCL 722.21 et seq., when there is a custody dispute between a parent and a third-party with **[***23]** whom a child has an established custodial environment. Under MCL 722.25(1), in a custody dispute between a parent and a third party, the court "shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." Under MCL 722.27(1)(c), a court may not modify a previous custody order or issue a new custody order so as to change the established custodial environment unless there is clear and convincing evidence that the change is in the best interest of the child. The Supreme Court held that, in order to protect a fit parent's fundamental constitutional rights, the parental presumption of MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c). *Hunter*, 484 Mich at 263-264. The Supreme Court then addressed a "remaining constitutional question" regarding the amount of deference due under *Troxel* to fit parents. *Id.* **[*613]** at 264. The Court concluded that MCL 722.25(1) provides sufficient deference to fit parents' fundamental rights to the care, custody, and management of their children because it requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the parent is not in the child's best **[***24]** interests. *Id.* at 264-265. The Supreme Court summarized the clear and convincing evidence standard:

> The clear and convincing evidence standard is "the most demanding standard applied in civil cases . . . ." This showing must "'produce[] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" [*Id.* at 265 (citations omitted; alterations in original).]

The Supreme Court concluded that requiring a third party to establish by clear and convincing evidence that it is not in the child's best interests for the parent to have custody "was entirely consistent with *Troxel*'s holding." *Id.* It explained, "Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a 'presumption of validity' or 'some weight.' That is precisely what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption." *Id.*

Hunter is minimally instructive in the present case. The Supreme Court in *Hunter* merely concluded that MCL 722.25(1) provides sufficient deference **[***25]** to a fit parent's fundamental rights to the care, custody, and management of their child because it requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the parent is not **[**255]** in the child's best interests. However, in *Hunter*, a preponderance of the evidence standard was not at issue, nor **[*614]** was it ever discussed. The Supreme Court never said that a clear and convincing evidence standard, rather than a preponderance of the evidence standard, was

constitutionally mandated. It simply declared that the standard, as set forth in the statute, was sufficient.

As previously stated, the grandparenting-time statute is consistent with *Troxel*. Because the grandparenting-time statute presumes that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child, and because it requires a grandparent to prove by a preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child, the statute gives deference to the decisions of a fit parent. *DeRose v DeRose, 469 Mich 320, 332; 666 NW2d 636 (2003)*.[1] It does not allow the trial court to grant grandparenting time simply because it disagrees with the parent's decision. See *id.* Moreover, a parent's fundamental **[***26]** right to make decisions concerning the care, custody, and control of their children is not most at jeopardy when a grandparent petitions a court for grandparenting time. See *Hunter, 484 Mich at 269*. An order granting grandparenting time does not sever, permanently and irrevocably, a parent's parental **[*615]** rights to a child, and it remains subject to modification and termination. Therefore, we conclude that, because due process concerns are not at their highest in cases involving requests for grandparenting time, see *id.*, the requirement that grandparents, in order to rebut the presumption given to a fit parent's decision, prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child is sufficient to protect the fundamental rights of parents. Father's facial challenge to the constitutionality of the grandparenting-time statute thus fails.

III. SUBJECT-MATTER JURISDICTION

Father next contends that the trial court lacked jurisdiction to hear Grandparents' motion for grandparenting time. We disagree.

As explained in Part I of this opinion, there are two ways that an action for grandparenting time can be commenced: (1) "[i]f the circuit court has continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a motion with the circuit court in the county where the court has continuing jurisdiction," and (2) "[i]f the circuit court does not have continuing jurisdiction over the child, the child's grandparent shall seek a grandparenting time order by filing a complaint in the circuit court for the county where the child resides." *MCL 722.27b(3)*.

Father argues that the trial court lacked subject-matter jurisdiction over Grandparents' **[**256]** motion for grandparenting time because the court did not have continuing **[***28]** jurisdiction over A. According to Father, the trial court did not have continuing jurisdiction over A **[*616]** because Father was awarded sole legal and physical custody over A in 2004 and Mother died in 2007.

Subject-matter jurisdiction is the right of the a court

> to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. [*Joy v Two-Bit Corp, 287 Mich 244, 253-254; 283 NW 45 (1938)* (citation and quotation marks omitted).]

A trial court's lack of subject-matter jurisdiction renders a trial court's judgment void. *Bowie v*

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[1] The Legislature rewrote the grandparenting-time statute in 2004 (2004 PA 542) after the *DeRose* Court, *469 Mich at 333-334*, held that a prior version of the statute was unconstitutional under *Troxel* because it did not require that any deference be given to the decisions that a fit parent makes for his or her child. The Legislature included the language requiring that deference be given to the decisions of fit parents in the rewritten **[***27]** grandparenting-time statute so that the statute would comply with *Troxel* and *DeRose*. See *Keenan v Dawson, 275 Mich App 671, 678-679; 739 NW2d 681 (2007)*, in which this Court stated that *Troxel* and *DeRose* "directly led to the 2004 amendment of *MCL 722.27b*" and that, in response to the those decisions, the Legislature attempted to correct the constitutional infirmities of the grandparenting-time statute.

Arder, 441 Mich 23, 56; 490 NW2d 568 (1992); *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992). However, the only support Father has cited in support of his argument is an unpublished opinion per curiam of the Court of Appeals. Unpublished decisions are not binding on the Court. MCR 7.215(C)(1) and (J)(1).

Trial courts have subject-matter jurisdiction over child custody disputes. *Bowie*, 441 Mich at 39. Additionally, the power to hear and decide requests by a child's grandparents for grandparenting time has not been prohibited or given exclusively **[***29]** to another court. See *id.* Pursuant to the CCA, when a child custody dispute has been submitted to the trial court, either as an original action under the CCA or when it has arisen incidentally in another action in the trial court, the trial court may "[u]pon petition consider the reasonable grandparenting time of maternal or paternal grandparents as provided in [MCL 722.27b] . . . ." MCL 722.27(f). Accordingly, the trial court had subject-matter jurisdiction to hear Grandparents' motion for grandparenting time. It had the right to **[*617]** exercise judicial power over requests by a child's grandparents for grandparenting time. See *Joy*, 287 Mich at 253-254.

IV. INTERPRETATION OF MCL 722.27b

Father contends that to obtain grandparenting time under the statute, a grandparent must first demonstrate that a fit parent's decision to *deny* grandparenting time creates a substantial risk of harm to the child and that he did not *deny*, i.e., refuse or reject all visitation between Grandparents and A. According to Father, Grandparents are therefore not eligible for relief under MCL 722.27b and the trial court erred by interpreting the word "deny" in any other manner in order to allow relief.

"'Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's **[***30]** findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.'" *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007) (citation omitted; alteration in original). Issues of statutory interpretation are questions of law. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 309; 645 NW2d 34 (2002). Questions of law are reviewed for clear legal error. *McCain v McCain*, 229 Mich App 123, 125; 580 N.W.2d 485 (1998). "Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing **[**257]** law." *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013) (citation and quotation marks omitted).

The goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). The rules of statutory construction **[*618]** serve as guides to assist in determining legislative intent with a greater degree of certainty. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 313; 683 NW2d 148 (2004). Statutory language should be construed reasonably, keeping in mind the purpose of the statute. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Once the intention of the Legislature is discovered, it must prevail over any conflicting rule of statutory construction. *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004).

The best indicator of legislative intent, and the first thing to be examined when determining intent, is the language of the statute. *Tevis*, 283 Mich App at 81. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). Every word of a statute is presumed to have **[***31]** some meaning, and this Court must avoid an interpretation that renders any part of the statute surplusage or nugatory. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011). Effect should be given to

every sentence, phrase, clause, and word. *Id.* Each word, unless specifically defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. *TMW Enterprises, Inc, 285 Mich App at 172.* Additionally, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63, 642 NW2d 663 (2002).*

[*619] Another rule of statutory construction is that statutory provisions are not to be read in isolation. *Robinson v Lansing, 486 Mich 1, 15; 782 NW2d 171 (2010).* Rather, to discern the true intent of the Legislature, statutory provisions must be read as a whole. *Id.*

Father's argument is premised on *MCL 722.27b(4)* which states, in relevant part, as follows:

> All of the following apply to an action for grandparenting time under [*MCL 722.27b(3)*]:
> * * *
>
> (b) In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision *to deny grandparenting time* does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, **[***32]** a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision *to deny grandparenting time* creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion. [Emphasis added.]

However, *MCL 722.27b(1)* provides:

> A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:
>
> (a) An action for divorce, separate maintenance, or annulment involving the **[**258]** child's parents is pending before the court.
> (b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.
> (c) The child's parent who is a child of the grandparents is deceased.
>
> **[*620]** (d) The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, *MCL 722.1001 to 722.1013*, by an order of filiation entered under the paternity act, 1956 PA 205, *MCL 722.711 to 722.730*, or by a determination by a court of competent jurisdiction that the individual is the father **[***33]** of the child.[2]
>
> (e) Except as otherwise provided in [*MCL 722.27b(13)*], legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.
>
> (f) In the year preceding the commencement of an action under [*MCL 722.27b(3)*] for grandparenting time, the grandparent provided an established custodial environment for the child as described in [*MCL 722.27*], whether or not the grandparent had custody under a court order.

Nothing in *MCL 722.27b(1)*, which sets forth when a grandparent may seek a grandparenting-time order, requires that there be a denial of grandparenting time before a grandparent may seek a grandparenting-time order. In the present case, Grandparents brought their motion for

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[2] *MCL 722.27b(3)* prohibits a trial court from allowing the parent of a father who never married the child's mother from seeking an order for grandparenting time if the father's paternity has never been established.

grandparenting time under MCL 722.27b(1)(d) and (f). Father has never disputed that, under MCL 722.27b(1)(d) and (f), Grandparents could seek an order for grandparenting time. Accordingly, under MCL 722.27b(1), Grandparents could seek an order of grandparenting time irrespective of whether Father had completely denied them all grandparenting [***34] time with A. Additionally, MCL 722.27b(4)(b) was included in the grandparenting-time statute so that the statute would no longer be constitutionally infirm. See [*621] Keenan, 275 Mich App at 678-679. To withstand a constitutional challenge under *Troxel* and *DeRose*, a grandparenting-time statute must require that a trial court give deference to a fit parent's decision regarding visitation between his or her child and the child's grandparent. See DeRose, 469 Mich at 332-334. The Legislature's intent in enacting MCL 722.27b(4)(b), then, was not to set forth requirements for when a grandparent could *seek* an order for grandparenting time (as it had already done in MCL 722.27b(1)), but merely to provide a scheme in which a parent's decision regarding visitation is given deference. This is the only logical conclusion when the grandparenting-time statute is read as a whole and when the historical context and development of MCL 722.27b(4)(b) are considered.

V. EXPERT TESTIMONY

Father argues that the trial court, upon concluding that the testimony of Grandparents' expert, psychologist Dr. Nancy Fishman, was not reliable, erred when it considered the statements that A made to Fishman as evidence. We disagree.

[**259] A trial court's decision regarding the admissibility of expert testimony is reviewed for an abuse of discretion, Surman v Surman, 277 Mich App 287, 304-305; 745 NW2d 802 (2007), as are all the trial court's [***35] evidentiary decisions, Taylor v Kent Radiology, PC, 286 Mich App 490, 519; 780 NW2d 900 (2009). A trial court abuses its discretion if its decision results in an outcome outside the range of principled outcomes. Surman, 277 Mich App at 305.

MRE 702 provides:

> If the Court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a [*622] witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under MRE 702, a trial court must act as a gatekeeper to ensure that all expert opinion testimony is reliable. Gilbert v DaimlerChrysler Corp, 470 Mich 749, 783; 685 NW2d 391 (2004). MRE 702 incorporates the standards of reliability that were described in *Daubert*[3] by the United States Supreme Court. Edry v Adelman, 486 Mich 634, 639; 786 NW2d 567 (2010). Under *Daubert*, a trial court must ensure that all expert opinion testimony is relevant and reliable. Id. at 640. A trial court must determine the reliability of expert opinion testimony before the testimony may be admitted. Tobin v Providence Hosp, 244 Mich App 626, 647; 624 NW2d 548 (2001).

The trial court initially qualified Fishman [***36] as an expert, in accordance with MRE 702, and permitted her to testify as such. Fishman had been asked by Grandparents to offer an expert opinion regarding the effect on A if he was not allowed to see Grandparents. To reach an opinion, Fishman met with Grandparents and A on several occasions. In a later order, the trial court disqualified Fishman as an expert, finding that her methods and opinions did not meet *Daubert* standards and indicated that it would disregard

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[3] Daubert v Merrell Dow Pharm, Inc, 509 U.S. 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Fishman's expert opinions.[4] Nonetheless, in finding that **[*623]** there would be a substantial risk of harm to A's mental and emotional health if grandparenting time were not granted, the trial court relied heavily on statements that A made to Fishman. In doing so, the court noted that Father had affirmatively waived any hearsay objection to A's statements made to Fishman, which Fishman testified regarding and were also contained in her report that had been admitted into evidence.

Many of A's statements to Fishman were hearsay; they were out-of-court statements used for the truth of **[***37]** the matter asserted. See *MRE 801*. Hearsay is not admissible unless it falls within an exception. *MRE 802*. There has never been a claim by Grandparents that any of A's statements to Fishman fell within a hearsay exception. As indicated by Grandparents, however, during the evidentiary hearing concerning Fishman's testimony, Father withdrew any hearsay objection to the admission of A's statements. In considering A's statements, the trial **[**260]** court relied on Father's withdrawal of the hearsay objection. Absent the withdrawal of such objection, many of A's statements would have been inadmissible.

Waiver is the voluntary and intentional relinquishment of a known right. *MacInnes v MacInnes, 260 Mich App 280, 287; 677 NW2d 889 (2004)*. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter, 462 Mich 206, 215; 612 NW2d 144 (2000)* (citation and quotation marks omitted). Father voluntarily and intentionally withdrew his hearsay objection to A's statements. Thus, Father cannot now argue on appeal that the trial court erred by considering A's statements because the statements were hearsay and did not fall **[*624]** within a hearsay exception. Because Father withdrew his hearsay objection to A's statements, thereby allowing the facts **[***38]** and data on which Fishman based her opinion to be admitted into evidence, Father cannot now claim on appeal that the trial court erred when it considered A's statements.

VI. SUBSTANTIAL RISK OF HARM

Father avers that the trial court's finding that Grandparents proved that a denial of grandparenting time would create a substantial risk of harm was against the great weight of the evidence. We disagree.

As noted earlier, an order concerning grandparenting time may be reversed if the trial court's findings of fact were against the great weight of the evidence. *Keenan, 275 Mich App at 679*. A trial court's findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction. *Id. at 679-680*. A trial court has superior fact-finding ability, and this Court must give deference to a trial court's determination regarding the weight to assign evidence. See *Berger v Berger, 277 Mich App 700, 715; 747 NW2d 336 (2008)*.

We first note that the vast majority of Father's argument on this issue is premised on his prior argument—that the trial court erred by relying on A's statements to Fishman. Father makes no argument that, if **[***39]** A's statements to Fishman were properly considered, the trial court's finding was still against the great weight of the evidence. Given our conclusion that the trial court properly considered A's statements, we could simply affirm the trial court's factual finding regarding a substantial risk of harm without any analysis. However, thoroughness requires that we point out several salient portions of A's statements **[*625]** to Fishman that showed, by a preponderance of the evidence, a denial of grandparenting time would create a substantial risk of harm to A's mental, physical, or emotional health.

A told Fishman that he feels as though he merely

[4] Grandparents make no argument on appeal that the trial court erred by determining that Fishman's methods and opinions did not meet *Daubert* standards.

exists until the next time he gets to see his Grandparents and is very sad about losing his Grandparents. A stated that he had grown up referring to his Grandparents as "Mom" and "Pop" and that he felt as though he had lost the only home he had known. A stated that being required to live with his father made him feel like he had been kidnapped. A told Fishman that he is afraid of not being able to see his Grandparents; that sometimes he is homesick and lonely; that Grandparents' house feels like home and that is where he belongs and is most welcome; **[***40]** and that, if he could not see Grandparents anymore, his life would be horrible, he would be sad, angry, and depressed, and he would not have much to look forward to.

[261]** As previously stated, the evidence showed that A lived with his Grandparents for numerous years and that the Grandparents raised A as their own child. A's statements support that he saw his Grandparents as parental figures and certainly show that not only did he want to spend time with them, he would be angry, sad and depressed if he could not. Under these circumstances, the evidence did not clearly preponderate against the trial court's finding that a denial of grandparenting time would create a substantial risk of harm to A's mental and emotional health. See *Keenan, 275 Mich App at 680*.

Affirmed.

/s/ Deborah A. Servitto

/s/ Amy Ronayne Krause

Dissent by: William B. Murphy

Dissent

[*626] MURPHY, J. (*dissenting*).

I conclude that defendant Peter Granneman (Father) was required to pursue his appeal by an application for leave and that he was not entitled to appeal the trial court's decision as of right. Therefore, I would dismiss Father's claims of appeal for lack of jurisdiction under *MCR 7.203(A)*.[1] In my view, the clear intent of the Supreme Court in drafting *MCR 7.202(6)(a)(iii)* was to allow for an appeal of right **[***41]** solely with respect to postjudgment orders in domestic relations actions in which a court either granted a motion that effectively sought to change the legal or physical custody of a minor or denied such a motion. The Supreme Court did not intend to provide for an appeal of right in cases involving a postjudgment order in which a court ruled on a motion for or to modify grandparenting or parenting time, neither of which is mentioned in *MCR 7.202(6)(a)(iii)*. In the simplest of terms relative to postjudgment proceedings, custody decisions are appealable of right under *MCR 7.203(A)(1)* and *MCR 7.202(6)(a)(iii)*, and grandparenting- and parenting-time decisions are appealable by applications for leave to appeal under *MCR 7.203(B)*. Accordingly, I respectfully dissent.

"Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo." *Wardell v Hincka, 297 Mich App 127, 131; 822 NW2d 278 (2012)*. We likewise review de novo, as a question of law, the proper interpretation and application of the court rules. *Haliw v Sterling Hts, 471 Mich 700, 704; 691 NW2d 753 (2005)*. In *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co, 274 Mich App 584, 591; [*627] 735 NW2d 644 (2007)*, this Court set forth the governing principles concerning **[***42]** the construction of a court rule:

> The interpretation of court rules is governed by the rules of statutory interpretation. Court rules should be interpreted to effect the intent of the drafter, the Michigan Supreme Court. . . . Clear and unambiguous language is given its plain

[1] The Supreme Court's remand orders indicated, in part, that "[i]f the Court of Appeals determines that the . . . [trial court's] order[s] [are] not appealable by right, it may then dismiss . . . [Father's] claim[s] of appeal for lack of jurisdiction . . . ." *Varran v Granneman, 497 Mich 928; 856 N.W.2d 555 (2014)*; *Varran v Granneman, 497 Mich 929; 856 NW2d 555 (2014)*.

> meaning and is enforced as written. But language that is facially ambiguous, so that reasonable minds could differ with respect to its meaning, is subject to judicial construction. [Citations and quotation marks omitted.]

MCR 7.203(A)(1) provides, in part, that this Court "has jurisdiction of an appeal of right filed by an aggrieved party" from "[a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." **[**262]** And MCR 7.202(6)(a)(iii) provides that a final judgment or order includes, "in a domestic relations action, a postjudgment order affecting the *custody* of a minor[.]"[2] (Emphasis added.)

In the context of family law, "custody" broadly means "'[t]he care, control, and maintenance of a child awarded by a **[***43]** court to a responsible adult.'" *In re AJR*, 496 Mich 346, 358; 852 NW2d 760 (2014) (citation omitted; alteration in original). In Michigan, two forms of custody are recognized—"physical" custody and "legal" custody. *Id.* at 359. "[T]he Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important **[*628]** decisions affecting the child's welfare." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013), citing MCL 722.26a(7)(a) and (b); see also *In re AJR*, 496 Mich at 359.[3] In relationship to resolving custody disputes, a trial court may "[p]rovide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions." MCL 722.27(1)(b). "Visitation," as considered in the context of either parenting or grandparenting time, differs from custody and merely pertains to a person having a "period of access to a child," during which the person "is responsible for the care of the child . . . ." *Black's Law Dictionary* (7th ed); see also MCL 722.27 (custody and custody-related matters); MCL 722.27a (parenting time); MCL 722.27b (grandparenting time).

There is no dispute that a postjudgment order in a domestic relations action that actually changes the legal or physical custody of a minor constitutes an order "affecting the custody of a minor," giving rise to an appeal of right under MCR 7.202(6)(a)(iii). See *Wardell*, 297 Mich App at 131-133. In *Wardell*, this Court concluded that a postjudgment order that *denies* a motion for change of custody also qualifies as an order that affects the custody of a minor for purposes of MCR 7.202(6)(a)(iii). *Id.* at 133. The *Wardell* panel reasoned as follows:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial **[*629]** court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. **[***45]** MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the **[**263]** custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders

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[2] I agree with the majority that neither of the postjudgment orders at issue qualify as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties" for purposes of MCR 7.202(6)(a)(i).

[3] Legal custody concerns the authority to decide such matters as what school a child will attend or which **[***44]** doctor a child will visit for regular medical care. See *Dailey v Klaenhammer*, 291 Mich App 660, 666; 811 NW2d 501 (2011); *Bowers v VandeMerkten-Bowers*, 278 Mich App 287, 295-296; 750 NW2d 597 (2008).

> appealable by right demonstrates,[4] a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [*Wardell*, 297 Mich App at 132-133 (alteration in original).]

[*630] The *Wardell* decision did not address postjudgment orders regarding motions for, or to modify, parenting or grandparenting time. And the Court's discussion of the term "affecting" as used in MCR 7.202(6)(a)(iii) was limited to the framework of a physical custody decision or, in other words, "a trial court's ruling [that] necessarily has an effect on and influences where the child will live . . ." *Id.* at 132.[5] In accordance with the conclusion reached in *Wardell*, I conclude that the Supreme Court employed the term "affecting" in MCR 7.202(6)(a)(iii) in order to ensure an appeal of right with respect to not only postjudgment orders actually changing the custody of a minor, but also postjudgment orders denying a motion to change custody. If the Supreme Court **[***47]** had intended to additionally allow for an appeal of right in regard to postjudgment parenting- or grandparenting-time orders, it certainly would have used language referring to "parenting time," "grandparenting time," or "visitation."

The trial court's order here did not have an effect on or influence where the child would live; therefore, it was not a postjudgment order affecting the physical custody of a minor for purposes of MCR 7.202(6)(a)(iii). An order that effectively determines the physical-custody arrangement or statuses of the parties, i.e., one that resolves whether a party will now have or continue having no physical custody, sole physical custody, or joint physical **[**264]** custody of a minor, would be an order truly having an effect on or influencing where **[***48]** **[*631]** a minor will live. The entry of such an order was not even a remote possibility in the present case in light of the nature of the postjudgment motion that merely sought limited grandparenting time.

I next address this Court's opinion in *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013). In *Rains*, the parties had joint legal and physical custody of their minor child pursuant to a divorce judgment. The plaintiff subsequently filed a motion for change of domicile, seeking to move the child from the Detroit area to Traverse City. The plaintiff proposed an associated modification of the defendant's parenting time to every other weekend relative to the school year, constituting a significant reduction in the defendant's time with the child under the existing joint-custody arrangement. *Id.* at 315. The defendant argued that "the move would turn defendant into a 'weekend dad' instead of a full-time dad . . . ." *Id.* at 318-319. The defendant filed his own motion, requesting sole physical

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[4] There is also a history of this Court treating parenting-time decisions as appealable by application for leave. See, e.g., *Young v Partners (On Reconsideration)*, 270 Mich App 553, 554; 718 NW2d 366 (2006) ("Plaintiff . . . appeals to this Court by leave granted the . . . order . . . which denied plaintiff's motion to dismiss a parenting time review pending in the circuit court.") (citation omitted); *Brown v Loveman*, 260 Mich App 576, 578; 680 NW2d 432 (2004) ("Plaintiff appeals by leave granted from the trial court's order adopting a parenting time schedule proposed by defendant . . . ."); *DeVormer v DeVormer*, 240 Mich App 601, 602; 618 NW2d 39 (2000) ("Defendant appeals by leave granted a circuit court order denying his motion for parenting time with his son . . ."). Further, this Court has treated grandparenting-time decisions, arising out of motions **[***46]** and not independent complaints, as appealable by application for leave. See, e.g., *Bonk-Gilbert v Greenleaf*, 302 Mich App 538, 539; 840 NW2d 743 (2013) ("[T]he minor child's paternal grandmother appeals by leave granted the family court order denying her motion for grandparent visitation. MCL 722.27b.") (punctuation omitted); *In re Keast*, 278 Mich App 413, 417; 750 NW2d 643 (2008) (The foster care provider "appeals by leave granted an . . . order allowing the maternal grandparents of the children . . . visitation with the children."); *Berl v Berl*, 154 Mich App 208, 211; 397 NW2d 270 (1986) ("The validity of the trial court's actions in regard to the petition for grandparent visitation are now before this Court on leave granted.").

[5] The Court's examination of the issue in terms of whether an order affects where a child will "live" indicates that the panel was focused on physical custody and not legal custody. The *Wardell* parties had joint physical and legal custody, which remained in place after the trial court denied competing motions to change custody. *Wardell*, 297 Mich App at 129-130. It does not appear that the parties or the trial court in *Wardell* were concerned with legal-custody matters.

custody of the child. *Id. at 315*. The trial court denied the plaintiff's motion for change of domicile, modified the parenting-time schedule to a straight alternating-week format, and implicitly denied the defendant's motion to change custody. *Id. at 319, 323*. The plaintiff filed an appeal of right, and **[***49]** the defendant argued "that the appeal should be dismissed for lack of jurisdiction because the trial court's order denying plaintiff's motion for change of domicile was not a final order appealable as of right." *Id. at 319-320*.

Referring to and quoting the *Wardell* opinion, the *Rains* panel stated that "we must ask whether the trial court's order denying plaintiff's motion for a change of domicile 'influences where the child will live,' regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.'" *Rains, 301 Mich App at [*632] 321*, citing and quoting *Wardell, 297 Mich App at 132-133*. The Court noted that, "[u]nder *Wardell*, a trial court need not change a custodial arrangement in order for its decision to affect custody." *Rains, 301 Mich App at 323*.[6] The Court further stated and held:

> Plaintiff had hoped to move the child to Traverse City, where he would reside primarily with her and see defendant every other weekend. The trial court's decision not to allow such a move to take place necessarily influenced where the child would live. Therefore, the fact that the parties were left in status quo as a result of the trial court's order is not dispositive.
>
> Further, as in *Thurston [v Escamilla, 469 Mich 1009; 679 NW2d 696 (2004)]* and as further discussed below, the parties in this case enjoyed joint legal and physical **[***50]** custody of the child and there was an established joint custodial environment with both parents. If a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment. Therefore, we conclude that plaintiff has properly invoked appellate jurisdiction as of right. *Wardell* has provided an expansive definition of "affecting the **[**265]** custody of a minor." Additionally, in *Thurston* our Supreme Court indicated that an order on a motion for change of domicile that could affect an established joint custodial environment is appealable by right. [*Rains, 301 Mich App at 323-324* (citations omitted).][7]

[*633] As reflected in this passage, the *Rains* panel concluded that the plaintiff was entitled to an appeal of right because the trial court's order on the plaintiff's motion to change domicile influenced where the child would live and because the prospective change in domicile would have substantially reduced the defendant's time with the child, potentially causing a change in the established custodial environment. I note that *Rains*, like *Wardell*, was focused on physical custody. The unremarkable principle that emanates from *Rains* is that while a motion may be framed as one seeking a change of domicile, if granting the motion would effectively result in a change of custody or the established **[***52]** custodial environment, the trial court's postjudgment order either granting or denying the motion is appealable of right under *MCR 7.203(A)(1)* and *MCR*

[6] To be clear, the Court in *Wardell* made the observation later referred to by the panel in *Rains* in the context of determining whether the *denial of a motion to change custody* affected the custody of a minor: the *Wardell* Court was not speaking in general terms about a decision resolving any motion in a domestic relations action, but rather a custody-based motion.

[7] I note that both the *Wardell* and *Rains* panels included a footnote indicating that even if they had determined that the orders were not appealable of right, they would have nevertheless, in the exercise of their discretion and the interest **[***51]** of judicial economy, treated the claims of appeal as applications for leave, granted leave, and then proceeded to address the substantive issues. *Rains, 301 Mich App at 320 n 2*; *Wardell, 297 Mich App at 133 n 1*. An argument can be made that the substantive analysis and statements on jurisdiction were rendered nonbinding obiter dicta given the inclusion of these footnotes. See *People v Peltola, 489 Mich 174, 190 n 32, 803 NW2d 140 (2011)* ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, 'lack the force of an adjudication.'") (citation omitted).

7.202(6)(a)(iii).[8] The same can be said when a parent or grandparent files a motion for, or to modify, parenting or grandparenting time, if indeed the nature of the request is such that granting the motion would effectively award custody to a party or alter the custodial arrangement or environment.[9] See Stevens v Stevens, [*634] 86 Mich App 258, 270; 273 NW2d 490 (1978) ("When the requested [visitation] modification amounts to a change in the established custodial environment, the trial court should not grant such a modification unless it is persuaded by clear and convincing evidence that the change would be in the best interests of the child.").

Once again, the trial court's postjudgment order here did [***53] not influence where the minor child would live, and the order did not change, either directly or effectively, the legal or physical custody arrangement; Father retained sole legal and physical custody of the child. And the postjudgment motion for grandparenting time did not request, either directly or effectively, a change of legal or physical custody relative to the child, so such a change was not even a possibility.

The Supreme Court's order in *Thurston, 469 Mich 1009; 677 N.W.2d 28*, which was referred to in *Rains*, does not add much to [**266] the analysis, in that, it essentially mirrors *Rains*. The *Thurston* order provided:

> In lieu of granting leave to appeal, the . . . order of the Court of Appeals is vacated, and the case is remanded to that Court for plenary consideration. MCR 7.302(G)(1). The divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children. The . . . order of the Saginaw Circuit Court granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the State of New York, the order is one *[***54] affecting* the custody of a minor . . . . Therefore, the . . . order is final, and appealable by right. [*Thurston, 469 Mich 1009; 677 N.W.2d 28* (quotation marks omitted).]

Despite the failure of the plaintiff in *Thurston* to frame the motion as one that also sought a change of custody, an appeal of right still arose because the trial [*635] court's order allowing the change of domicile to New York *effectively* changed the custody arrangement. In no way do *Thurston* or *Rains* suggest that *any and all* postjudgment orders on motions for change of domicile are appealable of right; it is only when a domicile motion has the potential of effectively changing custody or the established custodial environment that an appeal of right is provided. The majority posits that "[i]n *Thurston*, . . . despite the fact that the trial court's order that granted the mother's motion for change in domicile did not alter the award of joint legal and physical custody, the Supreme Court still held that the order was one affecting the custody of a minor." While the short order in *Thurston* may not be entirely clear, I conclude, contrary to the majority's construction of the order, that the *Thurston* Court held that the order changing domicile effectively altered custody. [***55] I reach this conclusion given the Court's references to the existing "joint" custody award, the "joint" custodial environment, the failure of the plaintiff to "mention *a change of custody*," and the fact that the defendant had nearly daily contact with the children before the change of domicile. *Thurston, 469 Mich 1009; 677 N.W.2d 28* (emphasis added). Considering that the *Thurston* plaintiff was moving to New York State, it is doubtful that the existing custody award was not

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[8] I do appreciate that an "established custodial environment" may differ from a specific custody award set forth in an order, e.g., there can be an order of joint physical custody, yet the established custodial environment could be with just one of the parents. See MCL 722.27(1)(c); Berger v Berger, 277 Mich App 700, 707; 747 NW2d 336 (2008).

[9] Of course, if a grandparent effectively seeks custody, it would be necessary for the grandparent to satisfy the criteria in MCL 722.26b regarding actions for custody by third persons.

effectively changed.[10] **[*636]** As stated earlier, in this case Father's sole legal and physical custody of the child was not subject to possible divestment or alteration in the lower court proceedings in this case.

The crux of the majority's position on the issue regarding whether Father has an appeal of right is as follows:

> A parent has a fundamental right, one that is protected by the *Due Process Clause of the Fourteenth Amendment*, to make decisions concerning the care, custody, and control of his or her child. **[**267]** It cannot be disputed that a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child. Although a parent has denied grandparenting time, a grandparent may obtain an order for grandparenting time if the grandparent proves by a preponderance of the evidence that the denial of grandparenting time will create a substantial risk of harm to the child and if the trial court finds by a preponderance of the evidence that a grandparenting-time order is in the child's best interests. Because a grandparenting-time order overrides a parent's legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child. Thus, **[***57]** when a parent has legal custody of the child, an order regarding grandparenting time is a postjudgment order affecting the custody of a minor. *MCR 7.202(6)(a)(iii)*. Because Father had legal custody of [the child], we hold that the . . . order was a "final judgment" or "final order" under *MCR 7.202(6)(a)(iii)* and, therefore, appealable by right, *MCR 7.203(A)(1)*.]

I fully agree with the majority that a parent has a fundamental constitutional right, under due process **[*637]** principles, to make decisions regarding the care, custody, and control of his or her child, and that right has heightened protection from governmental interference. *In re Sanders, 495 Mich 394, 409; 852 NW2d 524 (2014)*. If I understand its analysis correctly, the majority is concluding that a grandparenting-time order entered against a parent's wishes interferes with or affects the parent's fundamental constitutional right to make decisions regarding the care of his or her child, which equates to interfering with or affecting the parent's legal custody for purposes of *MCR 7.202(6)(a)(iii)*. Because "legal" custody "is understood to mean decision-making authority as to important decisions affecting [a] child's welfare," *Grange Ins Co, 494 Mich at 511*, the majority is necessarily of the view that the decision of a parent to disallow grandparenting time constitutes **[***58]** an important decision affecting a child's welfare. Therefore, under the majority's reasoning, the postjudgment order here affected Father's legal custody of the child, i.e., his decision-making authority, considering that the order awarded grandparenting time contrary to his decision on the matter.[11] I surmise that part of the majority's logic in deciding that a postjudgment, grandparenting-time order is one affecting constitutional rights and legal custody is grounded in the fact that a

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[10] I note that a similar situation was recently addressed in *Sulaica v Ramsey, 308 Mich App 568, 576; 866 NW2d 838 (2014)*, wherein this Court, after reviewing *Rains*, *Wardell*, and *Thurston* held, consistently with my analysis, as follows with respect to a jurisdictional challenge under *MCR 7.202(6)(a)(iii)*:

> In this case [involving an underlying order of joint physical custody], the trial court's orders affected the child's domicile *and substantially reduced the amount of time plaintiff can spend with the child as a result of the child's move from Michigan to Florida*. Accordingly, we find that both of the orders from which plaintiff appeals **[***56]** were orders "affecting the custody of a minor" and that they are appealable as of right. [Citations omitted; emphasis added.]

[11] Although not expressly discussed by the majority, it would appear, given the majority's analysis and reasoning and its acceptance of the principles in *Wardell* and *Rains*, that it would have allowed Deborn and James Granneman an appeal of right had the trial court denied their motion for grandparenting time.

grandparent is an outside or third party, not simply an opposing parent.

I respectfully disagree with the majority's analysis, because it reflects an overly broad construction of MCR 7.202(6)(a)(iii) that is not consistent with the language of the court rule, thereby undermining our Supreme [*638] Court's intent. It is well-accepted and beyond reasonable dispute that there are three custodial classifications [***59] related to both the physical and legal custody of a child—(1) no custody, (2) sole custody, and (3) joint custody. See MCL 722.27(1)(a) (stating that a court may "[a]ward the custody of the child to 1 or more of the parties involved"); MCL 722.26a (concerning joint custody). Keeping [**268] this in mind, when MCR 7.202(6)(a)(iii) speaks of a postjudgment order "affecting the custody of a minor," it is necessarily concerned solely with orders that address motions that had effectively sought to change custody, because the *custody* of a minor would not be *affected* in deciding motions unrelated to altering a custodial classification and arrangement. If a parent has sole legal custody, and a motion is filed for straightforward parenting or grandparenting time, the postjudgment order resolving the motion cannot be an order "affecting the custody of a minor" MCR 7.202(6)(a)(iii). This is true given that "custody" was not in dispute and could only have been affected had a possibility existed that the parent's sole legal custody would be modified in a manner that left the parent with "no" or "joint" legal custody. When, in light of the nature of a motion filed by a party, a postjudgment dispute will definitively result in no change of custody, as between the three recognized custodial classifications, [***60] the ultimate order will simply never affect custody.

The majority is advocating in favor of an appeal of right, not with respect to postjudgment orders affecting custody as set forth in MCR 7.202(6)(a)(iii), but in regard to postjudgment orders affecting the exercise of custodial rights, affecting the parameters of earlier custody awards, or affecting decisions made in relationship to having custody of a child, *which do not reach the level of potentially changing custody, i.e., affecting the custody of a child.* The majority's reasoning [*639] thus opens a Pandora's box for litigants to argue that an appeal of right exists in cases intended to be appealable only by application for leave, merely because custody-related rights, parameters, and decisions, but not custody changes, were litigated.[12] While the postjudgment order in this case may have affected or interfered with Father's decision to disallow grandparenting time, it did not affect or potentially affect his legal custody of the minor. Father retained sole legal custody of his child, and he was never in danger of losing sole legal custody.

Again, MCR 7.202(6)(a)(iii) only mentions custody; it does not refer to parenting time, grandparenting time, or visitation. Therefore, I am convinced that our Supreme Court did not intend to extend appeals of right to postjudgment visitation orders or any other orders that did not address efforts to change custody.[13] In sum, I conclude, in the simplest of terms, that postjudgment custody decisions are appealable of right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(iii), and that postjudgment grandparenting- and parenting-time decisions are appealable by applications for leave to appeal under MCR 7.203(B). I would therefore dismiss Father's appeal for lack of jurisdiction under MCR 7.203(A). Accordingly, I respectfully dissent.

/s/ William B. Murphy

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[12] Under the majority's analysis, any and all subsequent motions regarding any type of modification to the existing grandparenting [***61] -time award will be appealable of right.

[13] The majority's opinion could be interpreted as suggesting that had this case simply involved a parent seeking parenting time, an application for leave would have been required. I am not prepared to recognize a dichotomy wherein grandparents seeking grandparenting time have an appeal of right if their postjudgment motion is denied, but the only avenue for relief as to a parent who is denied a request for parenting time is an application for leave. This would improperly elevate the appellate rights of grandparents [***62] relative to a minor over the rights of the minor's parents.

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STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 10 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 10

Massey v. Mandell

Supreme Court of Michigan

April 4, 2000, Argued ; July 11, 2000, Decided ; July 11, 2000, Filed

No. 115398

Reporter
462 Mich. 375 *; 614 N.W.2d 70 **; 2000 Mich. LEXIS 1415 ***

MAUREEN MASSEY, Personal Representative of the Estate of Jeremy Massey, and Maureen Massey, individually, Plaintiff-Appellee, v JOANNE MANDELL and CAMP NIOBE, Defendants-Appellants, and THE CHILDREN'S CENTER, LISA DILG, TIM HAWLEY and CARRIE DORNAN, Defendants.

Prior History: [***1] Wayne Circuit Court, Amy P. Hathaway, J. Court of Appeals, D. E. HOLBROOK JR. and MICHAEL J. KELLY, JJ. and GAGE, P.J. (Docket No. 219751).

Massey v. Children's Ctr., 1999 Mich. App. LEXIS 2960 (Mich. Ct. App., Aug. 16, 1999)

Disposition: The trial court's properly denied the camp's and Massey's motion.

Counsel: Donald M. Fulkerson [Westland, MI], for plaintiff-appellee.

Plunkett & Cooney, P.C. (by Christine D. Oldani and Gregory Gromek) [Detroit, MI], for defendants-appellants Mandell and Camp Niobe.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by Janice G. Hildenbrand) [Southfield, MI], for defendants Children's Center and Dilg.

Judges: BEFORE THE ENTIRE BENCH. Chief Justice Elizabeth A. Weaver, Justices Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman. WEAVER, C.J., and YOUNG and MARKMAN, JJ., concurred with TAYLOR, J. CORRIGAN, J. (concurring). CAVANAGH and KELLY, JJ., concurred with CORRIGAN, J.

Opinion by: Clifford W. Taylor

Opinion

[*377] **[**71]** TAYLOR, J.

We granted leave to appeal to consider defendants Camp Niobe's and Joanne Mandell's claim that the trial court had erred in denying their motion to change venue from Wayne County to Lapeer County. Because we conclude that venue in Wayne County was proper, we affirm **[***2]** the judgment of the trial court.

I. Facts and Proceedings Below

Plaintiff's decedent, nine-year-old Jeremy Massey, was a foster child in Detroit. On June 28, 1998, Jeremy participated in an outing sponsored by the Children's Center of Detroit at Camp Niobe in Lapeer County. Tragically Jeremy drowned while in the swimming area at the camp. Maureen Massey filed a lawsuit in Wayne County as personal representative of Jeremy's estate. The lawsuit named as defendants the Children's Center and one of its employees, Lisa **[*378]** Dilg, and Camp Niobe and some of its employees, including Mandell.

The camp and Mandell filed a motion for change of venue, arguing that venue in Wayne County was improper and that, pursuant to *MCL*

600.1629(1)(a); MSA 27A.1629(1)(a) [1] **[***3]** venue in Lapeer County was proper because the camp was located and conducts business in Lapeer County and the drowning took place in Lapeer **[**72]** County. Plaintiff opposed the motion, arguing that the criteria under subd (1)(a) and (b) of the statute did not apply, but that venue in Wayne County was proper pursuant to subd (1)(c) [2] because **[*379]** plaintiff resided there and the Children's Center did business there.

The trial court denied the motion to change venue on the basis that both the plaintiff and the Children's Center were in Wayne County. Camp Niobe and Mandell filed an application for leave to appeal, a motion for immediate consideration, and a request for a stay with the Court of Appeals. The Court of Appeals granted immediate consideration and denied the application and stay "for lack of merit in the grounds **[***4]** presented." [3] The camp and Mandell then filed a motion for immediate consideration, an application for leave to appeal, and a motion for stay with this Court. This Court granted immediate consideration and granted a stay and leave to appeal. [4]

II. Standard of Review

This Court reviews a trial court's ruling in response to a motion to change improper venue under the clearly erroneous standard. *Shock Bros, Inc v Morbark Industries, Inc, 411 Mich. 696, 698-699; 311 N.W.2d 722 (1981)*. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczyk, 443 Mich. 289, 303; 505 N.W.2d 528 (1993)*.

III. Principles of Statutory Construction

In examining a statute, it is our obligation to discern **[***5]** the legislative intent that may reasonably be **[*380]** inferred from the words expressed in the statute. *White v Ann Arbor, 406 Mich. 554, 562; 281 N.W.2d 283 (1979)*. One fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin, 443 Mich. 59, 65; 503 N.W.2d 435 (1993)*. Thus, when the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n, 448 Mich. 22, 27; 528 N.W.2d 681 (1995)*. Concomitantly, it is our task to give the words used by the Legislature their common, ordinary meaning. *MCL 8.3a*; MSA 2.212(1).

IV. The Statute

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[1] *MCL 600.1629(1)(a)*; MSA 27A.1629(1)(a) states:

(1) In an action based on tort . . . seeking damages for . . . wrongful death, all of the following apply:

(a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) *The defendant* resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of *a defendant* is located in that county. [Emphasis added.]

[2] *MCL 600.1629(1)(c)*; MSA 27A.1629(1)(c) states:

(1) In an action based on tort . . . seeking damages for . . . wrongful death, all of the following apply:

* * *

(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:

(i) *The plaintiff* resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(ii) *The defendant* resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county. [Emphasis added.]

[3] Unpublished order, entered August 16, 1999 (Docket No. 219751). Judge Gage dissented indicating she would have granted a stay and leave to appeal.

[4] ***461 Mich. 904, 603 N.W.2d 645 (1999)***.

MCL 600.1629; MSA 27A.1629 in full provides:

(1) Subject to subsection (2) *in an action based on tort or another legal theory seeking damages for* personal injury, property damage, or *wrongful* **[***6]** *death, all of the following apply*:

(a) *The county in which the original injury occurred and* in which *either* of the following applies is a county in which to file and try the action:

(i) *The defendant* resides, has a place of business, or conducts business in that county.

[*381] (ii) The corporate registered office of *a defendant* is located in that county.

[73]** (b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which *either* of the following applies is a county in which to file and try the action:

(i) *The plaintiff* resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of *a plaintiff* is located in that county.

(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which *both* of the following apply is a county in which to file and try the action:

(i) *The plaintiff* resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(ii) *The defendant* resides, has a place of business, or conducts business in that county, or has **[***7]** its corporate registered office located in that county.

(d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

(2) Any party may file a motion to change venue based on hardship or inconvenience.

(3) For the purpose of this section only, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product is sold at retail. [Emphasis added.]

V. Analysis

The parties agree that the original injury for purposes of construing § 1629 was the drowning and that the drowning occurred in Lapeer County. The camp and Mandell argue that they satisfy subd (1)(a) of § 1629 because the original injury occurred in Lapeer County and they reside, have a place of business, or conduct business in Lapeer County. The plaintiff argues however that when subd (1)(a) is carefully analyzed the argument for mandatory venue in Lapeer County fails.

Subd (1)(a) provides that, using the place of original injury (Lapeer County) as the referent, the inquiry is then if either of the following apply:

[*382] (i) *The defendant* **[***8]** resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of *a defendant* is located in that county.

Accordingly, subd (1)(a)(i) requires that "the defendant" reside, have a place of business, or conduct business in the county. [5] **[***9]** Here, we

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[5] The use of the word "the" has a meaning that is different than the word "a." Subd (1)(a)(i) does not say "a defendant" resides, has a place of business, or conducts business in the county. Nor does it say "one of the defendants." Rather, it says "the defendant." Thus, in order for the camp's and Mandell's position to prevail, we would have to read "the" as if it said "a." This we decline to do. "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . ." *Random House Webster's College Dictionary*, p 1382. Moreover, when, as in subd (1)(a), the Legislature has qualified the same word with the definite article "the" in one instance (subd [1][a][i]) and the indefinite article "a" in another instance

have a case with four defendants. [6] The camp and Mandell would satisfy subd (1)(a)(i) if either were the only defendant. Moreover, the Children's Center and Lisa Dilg would not satisfy subd (1)(a)(i) even if they were the only defendant. These circumstances are fatal to the camp's and Mandell's reliance on subd (1)(a)(i). [7]

[74]** Having determined that subd (1)(a)(i) does not apply, we next must determine if subd (1)(a)(ii) required venue be established in Lapeer County. **[*383]** Under this subdivision, venue would be required to be in the county where the original injury occurred if a defendant is a corporation and its registered corporate office is in the same county. "A," as the above makes clear, should be understood to cover a case with more than one defendant and one of them is a **[***10]** corporation. In the case at bar none of the defendants has asserted that it is a corporation or that it has its corporate registered office in Lapeer County. Accordingly, subd (1)(a)(ii) is also inapplicable.

The statute next instructs that, if a county does not satisfy the criteria in subd (1)(a), one must look to subd (1)(b). Under subd (1)(b), Lapeer County would be the proper venue if "the plaintiff" resided there, or had a place of business there or conducted business there or if "a plaintiff" had a registered corporate office there. None of these criteria are satisfied.

The statute next instructs that if a county does not satisfy subd (1)(a) or (1)(b) that one must look to subd (1)(c). Under subd (1)(c), the county in which the original injury occurred is no longer a consideration. Rather, if there is a county wherein "the plaintiff" resides, or has a place of business, conducts business or has its registered office, *and* at the same time "the defendant" resides or has a place of business or conducts business or has its registered corporate office, then such a county is a county in which to try an action. Plaintiff argues that Wayne County comes within subd (1)(c). We **[***11]** cannot agree. There is no question that plaintiff resides in Wayne County. However, subd (1)(c)(ii) also requires that "the defendant" reside, have a place of business, conduct business, or have its registered office in Wayne County before Wayne County would be "a county in **[*384]** which to file and try the action . . . ." *MCL 600.1629(1)(c)*; MSA 27A.1629(1)(c). As before, "the" does not mean "a" and thus the requirements of subd (1)(c)(ii) are not satisfied merely because one or more of the defendants reside or have a place of business or conduct business in Wayne County.

The statute next instructs that if a county does not satisfy subd (1)(a), (1)(b), or (1)(c) one must look to subd (1)(d), which provides:

If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

Thus, we are instructed to consult *MCL 600.1621*; MSA 27A.1621, which provides:

Except for actions provided for in sections 1605, 1611, 1615, and 1629, venue is determined as follows:

(a) The county in which a defendant resides, has a place of **[***12]** business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

(subd [1][a][ii]), and both are within the same subsection of a statute, even more clearly there can be no legitimate claim that this Court should read "the" as if it were "a."

[6] Plaintiff has apparently been unable to serve process on two of the six defendants named in the caption.

[7] Further demonstration that the Legislature itself is familiar with the difference between using "the defendant" and "a defendant" in a venue statute can be seen by the fact that *MCL 600.1621(a)*; MSA 27A.1621(a) says that, in certain circumstances, venue is proper in the county "in which *a* defendant resides . . . ." In contrast with such language, *MCL 600.1629(1)(a)(i)*; MSA 27A.1629(1)(a)(i) provides that venue is proper in the county in which "the defendant resides . . . ."

Sections 1605, [8] 1611, [9] 1615 [10] do not apply here. This means we must look to § 1629, which by its terms refers us to § 1621 or § 1627.

[75]** Applying § 1621 leads to the conclusion that Wayne County was a proper county in which plaintiff was free to file her lawsuit because at least one defendant **[*385]** (The Children's Center) has a place of business and conducts business in Wayne County. Alternatively, applying § 1627 **(which, with several exceptions, provides that venue shall be in a county where all or [***13] a part of the cause of action arose) also supports a Wayne County venue because plaintiff asserts that part of her cause of action arose in Wayne County.**

VI. Conclusion

In summary then, because *MCL 600.1629*; MSA 27A.1629 referred us to *MCL 600.1621*; MSA 27A.1621 or *MCL 600.1627*; MSA 27A.1627 and Wayne County satisfies the venue criteria of §§ 1621 and 1627, venue in Wayne County was proper. Thus, the trial court's properly denied the camp's and Massey's motion.

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

Concur by: Maura D. Corrigan

Concur

CORRIGAN, J. (*concurring*).

I concur in the result reached by the majority, but for a different reason. In my view, the answer to the difficult venue question presented in this case lies in § 1641 of the Revised Judicature Act, which provides in full:

(1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.

[*14]** (2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in section 1629.

[*386] Section 1641 applies to claims involving the joinder of multiple "causes of action." Whether plaintiff's claim in this case involves the joinder of multiple "causes of action" under § 1641 depends on the proper construction of the statutory phrase "cause of action."

When examining a statute, our primary task is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward, 460 Mich. 230, 236; 596 N.W.2d 119 (1999)*. This task begins by examining the language of the statute itself, as the words of a statute provide "the most reliable evidence of its intent." See *id.*, quoting *United States v Turkette, 452 U.S. 576, 593; 101 S. Ct. 2524; 69 L. Ed. 2d 246 (1981)*. If statutory language is clear and unambiguous, the Legislature **[***15]** will be presumed to have intended the meaning plainly expressed, and the language must be applied as written. "No further judicial construction is required or permitted." *Sun Valley, supra at 236*. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Id.* The interpretation of individual words and phrases within a statute is governed by *MCL 8.3a*; MSA 2.212(1), which

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[8] *MCL 600.1605*: MSA 27A.1605 establishes venue for certain real property lawsuits.

[9] *MCL 600.1611*: MSA 27A.1611 establishes venue for actions involving probate bonds.

[10] *MCL 600.1615*: MSA 27A.1615 establishes venue for actions against governmental units.

provides:

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

"Cause of action" is a legal term of art. Therefore, it must be understood according to its "peculiar and appropriate meaning." MCL 8.3a; MSA 2.212(1). Depending on the context in which it is used, the term "cause of action" could mean (1) a **[**76]** particular **[*387]** claim against a particular defendant, (2) a legal theory, or (3) a lawsuit. Black's Law Dictionary (7th ed), p 214, **[***16]** gives three alternate definitions corresponding to these three general ideas:

1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM (4) <<after the crash, Aronson had a cause of action>.

* * *

2. A legal theory of a lawsuit <<a malpractice cause of action>. Cf. RIGHT OF ACTION.--Also termed (in senses 1 & 2) *ground of action*.

* * *

3. Loosely, a lawsuit <<there are four defendants in the pending cause of action>.

Section 1641 describes "causes of action" that are "joined." For purposes of joinder, this Court has repeatedly defined "cause of action," as being "the fact or combination of facts giving rise to or entitling a party to sustain an action." See *Multiplex Concrete Machinery Co v Saxer, 310 Mich. 243, 253; 17 N.W.2d 169 (1945)*; *Brewster Loud Lumber Co v General Builders' Supply Co, 233 Mich. 633, 638; 208 N.W. 28 (1926)*; *Otto v Highland Park, 204 Mich. 74, 80; 169 N.W. 904 (1918)*. Because § 1641 speaks in terms of the joinder of causes of action, this definition **[***17]** of "cause of action," which is generally consistent with the word "claim," best represents the "peculiar and appropriate meaning" of the statutory term in this context.

Understanding "cause of action" to mean "the combination of facts giving rise to or entitling a party to **[*388]** sustain an action," e.g., *Multiplex Concrete Machinery, supra at 253*, supports the conclusion that separate claims against various defendants amount to separate "causes of action." In this case, because each of plaintiff's claims involves the alleged negligence of a different person or entity, each claim involves a different "combination of facts" entitling plaintiff to "sustain an action," and, therefore, each amounts to a separate "cause of action." The conclusion that each claim amounts to a separate "cause of action" is further supported by the fact that defendant could have elected to sue any one of the defendants alone without joining her claims against the other defendants. [1]

[*18]** Section 1641 is not a substantive venue provision. Standing alone, it does not instruct a litigant where to file an action. Rather, it demands reference to the various substantive venue statutes. Section 1641 explains that when a case involves joined "causes of action," the entire case may be brought in any county in which it would have been proper to bring one of the various joined causes of action, if that cause of action had been sued upon separately. To determine whether a particular county would have been a proper venue for one of

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[1] The Court of Appeals, in *Schultz v Silver Lake Transport, Inc, 207 Mich. App. 267, 273; 523 N.W.2d 895 (1994)*, reached a different conclusion on this issue. There, the Court of Appeals held that a negligence suit against several defendants residing in different counties did "not involve the joinder of separate claims, but a single claim against multiple defendants." *Schultz* did not cite any authority for its conclusion that a tort claim brought against several defendants for damages arising from a single accident does not involve the joinder of separate claims. Nor did the Court of Appeals explain its conclusion. Accordingly, I would reject the conclusion reached in *Schultz, supra*.

the various joined causes of [*389] action sued upon separately, one must refer to whichever substantive venue statute is applicable. [2]

Subsection 1641(2) provides an exception to the general rule set forth in subsection 1641(1) that venue for the entire case is proper in any county in which one of the [**77] joined causes of action could have been brought separately. In cases involving joined causes of action, [***19] where at least one cause of action is "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death," venue must be "determined" according to the rules of § 1629. Section 1629 is the substantive venue statute applicable to causes of action sounding in tort and wrongful death. Subsection 1641(2) creates a preference for § 1629 over the other substantive venue statutes.

Consider, for instance, a complaint that joins a cause of action sounding in tort with a cause of action sounding in contract. The proper venue for the tort cause of action would be determined by reference to § 1629, which is the substantive venue provision applicable to tort actions. The proper venue for the contract cause of action would be determined by reference to § 1621, which is the substantive venue provision applicable to contract actions. Under the general rule set forth in subsection 1641(1), either of these venues would be permissible for the entire case. Under the exception set forth in subsection 1641(2), however, only the venue determined proper by reference to § 1629 would be permissible for the entire case. Thus, the practical effect of subsection [***20] [*390] 1641(2) is that, in cases involving the joinder of multiple causes of action, venues determined by reference to § 1629 take precedence over venues determined by reference to the other substantive venue provisions.

Applying the rules of § 1641 and § 1629 to the facts of this case, it becomes evident that the trial court did not clearly err in determining that Wayne County is a proper venue. If plaintiff had brought suit against only the Children's Center, then venue would have been proper in Wayne County under § 1629. Subsection 1629(1)(a) would not apply, because the original injury occurred in Lapeer County and the Children's Center is a Wayne County organization. Subsection 1629(1)(b) would not apply because the original injury occurred in Lapeer County and plaintiff is a Wayne County resident. Wayne County would satisfy the criteria of subsection 1629(1)(c), however, because no county satisfied the criteria of subsections (1)(a) or (1)(b), plaintiff is a Wayne County resident, and the Children's Center has its place of business in Wayne County.

On the other hand, if plaintiff had brought suit against only defendant Camp Niobe, venue would have been proper only in Lapeer County [***21] under subsection 1629(1)(a), because the original injury occurred in Lapeer County and Camp Niobe has its place of business in Lapeer County. Because plaintiff elected to bring this suit against *both* the Children's Center and Camp Niobe (as well as a number of the individual agents of those entities), this case involves the joinder of multiple "causes of action." Under the general rule set forth in § 1641, venue would be proper in any county in which one of the joined causes of action could have been brought separately. [*391] In this case, as set forth above, that would include both Wayne County (for the cause of action against the Children's Center) and Lapeer County (for the cause of action against Camp Niobe). Because each of these possible venues is "determined" by application of the substantive rules of § 1629, the exception set forth in subsection 1641(2) would have no practical effect in this case.

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

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[2] The substantive venue statutes are §§ 1605, 1615, 1621, 1627, 1629, and 1635.

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 11 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 11

State rules current with changes received through October 15, 2021.

Rule 7.203. Jurisdiction of the Court of Appeals.

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1)A final judgment or final order of the circuit court, or court of claims, as defined in *MCR 7.202(6)*, except a judgment or order of the circuit court

(a)on appeal from any other court or tribunal;

(b)in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in *MCR 7.202(6)(a)(iii)*–(v) is limited to the portion of the order with respect to which there is an appeal of right.

(2)A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

(B) Appeal by Leave. The court may grant leave to appeal from:

(1)a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right;

(2)a final judgment entered by the circuit court on appeal from any other court;

(3)a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;

(4)any other judgment or order appealable to the Court of Appeals by law or rule;

(5)any judgment or order when an appeal of right could have been taken but was not timely filed.

(C) Extraordinary Writs, Original Actions, and Enforcement Actions. The court may entertain an action for:

(1)superintending control over a lower court or a tribunal immediately below it arising out of an action or proceeding which, when concluded, would result in an order appealable to the Court of Appeals;

(2)mandamus against a state officer (see *MCL 600.4401*);

(3)habeas corpus (see *MCL 600.4304*);

(4)quo warranto involving a state office or officer;

(5)any original action required by law to be filed in the Court of Appeals or Supreme Court;

(6)any action to enforce a final order of an administrative tribunal or agency required by law to be filed in the Court of Appeals or Supreme Court.

(D) Other Appeals and Proceedings. The court has jurisdiction over any other appeal or action established by law. An order concerning the assignment of a case to the business court under *MCL 600.8301 et seq.* shall not be appealed to the Court of Appeals.

(E) Appeals by Prosecution. Appeals by the prosecution in criminal cases are governed by *MCL 770.12*, except as provided by *MCL 770.3*.

(F) Dismissal.

(1) Except when a motion to dismiss has been filed, the chief judge or another designated judge may, acting alone, dismiss an appeal or original proceeding for lack of jurisdiction.

(2) The appellant or plaintiff may file a motion for reconsideration within 21 days after the date of the order of dismissal. The motion shall be submitted to a panel of 3 judges. No entry fee is required for a motion filed under this subrule.

(3) The clerk will not accept for filing a motion for reconsideration of an order issued by a 3-judge panel that denies a motion for reconsideration filed under subrule (2).

History

Rule 7.203(E) adopted March 30, 1989, eff October 1, 1989; Rule 7.203(A) repealed and replaced December 15, 1993, eff February 1, 1994; Rule 7.203 amended imd eff December 30, 1994; Rule 7.203 clarified March 31, 1995, to apply to crimes committed on or after December 27, 1994, and extended until June 30, 1995; Rule 7.203 extended June 19, 1995, until October 15, 1995; Rule 7.203 extended October 13, 1995, until August 15, 1996; Rule 7.203(A) amended October 19, 1995, eff January 1, 1996; Rule 7.203(F) adopted eff September 1, 1999; Rule 7.203(A)(1) amd eff November 30, 1999; Rule 7.203(A)(4) adopted eff February 1, 2000; Rule 7.203(A)(3) amended eff September 11, 2001; Rule 7.203(A) amended eff September 1, 2002; Rule 7.203(F)(3) amended eff May 1, 2003; Rule 7.203(G) adopted eff October 5, 2004; Rule 7.203(A) amended eff January 1, 2006; Rule 7.203(D) amended eff September 1, 2013; Rule 7.203(B) amended eff May 7, 2014; Rule 7.203(G) amended eff December 14, 2016.

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STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 12 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE

DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S

APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 12

Henry v. Dow Chem. Co.

Supreme Court of Michigan

July 31, 2009, Filed

No. 136298

Reporter
484 Mich. 483 *; 772 N.W.2d 301 **; 2009 Mich. LEXIS 1606 ***

GARY HENRY and ALL OTHERS SIMILARLY SITUATED, Plaintiffs-Appellees, v DOW CHEMICAL COMPANY, Defendant-Appellant.

Subsequent History: Remanded by *Henry v. Dow Chem. Co., 2016 Mich. LEXIS 1323 (Mich., June 28, 2016)*

Prior History: *Henry v. Dow Chem. Co., 2008 Mich. App. LEXIS 180 (Mich. Ct. App., Jan. 24, 2008)*

Judges: [***1] Chief Justice: Marilyn Kelly. Justices: Michael F. Cavanagh, Elizabeth A. Weaver, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, Diane M. Hathaway.

Opinion by: Elizabeth A. Weaver

Opinion

[*488] [**303] BEFORE THE ENTIRE BENCH

WEAVER, J.

Class action litigation in Michigan is governed by the Michigan Court Rules, and *MCR 3.501(A)(1)* specifically sets forth the prerequisites for class certification. These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. [1]

In this case we consider the proper analysis a court must conduct when determining whether the prerequisites for class certification have been met. Additionally, we consider whether this particular class of plaintiffs was erroneously certified by the circuit court.

In deciding these questions, we conclude that a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in *MCR 3.501(A)(1)* is in fact satisfied. A court should avoid making determinations on the merits of the underlying claims at the class [***2] certification stage of the proceedings.

Additionally, we remand this case to the circuit court for clarification of its analysis of *MCR 3.501(A)(1)(c)* and (d) in light of our opinion today.

I. FACTS AND PROCEDURAL BACKROUND

This case arises from allegations that defendant, Dow Chemical Company, negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, from its Midland plant into the Tittabawassee River. The representative plaintiffs allege that they, along with the proposed class members, have incurred property damage caused by the dioxin contamination. Plaintiffs' claims are based on theories of [*489] negligence and nuisance. This dispute concerns the circuit court's decision to grant plaintiffs' motion for class certification.

[1] See *infra* at 11-12 for the complete court rule containing the prerequisites for class certification.

At the outset, we note that Dow's alleged dioxin contamination of the Tittabawassee **[**304]** River has been the subject of a prior appeal in this Court (*Henry I*). [2] In *Henry I*, we addressed plaintiffs' allegations that dioxin negligently released by Dow caused a risk of harm to their health. [3] In *Henry I*, we articulated the basic facts and procedural history surrounding the alleged dioxin contamination as follows:

> Defendant, The Dow Chemical **[***3]** Company, has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. The plant has produced a host of products, including, to name only a few, "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chloropyrifos, Dursban and 2, 4, 5-trichlorophenol." Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, *Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan*, May 25, 2004, p 4.
>
> According to plaintiffs and published reports from the MDEQ, defendant's operations in Midland have had a deleterious effect on the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects.
>
> By spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain. Further investigation by the MDEQ indicated that defendant's **[***4]** Midland plant was the likely source of the dioxin. **[*490]** Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, p 42 (identifying Dow's Midland plant as the "principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils").
>
> In March 2003, plaintiffs moved for certification of two classes in the Saginaw Circuit Court. The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant. This latter class consists of 173 plaintiffs and, by defendant's estimation, "thousands" of putative members.
>
> Defendant moved under MCR 2.116(C)(8) for summary disposition of plaintiffs' medical monitoring claim. The Saginaw **[***5]** Circuit Court denied this motion, and denied defendant's subsequent motions for reconsideration and for a stay of proceedings.
>
> After the Court of Appeals denied defendant's motion for peremptory reversal and emergency application for leave to appeal, the defendant sought emergency leave to appeal in this Court. Discovery and other preliminary proceedings on plaintiffs' motion for class certification continued in the Saginaw Circuit Court until, on June 3, 2004, we **[**305]** stayed the proceedings below and granted defendant's application for leave to appeal. [4]

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[2] *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005) (*Henry I*).

[3] *Id.* at 67.

[4] *Id.* at 69-70.

Given that plaintiffs did not allege a *present* medical injury, we concluded that plaintiffs did not assert a viable negligence claim recognized by Michigan common **[*491]** law. [5] Therefore, we reversed the circuit court's denial of Dow's motion for summary disposition with regard to plaintiffs' medical monitoring claims and remanded the matter to the circuit court for entry of an order of summary disposition accordingly. [6]

On remand, the circuit court addressed plaintiffs' motion for class certification with respect to the remaining claims **[***6]** of negligence and nuisance, which are the subjects of the present appeal. The current proposed class consists of persons owning real property within the 100-year flood plain of the Tittabawassee River on February 1, 2002. [7] The proposed class is estimated by plaintiffs to consist of approximately 2,000 persons.

The circuit court certified the proposed class, concluding that the prerequisites for class certification in *MCR 3.501(A)(1)* were met. Specifically, the circuit court ruled that joinder of approximately 2,000 persons is impracticable, the question of Dow's allegedly negligent **[*492]** pollution is common to all plaintiffs, the mere fact that damages may be individualized is not sufficient to defeat class certification, the plaintiffs' property claims arise from the same alleged actions of Dow, the class members share common legal and remedial theories, and the representative plaintiffs are able to fairly and adequately protect the interests of the proposed class members.

Additionally, the circuit court determined that maintenance of this suit as a class action is the superior method of adjudication given that denial of class certification may result in up to 2,000 individual suits against Dow. The circuit court further reasoned that a class action would be manageable here because the class members all reside in the allegedly polluted area and similar evidence would be required to establish Dow's negligence with respect to each class member.

The Court of Appeals granted **[***8]** Dow's application for leave to appeal from the circuit court order granting class certification. In a divided decision, the Court of Appeals affirmed the class certification with regard to the issue of Dow's liability only. [8]

The lead opinion concluded that class certification on *all* issues, including the **[**306]** issue of damages, is proper. [9] **[*493]** The lead opinion relied on the MDEQ findings submitted by

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[5] *Id. at 81.*

[6] *Id. at 102.*

[7] Plaintiffs define the scope of the 100-year flood plain of the Tittabawassee River as the geographic area bounded on the west and south by River Road and Stroebel Road, including areas on the west and south side of those roads, and bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including areas on the east and north side of those roads.

The Michigan Department of Environmental Quality provides the following information regarding "floodplains" on its website:

> A river, stream, lake, or drain may on occasion overflow [its] banks and inundate adjacent land areas. The land that is inundated by water is defined as a floodplain. In Michigan, and nationally, the term floodplain has come to mean the land area that will be inundated by the overflow of water resulting from a 100-year flood (a flood which has a 1% chance of occurring any given year). <http://www.michigan.gov/deq/0,1607,7-135-3313_3684_3725---,00.html> **[***7]** (last accessed July 14, 2009).

[8] *Henry v Dow Chem Co, 2008 Mich. App. LEXIS 180, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 266433).*

[9] The lead opinion reviewed the order for clear error and concluded that because neither party requested an evidentiary hearing in the circuit court, there were no factual findings to review. *Henry, supra at 7-8* (opinion of Fort Hood, J.). Additionally, the lead opinion concluded that the circuit court properly relied on caselaw in support of its decision to grant certification. *Id. at 8.* The lead opinion referred to two published Court of Appeals opinions in which class certification was **[***9]** deemed inappropriate: *Zine v Chrysler Corp, 236 Mich App 261; 600 NW2d 384 (1999)*, and *Timman v Blue Cross & Blue Shield, 264 Mich App 546; 692 NW2d 58 (2004)*. After reviewing those cases, the lead opinion concluded that both cases required more of an individualized inquiry than in the present case and, therefore, the present case is factually distinguishable. *Henry, supra at 8-11* (opinion of Fort Hood, J.).

plaintiffs and held that, in light of the MDEQ's findings and the fact that the parties presented contradicting theories of the dioxin contamination, the circuit court did not clearly err. [10]

A partial concurrence to and partial dissent from the lead Court of Appeals opinion agreed that the circuit court did not err in certifying the class with respect to Dow's liability, but concluded that individualized questions prevailed with respect to the issue of damages. Thus, the partial concurrence and partial dissent reasoned that a bifurcated proceeding would be the most appropriate manner of adjudication. [11]

[*494] The Court of Appeals dissent concluded that the circuit court did not engage in a "rigorous analysis" to determine whether the prerequisites for class certification are met, as required by *Gen Tel Co of the Southwest v Falcon, 457 U.S. 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982)*. Therefore, the dissent concluded that the class was erroneously certified with respect to *all* issues. [12]

[307]** This Court granted Dow's application for leave to appeal, asking the parties to address, among other issues, whether the federal "rigorous analysis" requirement for class certification **[***12]** also applies to state class actions and whether this particular class of plaintiffs was properly certified by the circuit court. [13]

[*495] II. STANDARD OF REVIEW

In order to resolve the issues presented in this case, this Court must first consider the proper application of *MCR 3.501(A)*. The proper interpretation and application of a **[***13]** court rule is a question of

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[10] The MDEQ's findings are set forth in a "declaration" made by the MDEQ. The declaration indicates that some of the levels of dioxin initially discovered near the Tittabawassee River were as high as 2,200 parts per million, which is a concentration 25 times that of the residential direct contact criterion. The declaration further explains that the dioxin was likely transported downstream onto the flood plain during flood events.

The declaration indicates that the MDEQ hired a survey firm to develop a flood plain map and establish the 100-year flood plain at issue. On the basis of the survey results, the MDEQ issued an information bulletin to 2,500 individuals explaining the potential hazards of dioxin exposure and the MDEQ's need for further investigation.

According to the declaration, **[***10]** further investigations confirmed the presence of excessive dioxin concentrations. This discovery permitted the MDEQ to classify each contaminated property as a "facility." The effect of the "facility" designation includes the imposition of various obligations on the affected property owners. Pursuant to state environmental laws, these property owners must notify potential purchasers of the dioxin contamination.

The MDEQ's declaration identifies Dow's Midland facility as the "principal source" of the dioxin. The declaration clarifies that dioxin concentrations from other sources were too low to result in the levels of dioxin discovered.

[11] In a "bifurcated" proceeding, the class would be certified with respect to the issue of Dow's liability. If Dow's liability is established, **[***11]** individual plaintiffs must then choose whether to seek damages on their own. *Henry, supra at 2* (Meter, P.J., concurring in part and dissenting in part). As the partial concurrence and partial dissent reasoned, the circuit court may "use case-management tools to consolidate claims that will involve largely similar proofs on the issue of damages." *Id.*

[12] *Henry, supra at 1* (K.F. Kelly, J., dissenting). The dissent additionally opined that individual issues overwhelmingly predominate over any common issues of fact and law in this case, specifically noting that the flooding pattern is not uniform for each plaintiff involved. *Id. at 5*.

[13] *Henry v Dow Chem Co, 482 Mich 1043; 769 N.W.2d 219 (2008)*. The order asked the parties to consider specifically:

> (1) whether the "rigorous analysis" requirement for class certification that is applied in the federal courts also applies to state class actions, see *Gen Tel Co of the Southwest v Falcon, 457 U.S. 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982)*;
>
> (2) if so, whether the Saginaw Circuit Court engaged in the required rigorous analysis to determine if class certification was appropriate;
>
> (3) whether the plaintiffs met all of the requisites for class certification established in *MCR 3.501(A)(1)*, including the requirement that questions of law or fact common to the members of the class predominate over questions affecting only individual members; and
>
> (4) whether the plaintiffs established that they suffered injury on a class wide basis in order to justify class certification.

law, which we review de novo. [14] This court uses the principles of statutory construction when interpreting a Michigan court rule. [15] We begin by considering the plain language of the court rule in order to ascertain its meaning. [16] "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." [17]

However, we note that this Court has not formally established the standard of review for class certification decisions. Therefore, we take this opportunity to do so. We have held that where a party challenges a trial court's factual findings, a review for clear error is appropriate, and where a party challenges a trial court's exercise of discretion, a review for abuse of discretion is appropriate. [18] Given that the analysis a trial court must **[*496]** undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations, we find it proper to review the trial court's factual findings for clear error and the **[***14]** decisions within the trial court's discretion for abuse of discretion. This differentiated standard of review for class certification decisions is consistent with the mixed nature of a proper class certification analysis.

[14] *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

[15] *Id.*

[16] *Id.* at 705.

[17] *Id.* at 706.

[18] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). In *Herald*, this Court clarified, in the context of the Freedom of Information Act (FOIA), that if a party challenges some underlying fact supporting the trial court's decision, then the appropriate standard of review is clear error, and the reviewing court must defer to the trial court's view of the facts unless the reviewing court is "left with the definite and firm conviction that a mistake has been made by the trial court." *Id.* at 472. However, we further held that "when an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in [FOIA cases] . . . the appellate court must review the discretionary determinations for an abuse of discretion ...." *Id.*

[308]** III. ANALYSIS

The parties dispute whether the federal "rigorous analysis" requirement for class certification also applies to state class actions and whether class **[***15]** certification was appropriate in this particular case.

A. What is the proper analysis for determining whether class certification is justified?

Pursuant to MCR 3.501(A)(1), members of a class may *only* sue or be sued as a representative party of all class members *if* the prerequisites dictated by the court rule are met. Therefore, in order to proceed with a suit in the form of a class action, the following circumstances must exist:

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> **[*497]** (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

Next, MCR 3.501(A)(2) sets forth the following non-exhaustive list of factors that a court should consider when determining whether maintaining a suit as **[***16]** a class action is the "superior" method of adjudication:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
> (i) inconsistent or varying adjudications with respect to individual members of the class that

would confront the party opposing the class with incompatible standards of conduct; or
(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
(b) whether final equitable or declaratory relief might be appropriate with respect to the class;
(c) whether the action will be manageable as a class action;
(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have **[***17]** a significant interest in controlling the prosecution or defense of separate actions. [*MCR 3.501(A)(2)*.]

[*498] It is important to note that the rules governing class certification in *MCR 3.501(A)* very closely mirror the federal prerequisites for class certification found in *FR Civ P 23*. In *Falcon*, the United States Supreme Court reiterated that the class action device for litigation is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual **[**309]** named parties only.'" [19] The Supreme Court concluded that district courts must conduct a "rigorous analysis" of each of the class action prerequisites in *FR Civ P 23* before certifying a class. [20]

Dow argues that the federal "rigorous analysis" requirement should apply to state class actions as well. [21] Dow asserts that representative plaintiffs will *always* allege that their proposed class complies with the prerequisites for class certification, and a trial court should not simply rely on these allegations when deciding whether to certify a class. While Dow concedes that a court may not deny class certification on the ground that plaintiffs are unlikely to prevail **[***18]** on the merits of their underlying claims, Dow argues that this prohibition alone does not relieve plaintiffs of their burden to establish that the prerequisites of class certification have in fact been met.

[*499] Conversely, plaintiffs argue that only *MCR 3.501(A)* governs class certification in Michigan, and that this court rule does not mandate a "rigorous analysis." Additionally, plaintiffs point out **[***19]** that no decision by this Court, or any published opinion by the Court of Appeals, has held that the federal "rigorous analysis" requirement applies to state class actions.

Given that Michigan's requirements for class certification are nearly identical to the federal requirements, we find it reasonable to conclude that similar purposes, goals, and cautions are applicable to both. [22] While it is true that Michigan courts are not bound by any decision requiring a "rigorous analysis," we question whether the purpose of the

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[19] *Falcon, supra at 153* (citation omitted).

[20] *Id. at 161*.

[21] Dow asserts that the "rigorous analysis" requirement has already been incorporated into Michigan caselaw in *Jackson v Wal-Mart Stores, Inc, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 258498), 2005 Mich. App LEXIS 2975 at 3*, quoting *Falcon, supra at 153*.

In *Jackson*, the Court of Appeals reasoned that "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising plaintiff's cause of action,'" and the "rigorous analysis" may necessarily require the court to "'probe behind the pleadings' and analyze the claims, defenses, relevant facts, and applicable substantive law 'before coming to rest on the certification question.'" *Jackson, supra at 3*, quoting *Falcon, supra at 155, 160* (citation and quotation marks omitted).

[22] The Sixth Circuit recognized class actions as a procedural device used "to achieve the economies of time, effort, and expense." *Sterling v Velsicol Chem Corp, 855 F2d 1188, 1196 (CA 6, 1988)*.

strictly articulated class certification prerequisites would be defeated if a representative plaintiff's only burden is to simply state that its proposed class does in fact meet the prerequisites.

Dow argues that this type of lax burden would give courts the authority to "rubber stamp" a plaintiff's allegations that the prerequisites in MCR 3.501(A)(1) have been met. To avoid this danger, Dow urges this Court to clarify that the federal "rigorous analysis" standard applies for state [***20] class actions. However, Dow's argument seems to implicate only two options: either Michigan courts must conduct a "rigorous analysis" for class certification decisions, or Michigan courts may simply accept a plaintiff's bare assertions that the prerequisites for class certification are in fact met. We believe that Dow's argument is unnecessarily narrow in scope.

The plain language of MCR 3.501(A)(1) states that representative plaintiffs may pursue a class action suit [**310] [*500] "*only if*" the enumerated prerequisites are met. Thus, it is apparent that strict adherence to the class certification requirements is required. There is nothing ambiguous about this court rule. A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action. Furthermore, there is no authority in Michigan allowing a party seeking class certification to avoid this affirmative burden.

The next logical inquiry is what a party must show in order to satisfy a court that the prerequisites for class certification are established. More specifically, how must a court *analyze* a party's motion for class certification to determine whether sufficient information exists [***21] to justify certification?

Given that MCR 3.501(A)(1) contains carefully crafted prerequisites for class certification, common sense dictates that at least some greater analysis is required than simply accepting a party's bare assertion that the prerequisites have been met. The United States Supreme Court has labeled this greater analysis as a "rigorous" one in *Falcon*. [23] The problem is that *Falcon* provides little guidance as to what a "rigorous analysis" actually entails. Furthermore, *Falcon* is so factually distinct from the present case that we are unable to draw significant parallel conclusions. [24] What we *can* infer from the *Falcon* decision is that a court [*501] must only certify a class in circumstances where the court has actually been *shown* that the prerequisites for class certification are satisfied.

Before *Falcon*, the United States Supreme Court held that trial courts should not conduct "a preliminary inquiry into the merits" of claims when making a class certification determination. [25] In *Falcon*, the Supreme Court reasoned that because the decision to certify a class involves considerations "'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" a court may at times need to look further than the pleadings to make a determination on class certification. [26] The Supreme Court added that, sometimes, the question of certification will be plainly and adequately answered by the pleadings. [27] After *Falcon*, the Supreme Court clarified that a trial court has broad discretion when determining whether a class should be certified; however, its

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[23] *Falcon*, supra at 161.

[24] *Falcon* is based on federal claims of Title VII discrimination. The most significant issue in *Falcon* dealt with whether it was sufficiently shown that the representative plaintiff had claims that were typical of those of the other class members. The Supreme Court concluded that no showing had been made regarding questions of law or fact that were common to the claims [***22] of the representative employee and of the members of the class he sought to represent. The Supreme Court stated in conclusion that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Id. at 161.

[25] Eisen v Carlisle & Jacquelin, 417 U.S. 156, 177; 94 S Ct 2140; 40 L Ed 2d 732 (1974).

[26] Falcon, supra at 160. [***23] quoting Coopers & Lybrand v Livesay, 437 U.S. 463, 469; 98 S Ct 2454; 57 L Ed 2d 351 (1978) (citation and quotation marks omitted).

[27] *Id.*

discretion must be exercised within the framework of FR Civ P 23. [28]

Now, federal courts must balance both the prohibition against delving into the [**311] merits of claims during the class certification determination with the requirement that courts conduct a "rigorous analysis" to determine whether the class certification prerequisites are satisfied. The Sixth Circuit recognizes that district courts must conduct a "rigorous analysis" to determine [*502] whether the prerequisites in FR Civ P 23 are met. [29] In addition, the United States Court of Appeals for the Sixth Circuit has acknowledged that it is possible to determine that the requirements for class certification are met solely on the basis of the pleadings. [30] Nevertheless, this determination often requires more information than the pleadings provide. [31]

We agree with Dow that a certifying court may not simply "rubber stamp" a party's allegations [***24] that the class certification prerequisites are met. [32] However, the federal "rigorous analysis" requirement does not necessarily bind state courts. [33] We believe that the plain language of MCR 3.501(A) provides sufficient guidance for class certification decisions in Michigan. Given that MCR 3.501(A)(1) expressly conditions a class action on satisfaction of the prerequisites, a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied. A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met. [34] The averments in the pleadings of a party [*503] seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party.

If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper. [35] However, when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the [***26] merits of a party's underlying claims [**312] at this early stage in the proceedings. [36] Similar to the federal district courts,

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[28] Gulf Oil Co v Bernard, 452 U.S. 89, 100-101 S Ct 2193, 68 L Ed 2d 693 (1981).

[29] In re American Med Sys, Inc, 75 F3d 1069, 1078 (CA 6, 1996).

[30] Id. at 1079, citing Weathers v Peters Realty Corp, 499 F2d 1197, 1200 (CA 6, 1974).

[31] Id.

[32] We note that plaintiffs do not contest this argument. In fact, plaintiffs assert that if this Court finds the [***25] need to articulate the proper analysis for class certification, it may find valuable guidance in Sixth Circuit decisions.

[33] See Walters v Nadell, 481 Mich. 377, 390; 751 N.W.2d 431 (2008).

[34] The Sixth Circuit reasoned as follows in *In re American Med Sys*:

> "Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ordinarily the determination should be predicated on more information than the pleadings will provide . . . . The parties should be afforded an opportunity to present evidence on the maintainability of the class action." [*In re American Med Sys*, supra at 1079, quoting *Weathers v Peters Realty Corp*, 499 F2d 1197, 1200 (CA 6, 1974).]

[35] A court may permit discovery before ruling on class certification pursuant to MCR 3.501(B)(3)(b), which states: "The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures."

[36] Beattie v CenturyTel, Inc, 511 F3d 554, 560 (CA 6, 2007). In *Beattie*, the court acknowledged that a "rigorous analysis" must be applied to determine whether the prerequisites for class certification in FR Civ P 23 are met. However, the court also noted as follows:

[*504] state courts also have broad discretion to determine whether a class will be certified. [37]

Certifying courts must be mindful that, when it is necessary to look beyond a party's assertions to determine whether class certification is proper, the courts shall analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case. [38] We believe the above analysis strikes the appropriate balance between the need to ensure that the class certification prerequisites are sufficiently satisfied and the need to preserve a trial court's discretion in making class certification decisions.

B. **[***28]** Did the circuit court engage in an appropriate analysis to determine if the prerequisites for class certification were satisfied in this particular case?

After reviewing the circuit court's decision, we believe its articulation and application of the analysis for class certification is potentially inconsistent with the required analysis. Therefore, we give the circuit court the opportunity to evaluate the class certification prerequisites in light of this Court's articulation of the proper analysis for determining whether class certification is justified.

Again, there are cases where the pleadings alone will be sufficient to establish that the prerequisites are met, and a court should not evaluate the merits of the case at **[*505]** the class certification stage, however, mere repetition of the language of *MCR 3.501(A)(1)* is not sufficient to justify class certification, and there must be an adequate statement of basic facts to indicate that each prerequisite is fulfilled. As we have concluded, at least some greater analysis is required than simply accepting a party's bare assertion that the prerequisites have been met. Thus, a circuit court may not simply accept as true a party's bare statement **[***29]** that a prerequisite is met unless the court independently determines that the plaintiff has at least alleged a statement of basic facts and law that are adequate to support that prerequisite.

In this particular case, before conducting its analysis of the class certification prerequisites, the circuit court announced that it must "accept the allegations of the plaintiff in support of the **[**313]** motion as true." This statement is potentially inconsistent with the standard adopted by this Court today to the extent that it could be read to require courts to accept as true plaintiffs' bare assertions that the class certification prerequisites are met. [39]

It is not clear whether the circuit court's understanding of the prerequisites of *MCR 3.501(A)(1)* was consistent with the proper analysis announced in this Court's decision today. **[***30]** We acknowledge that this case does not present a situation in which plaintiffs provided the circuit court with only a complaint containing bare assertions that the prerequisites of *MCR 3.501(A)(1)* were met and the circuit court granted plaintiffs' motion for class certification on the basis of those assertions **[*506]** alone. Instead, the

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Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff's suit. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177; 94 S. Ct. 2140; 40 L. Ed. 2d 732 (1974)* ("We find nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained **[***27]** as a class action."). *Daffin v. Ford Motor Co., 458 F.3d 549, 553 (6th Cir. 2006)*. [*Beattie, supra at 560.*]

[37] See *In re American Med Sys, supra at 1079*.

[38] In *Jackson*, the Court of Appeals did in fact rely on *Falcon*. However, the Court of Appeals did not lose sight of the prohibition against examining the merits of a case when determining whether to certify a class, even if the certifying court finds it necessary to "'probe behind the pleadings' and analyze the claims, defenses, relevant facts, and applicable substantive law 'before coming to rest on the certification question.'" *Jackson, supra at 3*, quoting *Falcon, supra at 160*, and citing *Neal v James, 252 Mich App 12, 15; 651 NW2d 181 (2002)*.

[39] The trial court's statement of the appropriate standard is similar to the approach previously adopted by the Court of Appeals in *Neal v James, 252 Mich App 12, 15-16; 651 NW2d 181 (2002)*. Therefore, to the extent that *Neal* could be read to require a trial court to accept as true a plaintiff's bare assertion that a class certification prerequisite is met, we overrule *Neal*.

circuit court conducted a two-day hearing and reviewed numerous documents from both parties, including scientific studies, affidavits from experts, and information provided by the MDEQ. In its analysis of MCR 3.501(A)(1)(a), (b), and (e), the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support each of those three prerequisites, and we hold that its analysis of those three prerequisites was sufficient. For MCR 3.501(A)(1)(c) and (d), however, the analysis conducted on the record by the circuit court was not sufficient to meet the proper analysis announced by this Court today. [40]

For MCR 3.501(A)(1)(c) and (d), where the analysis conducted by the circuit court on the record was not sufficient to meet the proper analysis, we do not believe that it is possible to look behind the circuit court's **[*507]** analysis in order to guess whether the circuit court actually conducted the correct analysis or whether the circuit court would have reached the same result if it *had* conducted the correct analysis. Especially given the extensive evidentiary record developed in this case before the class certification decision, the circuit court may have made a valid, independent determination that the plaintiffs had alleged an adequate statement of basic facts and law sufficient to support a finding that MCR 3.501(A)(1)(c) and (d) were met. Nonetheless, **[**314]** because the circuit court potentially used an evaluative framework that is inconsistent with this Court's interpretation of the rule, we remand this case to the circuit court so that it may at least clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met, in light of this Court's decision today. **[***33]** [41]

We do not reach the question of if, and to what extent, the issues involved in this case should be "bifurcated." However, we note that it is within the circuit court's discretion to certify a class on a limited basis and to decertify certain members of the class when it deems it appropriate under MCR 3.501(B)(3). [42] Indeed, the circuit court's order

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[40] For MCR 3.501(A)(1)(c), the typicality prerequisite, the trial court's analysis consisted of a restatement of the standard: a statement that "plaintiffs contend" that their claims "arise from the same **[***31]** course of conduct" and that "they share common legal and remedial theories"; and a quote from a federal district court case stating that the typicality requirement may be satisfied if "there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class." It is unclear from the trial court's analysis whether it independently determined that the plaintiffs alleged basic questions of law and fact sufficient to support their allegation that their legal remedial theories were typical of those of the class.

In the circuit court's analysis of MCR 3.501(A)(1)(d), the adequacy of representation prerequisite, it stated that "[t]he representative parties will fairly and adequately assert and protect the interest of the class." It supported this conclusion by reasoning that "no proof has been submitted to this Court that would indicate that the Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class." In other words, the circuit court did not perform an analysis that sufficiently shows that it independently determined that the plaintiffs would adequately represent **[***32]** the class and also potentially shifted the burden to defendant to show that plaintiffs would *not* adequately represent the class.

[41] To the extent that the circuit court determines that the standard it initially used is inconsistent with the proper standard, it should reanalyze all the prerequisites under MCR 3.501(A)(1). If, however, the circuit court determines that its standard was consistent with the proper standard, it should only revisit MCR 3.501(A)(1)(c) and (d) in order to provide further explanation on the record for its conclusion that the prerequisites were met.

[42] Justice Young states that we have "reversed the Court of Appeals majority's decision that bifurcation on damages is required," and, in doing so, violated this Court's procedural rules because the plaintiffs did not file a cross-appeal on this issue. *Post* at 17. We disagree that the Court of Appeals reached a decision on bifurcation that would have required plaintiffs to cross-appeal the issue in order for it to be before this Court.

We suggest that Justice Young is misreading the Court of Appeals opinions. To the extent that there was a Court of Appeals "decision" on bifurcation, it is because there were two votes in favor of class certification *only* for the issue of liability and two votes against class certification *only* for the issue of whether the commonality prerequisite was met with regard to damages. The Court of Appeals wrote three separate opinions. Henry v Dow Chem Co, unpublished opinion of the Court of Appeals, issued January 24, 2008 (Docket No. 266433), 2008 Mich App LEXIS 180. Judge Karen Fort Hood would have affirmed the trial court's ruling that the class should be certified, without qualification. Judge **[***35]** Patrick Meter, in a partial concurrence and partial dissent, would have certified the class "with regard to defendant's potential liability," but believed that

suggested that it recognizes **[*508]** that it will likely be administratively easier to bifurcate at some point. Given that the most efficient method for conducting the proceedings will likely be affected by how other issues in the case develop, and given the **[*509]** circuit court's extensive familiarity with the complex factual and legal issues presented, we do not think that the circuit court abused its discretion **[**315]** **[***34]** by waiting to determine to what extent bifurcation of the issues involved may be needed.

IV. CONCLUSION

A party seeking class certification bears the burden of establishing that each of the prerequisites for class certification in MCR 3.501(A)(1) is in fact satisfied. It is not sufficient for a certifying court to simply accept a party's assertion that the prerequisites are met. When it is necessary to look beyond a party's assertions in order to assess whether the prerequisites for class certification are met, a certifying court should do so without delving into the merits of the underlying claims involved.

Because the circuit court potentially used an **[***37]** evaluative framework that is inconsistent with this Court's interpretation of the rule and articulation of the proper analysis for class certification, we remand this case to the circuit court so that it may at least clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met, in light of this Court's decision today.

Elizabeth A. Weaver

Marilyn Kelly

Michael F. Cavanagh

Diane M. Hathaway

WEAVER, J.

[*538contd] **[**331contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence, however, this pagination accurately reflects the pagination of the original published document]

I write this separate opinion with regard to the issue of my participation in this case.

In preparation of my 2008 income taxes, it came to my attention that I own 108 shares of Dow Chemical, which I received through a recent inheritance. After I became aware of this information, I asked the Clerk of the Court, Corbin Davis, to notify the parties to this case. Below is a copy of the disclosure statement sent to the parties by Mr. Davis on April 15,2009:

> Justice Weaver has requested that I inform you of the following:
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> In preparation of her 2008 income taxes, it has come to Justice Weaver's attention that she now owns 108 shares in Dow Chemical, which she received through a recent inheritance. Justice Weaver has informed me that she did not own any Dow Chemical stock at the time she sat **[***38]** on this matter in a prior appeal. Henry

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"with regard to damages, individual questions predominate over common questions." Id. 2008 Mich. App. LEXIS 180 at *33 (Meter, P.J., concurring in part and dissenting in part). Therefore, he believed that "the damages phase, should liability be established, must be dealt with on a case-by-case basis." Id. Judge Kirsten Frank Kelly would have reversed the trial court and held that the class could not be certified with regard to any issues because she believed that "individual questions of fact and law predominate over the issues common to the class such that the commonality requirement of MCR 3.501(A) is not met." Id. 2008 Mich. App. LEXIS 180 at *37 (K.F. Kelly, J., dissenting).

Given that only one Court of Appeals judge held that bifurcation was necessary, reading the Court of Appeals opinion to have reached a holding regarding bifurcation requires cobbling together three divergent applications of the commonality prerequisite in MCR 3.501(A)(1). If this Court were to reverse the Court of Appeals holding concerning the commonality prerequisite with regard to damages, there would be **[***36]** no Court of Appeals "decision" requiring bifurcation. This Court *specifically granted leave* on whether the commonality prerequisite was met. ***Henry v Dow Chem Co, 482 Mich 1043; 769 N.W.2d 219 (2008)*** (ordering the parties to address "whether the plaintiffs met all of the requisites for class certification established in MCR 3.501(A)(1), including the requirement that questions of law or fact common to the members of the class predominate over questions affecting only individual members [the commonality prerequisite]"). Therefore, to the extent that there was a Court of Appeals holding regarding bifurcation, it is squarely before this Court.

v Dow Chemical Co, 473 Mich 63; 701 NW2d 684 (2005).

She has been informed that this stock is currently worth approximately $ 10.94 per share, thus making the total value of her stock $ 1,181.52. Pursuant to the *Code of Judicial Conduct Canon 3(C)*:

"A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under *MCR2.003(B)*."

MCR 2.003(B)(5) provides in part that a judge is disqualified when:

[*539] "The judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding."

Justice Weaver believes that the amount of stock she owns in Dow Chemical is not a "more than de minimis interest" that could be substantially affected by this proceeding.

She also states that she has no personal bias or prejudice for or against either party and, therefore, finds no need to recuse herself in this case. However, should either of the parties desire that she recuse herself, she is willing to do so.

Please advise me of your preference in this **[***39]** matter at your earliest convenience.

Justice Young also sent a separate statement to the parties expressing his disagreement with my decision to notify the parties in this manner. Both parties responded that they had no objection to my continued participation in this case.

I bring this issue to the public's attention because it is another example of why this Court needs fair, clear, written rules for disqualification concerning the participation or nonparticipation of Michigan Supreme Court justices. Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. [1] See, e.g., statement or opinion by **[**332contd]** Weaver, J., **[*540]** in *In re JK, 468 Mich 202, 219-225; 661 NW2d 216 (2003)*; *Gilbert v DaimlerChrysler Corp, 469 Mich 883; 669 N.W.2d 265 (2003)*; *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n, 472 Mich 91, 96-104; 693 NW2d 358 (2005)*; *McDowell v Detroit, 474 Mich 999, 1000; 708 N.W.2d 104 (2006)*; *Stamplis v St John Health Sys, 474 Mich 1017, 1017-1018; 708 N.W.2d 377 (2006)*; *Heikkila v North Star Trucking, Inc, 474 Mich 1080, 1081, 713 N.W.2d 254 (2006)*; **[***40]** *Lewis v St John Hosp, 474 Mich 1089, 1089-1090; 711 N.W.2d 351 (2006)*; *Adair v Michigan, 474 Mich 1027, 1044-1051, 709 N.W.2d 567 (2006)*; *Grievance Administrator v Fieger, 476 Mich 231, 328-347; 719 NW2d 123 (2006)*; *Grievance Administrator v Fieger, 477 Mich 1228, 1231-1271; 729 N.W.2d 451 (2006)*; *People v Parsons, 728 NW2d 62, 62-65 (2007)*; *Ruiz v Clara's Parlor, Inc, 477 Mich 1044; 728 N.W.2d 855 (2007)*; *Neal v Dep't of Corrections, 477 Mich 1049, 1049-1053; 728*

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[1] Justice Young now asserts that he feels an "ethical obligation" to raise questions about the manner in which I have handled the issue of my participation in this matter. **[***41]** *Post* at 2 n 1. However, I again note that since 2003, I have raised the issue of the need for clear, written, and fair disqualification rules for Michigan Supreme Court justices, but the "majority of four" (Justice Young, along with Justices Corrigan and Markman and former Chief Justice Taylor) refused to address the issue until 2006, when this Court worked on the issue of disqualification, and the "majority of four" refused to publish the proposed disqualification rules formulated by members of this Court.

In March of this year (2009), after former Chief Justice Taylor's removal from this Court as a result of his overwhelming defeat in the 2008 election, the "remaining three" (Justice Young, along with Justices Corrigan and Markman) voted against publishing proposed rules for disqualification. Fortunately, this year, a majority voted in March 2009 to publish for public comment until August 1, 2009, the three proposals for rules of disqualification to be considered at a public hearing later in 2009.

N.W.2d 857 (2007); *State Auto Mut Ins Co v Fieger, 477 Mich 1068, 1070-1071, 730 N.W.2d 212 (2007)*; *Ansari v Gold, 477 Mich 1076, 1077-1079; 729 N.W.2d 213 (2007)*; *Short v Antonini, 729 NW2d 218, 219-220 (2007)*; *Flemister v Traveling Med Services, PC, 729 NW2d 222, 223-225 (2007)*; *McDowell v Detroit, 477 Mich 1079, 1084-1086; 729 N.W.2d 227 (2007)*; *Johnson v Henry Ford Hosp, 477 Mich 1098, 1099-1100; 729 N.W.2d 515 (2007)*; *Tate v Dearborn, 477 Mich 1101, 1102-1103; 729 N.W.2d 521 (2007)*; *Dep't of Labor & Economic Growth v Jordan, 480 Mich 869, 869-873; 738 N.W.2d 703 (2007)*; *Cooper v Auto Club Ins Ass'n, 739 [*541] NW2d 631, 631-633 (2007)*; and *Citizens Protecting Michigan's Constitution v Secretary of State, 482 Mich 960, 962-964, 755 N.W.2d 157 (2008)*.

Elizabeth A. Weaver

Concur by: Maura D. Corrigan; Marilyn Kelly; Robert P. Young, Jr. (In Part)

Concur

[*530contd] [326contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence, however, this pagination accurately reflects the pagination of the original published document]

CORRIGAN, J. (*concurring in the opinion of YOUNG, J.*).

I join Justice Young's opinion in full. I write separately **[***42]** in order to discuss additional issues raised by this appeal that I believe the trial court should consider on remand before again certifying a class in this case. The trial court's October 21, 2005, opinion and order granting class certification formally defined the class to include "all persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan, on February 1, 2002." The class definition also included a geographic description of the relevant flood plain. But the definition did *not* limit the class to those property owners who are *actually injured* by pollution emanating from the activities of defendant, Dow Chemical Company. Rather, the order defined the class broadly to include all of the approximately 2,000 persons who owned property on approximately 13,000 acres of land. I conclude that such an indiscriminate, overbroad definition of the class failed to comport either with *MCR 3.501* or with the precedent cited in the trial court's order because it included numerous **[**327contd]** class members *with no present injuries*.

Further, such an overbroad class definition would be likely to have significant, negative effects on the hundreds **[***43]** of purported class members who indeed may have no present injuries. It is striking that only about 170 landowners had elected to join this suit as plaintiffs at the time of the trial court's certification decision. [1] The **[*531]** owners of property with no present injuries may reasonably wish *not* to be included in the class because certification of their otherwise unharmed property may *itself* guarantee reduction in their property values; these landowners will never recover against Dow because they cannot allege damages under negligence or nuisance theories, but their property values may collapse further simply as a result of their being lumped into the class.

For this reason, if the trial court on remand again concludes that certification of a class is proper, I would direct the court to limit the class to those property owners with *actual injuries* as a result of Dow's activities.

The actual injury requirement

[1] Indeed, although I agree with Justice Young that the trial court should reconsider whether the proposed class satisfied *each* criterion for class certification on the question of Dow's liability, I agree with the majority that the record presents particularly problematic unanswered questions concerning whether the representative plaintiffs' claims are typical of those of the proposed class, *MCR 3.501(A)(3)(c)*, and whether plaintiffs will "fairly and adequately assert and protect the interests of the class" as class representatives, *MCR 3.501(A)(4)(b)*. **[***44]** See *ante* at 22-23.

It is axiomatic that each member of a plaintiff class must have suffered an actionable injury, which is a prerequisite of any tort claim. "[C]lass members must have suffered actual injury to have standing to sue . . . ." *Zine v Chrysler Corp, 236 Mich App 261, 288; 600 NW2d 384 (1999)*. As the United States Supreme Court opined in *Gen Tel Co of the Southwest v Falcon, 457 U.S. 147, 156; 102 S Ct 2364; 72 L Ed 2d 740 (1982)*: "We have repeatedly held that a class representative must be part of the class and possess the same interest and *suffer the same injury* as the class members." (Emphasis added; citation and quotation marks omitted.) Michigan cases similarly require plaintiffs to "demonstrate with common proof that the members of the class have suffered *a common injury*." *A&M Supply Co v Microsoft Corp, 252 Mich App 580, 599-600; 654 NW2d 572 (2002)* (emphasis added).

Likewise, the federal toxic tort cases relied on by **[***45]** plaintiffs and the trial court involved certification of classes explicitly defined by reference to the members' **[*532]** *present injuries*. For example, the discussion in *Sterling v Velsicol Chem Corp, 855 F2d 1188, 1197 (CA 6, 1988)*, which the trial court quotes at length in its October 21, 2005, order, addresses a class of residents who alleged that they "suffered damages as a result of ingesting or otherwise using . . . contaminated water." *Sterling* involved plaintiffs who lived near a landfill from which toxic chemicals seeped into the ground, contaminating soil and groundwater. Much as in the present case, because several wells near the site tested positive for contamination, all residents within 1,000 acres of the site were advised to stop using their wells for any purpose. Several residents sued under theories including nuisance and negligence. *Id. at 1192-1194*. The United States Court of Appeals for the Sixth Circuit affirmed class certification. But the class did not indiscriminately include *every* resident within the 1,000-acre area; rather, *Sterling's* discussion and holding presuppose **[**328contd]** that each class member had a present injury because "each class member lived in the vicinity of the **[***46]** landfill *and* allegedly *suffered damages as a result of ingesting or otherwise using* the contaminated water." *Id. at 1197* (emphasis added). Similarly, the class in *Olden v Lafarge Corp, 383 F3d 495, 507 (CA 6, 2004)*, was expressly defined as "all owners of single family residences in the City of Alpena whose persons or property *was damaged* by toxic pollutants and contaminants which originated from the Lafarge cement manufacturing facility . . . ." (Emphasis added.) In contrast, as noted, the class certified here broadly included "all persons who owned real property" within the 100-year flood plain, without reference to whether such persons could allege harm as a result of Dow's activities. Because it is apparent that such an overbroad class cannot all allege cognizable claims, I conclude that plaintiffs' proposed class definition is flawed.

[*533] *Present injuries under the torts alleged*

Plaintiffs sued under negligence and nuisance theories. To prove negligence, "a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury." *Henry v Dow Chem Co, 473 Mich 63, 75-76; 701 NW2d 684 (2005)* (*Henry I*) (emphasis in original). **[***47]** *Henry I* created a bright line rule by unambiguously requiring a plaintiff alleging negligence to prove *present physical injury*. Here, plaintiffs cannot show that each land parcel in the 100-year flood plain is presently contaminated with pollution alleged to have originated from Dow's activities. Indeed, studies by the Michigan Department of Environmental Quality (DEQ) expressly show that some of the land is *not* contaminated. Because the owners of uncontaminated property do not have present physical injuries, they cannot allege negligence under Michigan law.

Accordingly, plaintiffs argue that even the uncontaminated properties suffer present injury in fact under a nuisance theory because they may become contaminated in the future. But Dow correctly argues that the purported injury in fact to many of these properties is too speculative to be

recognized in Michigan.

To prove private nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land. *Adkins v Thomas Solvent Co, 440 Mich 293, 303-304; 487 NW2d 715 (1992)*. [2] Because a nuisance is a "nontrespassory invasion," a plaintiff need not show *physical* intrusion upon his land to prove nuisance. *Id. at 302*.

> **[*534]** There **[***48]** are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." [*Id. at 303*.]

Significantly, although nuisance may involve "'threatening or impending danger,'" *id.* quoting *Kilts v Kent Co Supervisors, 162 Mich 646, 651; 127 N.W. 821 (1910)*, a plaintiff cannot prove nuisance "where damage and injury are both predicated on unfounded fear of third parties that depreciates property values," *id. at 312*. "[P]roperty depreciation **[**329contd]** alone is insufficient to constitute a nuisance." *Id. at 311*.

Here, the facts presented by plaintiffs do not suggest that all or even most of the 2,000 proposed class members can allege cognizable nuisance claims. As noted, the DEQ reports that many parcels of land are not physically contaminated. **[***49]** Many more parcels have not even been tested, were never subject to flooding, and are very unlikely to experience flooding even during the next *century*. Crucially, the DEQ's restrictions apply *only* to *contaminated* or *frequently flooded* land--not to *all* land in the 100-year flood plain. [3] Because the class **[*535]** was defined on the sole basis of the geographic boundaries of the 100-year flood plain, much of the circumscribed land has only a one percent chance of flooding in a given year. See *ante* at 3 n 1 (Young, J.). Moreover, the degree of risk of *contamination* from *future* flooding is questionable and somewhat speculative; Dow has already altered its activities and begun remediating past contamination of the river as was required, in part, by the DEQ. [4]

Accordingly, although some landowners may be able to allege present harm from nuisance, many residents of the flood **[***51]** plain certainly cannot. Indeed, the land that is not presently contaminated, that has a low risk of flooding in the future, and that has a largely speculative risk of actual contamination as a result of future flooding, is comparable to the land in *Adkins* where the plaintiffs sought damages based on diminished property values they alleged were caused by contamination in the surrounding area. These plaintiffs' land was not actually contaminated; a groundwater divide prevented the migration of toxic chemicals from the surrounding land. *Adkins*,

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[2] Public nuisance, on the other hand, requires proof of an "unreasonable interference with a right common to all members of the general public." *Adkins, 440 Mich at 304 n 8*. Plaintiffs alleged both public and private nuisance theories.

[3] The March 15, 2004, declaration of Andrew W. Hogarth, chief of the MDEQ's Remediation and Redevelopment Division, specifies that only "locations where dioxin concentrations exceed the residential direct contact criteria" are a designated "facility" for purposes of state restrictions on contaminated land, which include the requirement to inform potential buyers of dioxin contamination. He states that the DEQ also "believes" that property "subject [***50] to frequent flooding by the Tittabawassee River downstream of Midland is a facility." He avers that residents were specifically informed of these definitions in the DEQ's June 2003 Information Bulletin No. 3. As Dow observes, there is no evidence to suggest that uncontaminated property with a low likelihood of flooding in a given year is "subject to frequent flooding" or otherwise designated a "facility" by the DEQ's terms. Similarly, the DEQ's Information Bulletin No. 4, dated March 2004, identified precautions that residents of the flood plain could take "to reduce exposure to dioxins *from the identified areas of contamination*." (Emphasis added.) By their terms, these guidelines do not apply to uncontaminated soil.

[4] I also note, as the DEQ observed in its June 2003, Phase II Final Report, the presence of uncontaminated properties within the 100-year flood plain that are elevated above the flood level as a result of "local natural features or the introduction of clean fill material." Obviously these properties also have a low risk of future contamination from flooding.

440 Mich at 299-300, 318. The Court held that fear-based diminution in property values was an insufficient basis for relief, stating:

> Under such a theory, a cause of action could be stated on behalf of any individual who could demonstrate an effect on property values even if the polluted ground water had **[*536]** neither strayed from defendants' own property, nor disturbed a plaintiff's enjoyment by the fear that it would do so.
>
> If any property owner in the vicinity of the numerous hazardous waste sites that have been identified can advance a claim seeking damages when unfounded public fears of exposure cause property **[**330contd]** depreciation, the ultimate effect might **[***52]** be a reordering of a polluter's resources for the benefit of persons who have suffered no cognizable harm at the expense of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property. [*Id. at 318-319*.]

The very problem identified in *Adkins* is present here. Plaintiffs argue that property values throughout the flood plain have been diminished in part as a result of DEQ warnings to residents concerning possible contamination and steps residents should take to avoid harmful exposure to dioxin-contaminated soil; residents were told, for example, that children and gardeners should avoid prolonged exposure to *contaminated* soil and that certain steps were required if residents wished to move or dispose of such soil. But the DEQ itself *also* reported that various areas of the flood plain were *not* harmfully contaminated, and the state-promulgated restrictions applied only to contaminated or, at most, frequently flooded land. Indeed, the depositions of some flood plain residents explicitly revealed that these residents were not directly affected by pollution and had not altered the use of their land in any way as a result of Dow's **[***53]** alleged polluting activities. Thus, many proposed class members would be able to argue *at most* that their property values decreased simply as a result of publicity concerning pollution of the Tittabawassee River in part due to this lawsuit. But this is precisely the sort of unfounded fear that the *Adkins* Court concluded could not underlie a nuisance claim. **[*537]** Finally, the 170 or so plaintiffs who moved for class certification risk the very problem identified in *Adkins*; by attempting to certify 2,000 class members, most of whom obviously had not yet chosen to participate in the suit and many of whom may not be able to allege damages from present injuries, the plaintiffs virtually guarantee both that Dow's resources will be stretched to defend uncognizable claims at the expense of those plaintiffs who suffer actual harm *and* that any fear-based diminution in property values throughout the flood plain will accelerate as a result of the overbroad class definition. [5] Indeed, not only does the proposed class definition incorrectly suggest that undamaged land is indeed damaged in some way, but the definition likely would suspend all flood plain residents' abilities to sell undamaged land throughout **[***54]** the pendency of this suit, which is already over six years old.

Conclusion

For these reasons, I conclude that the class proposed by plaintiffs is too broad and therefore is untenable. Significantly, it is not even clear that the trial court intended to accept plaintiffs' broad proposed definition when it initially certified the class. I note that the October 21, 2005, order refers to two defining characteristics of the class, one largely geographic but the other apparently based on present injury: "Each member of the class lives in the area alleged to have been damaged. Each

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[5] Dow posits that the 100-year flood plain is too broad an area for a factfinder to conclude that *every* owner suffers a present, non speculative injury sounding in nuisance. Dow reasonably asks: why not the 1,000-year or 1 million-year flood plain? Conversely, plaintiffs would be more likely to properly define a geographically based class if they focused merely on the 10- or 20-year flood plain.

member of the class allegedly *suffered damages* as a result of the release of contaminates in **[*538]** the Tittabawassee River." (Emphasis added.) Accordingly, if the trial court again concludes on remand that class certification is **[***55]** appropriate, I would direct the court to explicitly **[**331]** limit any class definition to property owners who suffer present injuries.

Maura D. Corrigan

Stephen J. Markman

[*509contd] [315contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence, however, this pagination accurately reflects the pagination of the original published document]

KELLY, C.J. *(concurring).*

I fully agree with and sign the majority opinion in this case. I write for the sole purpose of responding to Justice Young's comments regarding the majority's respect for the doctrine of stare decisis. Justice Young repeats a claim that he and Justices Corrigan and Markman have published numerous **[*510]** times this term [1] with the same string of citations. [2] The claim is that their colleagues who comprise the majority in this case have been ignoring precedent. A review of the cases in the string cite serves to illustrate that the claim is simply false.

Justice Young claims that in *Vanslembrouck v Halperin*, [3] the Court ignored *Vega v Lakeland Hosps.* [4] However, *Vanslembrouck* is distinguishable from *Vega* because *Vega* determined that MCL 600.5851(1) is a savings provision, whereas *Vanslembrouck* held that MCL 600.5851(7) is a statute of limitations. Thus, these cases examined the effect of altogether different statutory provisions.

Justice Young also claims that in *Hardacre v Saginaw Vascular Services*, [5] the Court failed to follow *Boodt v Borgess Med Ctr.* [6] However, in *Hardacre*, the Court denied leave to appeal because the allegations in the plaintiff's notice of intent to file an action did not need to comply with *Boodt*. In *Hardacre*, the burden of explication of the standard of care was minimal. [7]

[*511] [316contd]** Nor did the **[***57]** Court ignore precedents with which it disagrees in *Sazima v Shepherd Bar & Restaurant*. [8] Justice Young claims that the Court failed to follow *Chrysler v Blue Arrow Transport Lines*. [9] However, *Sazima* involved exceptions to the "going and coming" rule as set forth in *Camburn v Northwest School Dist*. [10] Thus, the Court was not bound by *Chrysler*.

Justice Young next claims the Court ignored *Smith*

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[1] See, e.g., *Petersen v Magna Corp*, 484 Mich 300; 773 N.W.2d 564; 2009 Mich. LEXIS 1605 (2009) (Markman, J., dissenting), decided July 31, 2009 (Docket Nos. 136542 and 136543); ***Chambers v Wayne Co Airport Auth*, 483 Mich 1081; 765 N.W.2d 890 (2009)** (Corrigan, J., dissenting); ***Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032; 766 N.W.2d 273 (2009)** (Corrigan, J., dissenting); ***Beasley v Michigan*, 483 Mich 1025, 765 N.W.2d 608 (2009)** (Corrigan, J., dissenting); *Juarez v Holbrook*, 483 Mich 970; 764 N.W.2d 216 (2009) (Markman, J., dissenting). Justice Young **[***56]** joined the dissenting statements in *Chambers*, *Scott*, *Beasley*, and *Juarez*.

[2] *Post* at 18 n 28.

[3] *Vanslembrouck v Halperin*, 483 Mich 965; 763 N.W.2d 919 (2009).

[4] *Vega v Lakeland Hospitals at Niles-St Joseph, Inc*, 479 Mich 243; 736 NW2d 561 (2007).

[5] ***Hardacre v Saginaw Vascular Services*, 483 Mich 918; 762 N.W.2d 527 (2009).**

[6] *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 N.W.2d 44 (2008).

[7] See *Roberts v Mecosta Cty Gen Hosp (After Remand)*, 470 Mich 679, 694 n 12; 684 N.W.2d 711 (2004).

[8] *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924; 762 N.W.2d 924 (2009).

[9] *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940).

[10] *Camburn v Northwest School Dist*, 459 Mich 471, 478; 592 NW2d 46 (1999).

v Khouri [11] when it decided *Juarez v Holbrook*. [12] However, in *Juarez*, it was undisputed that the trial court performed a reasonableness analysis in calculating the proper attorney fee award. Therefore, a remand in light *of Smith* was unnecessary.

Likewise, Justice Young is incorrect in claiming that the Court failed to enforce *Thornton v Allstate Ins Co* [13] and *Putkamer v Transamerica Ins Corp of America* [14] in *Scott v State Farm*. [15] In *Scott*, the Court of Appeals undertook a thorough analysis of the relevant no-fault jurisprudence and **[***58]** applied precedent as it has been understood for nearly 30 years.

Finally, the Court did not fail to abide by *Rowland* in *Chambers v Wayne Co Airport Auth*. [16] *Chambers* interpreted *MCL 691.1406*, **[*512]** while *Rowland* interpreted *MCL 691.1404(1)*. Thus, the cases dealt with different statutory provisions and the Court was not bound to extend *Rowland* to the statute at issue in *Chambers*.

In summary, the accusation that the Court has been ignoring precedent is incorrect. Had other Justices been in the majority in some of the decisions complained about, they might well have extended existing precedent to a new area of the law. But the refusal of those in the majority in this case to so extend precedent is quite different from a refusal on their part to apply it. This is a distinction that Justices Young, Corrigan, and Markman would do well to concede.

Marilyn Kelly

[*541contd] [332contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence, however, this pagination accurately reflects the pagination of the original published document]

YOUNG, J.

I write separately to respond to Justice Weaver's separate concurrence.

It would appear from Justice Weaver's separate opinion that I opposed the communication **[***59]** of her late-discovered ownership interest in one of the parties. She states: "Justice Young also sent a separate statement to the parties expressing *his disagreement with my decision to notify* the parties in this manner." *Ante* at 2 (emphasis added). This is patently untrue, as Justice Weaver knows. What I challenged was the *inadequacy* of her disclosure to the parties concerning the nature of her ownership of stock in Dow Chemical. For example, she did not disclose when she actually became the legal owner of stock in Dow Chemical or precisely when she discovered she had this ownership interest. Moreover, she did not disclose the basis for her unilateral determination that her ownership interest is not a "more than de minimis interest" or *why any ownership interest was not itself disqualifying*. In order to ensure that the context of my criticism of her disclosure is provided, I am publishing my own communication to the parties below.

[333contd]** I continue to question Justice Weaver's participation in this case. [1] I believe that

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[11] *Smith v Khouri, 481 Mich 519; 751 NW2d 472 (2008).*

[12] *Juarez, supra.*

[13] *Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986).*

[14] *Putkamer v Transamerica Ins Corp of America, 454 Mich 626; 563 NW2d 683 (1997).*

[15] ***Scott, supra.***

[16] ***Chambers, supra.***

[1] While, consistent with my previous practice, ***Adair v Michigan, 474 Mich 1027, 1052, 709 N.W.2d 567 (2006)*** (statement of Young, J.), I do not "vote" on Justice Weaver's disqualification in this case, I believe I do have an ethical obligation to raise questions about her decision. I note that, contrary to their participation in ***United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n, ___ Mich ___ order of the Supreme Court, entered July 21, 2009 (Docket Nos. 133466 and 133468), 484 Mich. 1; 795 N.W.2d 101; 2009 Mich. LEXIS 1573***, where the Chief Justice and Justice Cavanagh concurred in and signed Justice Hathaway's decision to participate, here they have not joined in Justice Weaver's decision to participate. I have no idea why these justices **[***61]** have chosen to

any ownership interest in a **[*542]** party precludes a judge's participation. MCR 2.003(B)(5) provides that a judge is disqualified when "[t]he judge knows that . . . she . . . has **[***60]** an economic interest in . . . a party to the proceeding or has any other more than a de minimis interest that could be substantially affected by the proceeding." This court rule is written in the disjunctive, which distinguishes an economic interest in a party from every other type of potentially disqualifying interest. Only those "other" types of interests contain an exception for de minimis interests. Without doubt, Justice Weaver has an "economic interest in . . . a party" in this proceeding.

This qualitative distinction made in MCR 2.003(B)(5) between economic interests and other interests is similarly found in the nearly identical federal statute regarding judicial recusal. [2] 28 USC 455(b)(4) disqualifies a federal judge from sitting in a case if he or she "has a financial interest in the subject matter in controversy . . . ." The statute defines "financial interest" as "ownership of a legal or equitable interest, however small." 28 USC 455(d)(4). The United States Court of Appeals for the Tenth Circuit has determined that the federal statutory scheme

> **[*543]** differentiates between two kinds of interests. If the judge has direct ownership, legal or equitable, then disqualification is required regardless of the size of the interest, unless one of the specified exceptions applies. On the other hand, an interest not entailing direct ownership falls under "other interest," and requires disqualification only if the litigation could substantially affect it. [3]

Furthermore, the leading commentators on federal practice and procedure indicate that this statutory provision

> eliminate[s] any **[***62]** dispute about the substantiality of a financial interest. If a judge, or any other person within the statutory language, has *any* financial interest, as that term is defined, however small, in a party or in the subject matter **[**334contd]** in controversy, the judge must recuse. There is no room for discretion. [4]

Under MCR 2.003(B)(5) there was no discretion here for Justice Weaver's continued participation.

My Statement to the Parties

My response, also communicated to the parties, challenging Justice Weaver's disclosure to the parties concerning her stock ownership is restated here as follows: [5]

> In light of her repeated public statements regarding standards for recusal, I regret that Justice Weaver has placed the parties in the awkward position of having to decide whether she will take part in the decision of this **[*544]** case notwithstanding her acknowledged financial interest as an investor in the defendant corporation. I ask that the following public information regarding Justice Weaver's stated

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vote on the disqualification in the one case but have declined to do so in this instance.

[2] Compare 28 USC 455(b)(4), which provides that a judge shall disqualify himself when "[h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," with MCR 2.003(B)(5), which provides that a judge is disqualified when "[t]he judge knows that he . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding." **[***63]** The federal statute was enacted in 1948 and the Michigan court rule was amended in 1995 in light of the 1990 ABA Model Code of Judicial Conduct, which, in pertinent part, was taken from the federal statute.

[3] In re New Mexico Natural Gas Antitrust Litigation, 620 F2d 794, 796 (CA 10, 1980). This is the *same* distinction made in MCR 2.003(B)(5).

[4] Wright and Miller, 13D Federal Practice and Procedure (3d ed), § 3546, pp 76-78 (emphasis in original; citations omitted).

[5] My communication to the parties begins with endnote 2 because Justice Weaver's communication contained one citation and the citations were numbered continuously. Additionally, all citations in the communication have been converted to this Court's standard format.

positions on recusal be taken into consideration in making a decision on her request for remittal.

While I have publicly supported the Court's **[***64]** more than a century old recusal policy, [2] Justice Weaver has been equally publicly critical of that longstanding policy in suggesting that she subscribes to a "higher" standard. [3]
Nevertheless, Justice Weaver claims that her ownership of approximately $ 1,200 in defendant Dow's stock is "not a 'more than de minimis interest.'" She has made this determination herself, which is contrary to her repeated public statements on the question of judicial recusal. [4]

For example, in this Court's March 18, 2009 order on ADM 2009-04 (Proposed Disqualification Rules for Justices), Justice Weaver reiterated her 2006 statement on disqualification and explained that "[i]t is a most basic truth that the person who may be the least capable of recognizing a justice's actual bias and prejudice, or appearance of bias and prejudice, is the justice h[er]self." [5] Presumably consistent with that sentiment, she recused herself in *Kyser v Kasson Twp*, "because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family." [6]

Moreover, Justice Weaver has advocated a disqualification standard that requires judges to recuse themselves if there is merely an *appearance* of **[***65]** impropriety. She has cited with approval *Canon 2 of the ABA Model Code of Judicial Conduct*, which states that "[a] judge shall avoid . . . the appearance of impropriety in all of the judge's activities" and *Model Canon 3(E)(1)*, which states that a judge "shall disqualify . . . herself in a proceeding in which the judge's impartiality might reasonably be questioned." [7]

The disqualification standard that she has publicly championed is an *objective* standard, not a subjective standard to be determined by her say-so. Justice Weaver's "appearance of impropriety" standard is made without **[*545]** regard to whether an individual judge harbors an *actual* bias toward any party in the case being heard:

"[W]hen a judge recuses . . . herself to avoid the appearance of impropriety, the result is that the judge avoids *risking* actual bias. Second, when a judge **[**335]** recuses . . . herself, the judge eliminates the *appearance* of impropriety and thereby engenders public confidence in the judiciary." [8]

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[2] "In short, a justice confronted with a disqualification motion has typically consulted with members of the Court and made a determination whether participation in a particular matter was appropriate. Other than providing counsel, other members of the Court have not participated in the decision." Order of the Michigan Supreme Court, March 18, 2009, p 33 ("March 18, 2009 order") ADM 2009-04 (statement of Young, J.). See also ***Adair v State of Michigan, 474 Mich 1027, 1052, 709 N.W.2d 567*** (statement of Young, [***69] J.).

[3] See, e.g., March 18, 2009 order, *supra* at 9 n 1 (statement of Weaver, J).

[4] So far as I am aware, Justice Weaver did not consult with any member of this Court before announcing her position.

[5] March 18, 2009 order, *supra* at 14.

[6] ***Kyser v Kasson Twp [483 Mich 903; 761 N.W.2d 692 (2009)*** (order denying leave)] and ***[483 Mich 983 (2009)*** (order vacating denial order and granting leave)]. Justice Weaver did not disclose the nature of her "business relationship" that warranted her recusal.

[7] See ***Adair v State of Michigan, 474 Mich 1027, 1047, 709 N.W.2d 567 (2006)*** (statement of Weaver, J.). Justice Weaver does not subscribe to my view that, because Justices cannot be replaced on a case by case basis, a different rule of disqualification must apply to Justices. See ***id. at 1044-45***. On the contrary, she advocates that a disqualified Justice *can* be replaced in such a case.

[8] *Id.* (Emphases added.) Justice Weaver claims that she "has no personal bias or prejudice for or against either party . . . ." Nevertheless, her lack of *actual* bias in this case is irrelevant under her disqualification standard to the question whether the participation of a judge who has an ownership interest in a litigant creates an *appearance* of impropriety.

Accordingly, if her support of the "appearance of impropriety" standard is genuine -- and I assume that she would not have advocated it otherwise -- her *personal* belief that she "has no personal bias or prejudice for or against [***66] either party" and that the total value of her stock is "not more than a de minimis interest" is irrelevant to whether she must recuse herself.

Moreover, Justice Weaver has advocated in her various published statements on disqualification standards that the disqualification decision cannot be solely vested in the judge who is the subject of disqualification but must be reviewed by other members of the Court. [9]

Here, Justice Weaver has made her own determination that her Dow stock ownership is "de minimis" within the meaning of *MCR 2.003(B)(5)*. But there is no basis upon which an objective observer can assess the validity of her claim and decision. Context is essential in considering what level of ownership in a party litigant is "de minimis," and no one but Justice Weaver is privy to her financial status -- something she has chosen not to share.

My point here is that Justice Weaver's request for remission is entirely inconsistent with her published views on what standards *ought* apply in recusal situations. Her ownership of stock in a party defendant does pose an *appearance* of impropriety from the standpoint of the public. [10] Can anyone imagine the public at large believing that it is perfectly [***67] appropriate for a judge to decide a case in which she owns stock in one of the parties? [11] Moreover, her communication -- which states her conflict, announces that her conflict does not matter, and asks the parties to agree with her -- is inherently intimidating and coercive to both parties involved in this litigation. [12] Rejection of her [*546] stated premise -- that, notwithstanding her stated conflict, she should participate in the case -- obviously puts the parties in the position of offending a sitting Justice. By her own stated positions on recusal, she should not be putting the parties in the position of having to bless an *appearance* of impropriety.

Finally, the nature of Justice Weaver's private communication with the parties does not comport with her conclusion that the *Michigan Constitution, art 6, § 6*, "requires that a justice's self-initiated decision and reasons not to participate, or a challenged justice's decision and reasons to participate or not participate, should be in writing and *accessible to the public*." [13] It would seem to me that, under her proposed regime, Justice Weaver's discussion of her stock ownership should be published for public review.

Again, I wish to state [***68] that I believe that our historic disqualification policy is constitutionally sound and should be embraced

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[9] March [***70] 18, 2009 order, *supra* at 13-14. This, of course, is one of the issues pending in *Caperton v Massey*, United States Supreme Court Docket No. 08-22, where it is claimed that due process requires that a recusal issue must be decided by someone other than the judge who is the subject of potential disqualification.

[10] Indeed, Congress has made this very policy judgment. *28 USC 455(b)(4)* disqualifies a federal judge from sitting in a case if he or she "has a financial interest in the subject matter in controversy." The statute defines "financial interest" as "ownership of a legal or equitable interest, however small." *28 USC 455(d)(4)*. While this federal statute is not controlling here as our disqualification rule for Michigan judges permits a "de minimis" financial interest, it does provide support for the proposition that even a small financial stake in a party litigant creates an appearance of impropriety.

[11] As stated, Justice Weaver provides the parties with no basis upon which to evaluate her request for remission.

[12] I am aware that this procedure is specifically contemplated by *MCR 2.003(D)*. Nevertheless, if Justice Weaver's standard for recusal is the *appearance* of impropriety, then submitting [***71] this question to the parties becomes moot and is inherently aimed at coercing the parties to accept her participation *notwithstanding* the appearance of impropriety.

[13] ***Adair, 474 Mich at 1050*** (statement of Weaver, J.) (emphasis added).

by all members of this Court. Since it has not been, and since Justice Weaver has articulated her own, purportedly "higher" recusal standards, I am left to wonder why Justice Weaver advocates a public position contrary to the position she practices and why she believes it appropriate that the parties should be asked to bless her conflict.

Robert P. Young, Jr.

Dissent by: Robert P. Young, Jr. (In Part)

Dissent

[*512contd] [316contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence, however, this pagination accurately reflects the pagination of the original published document]

YOUNG, J. *(concurring in part and dissenting in part).*

In this case, we are asked to review the trial court's certification of a plaintiff class consisting of approximately 2,000 landowners within the flood plain of the Tittabawassee River. The Michigan Court Rules govern the procedure for certifying class actions in Michigan courts. MCR 3.501(A)(1) provides specific prerequisites for proposed plaintiff classes. A party seeking class certification bears the burden of proving that these prerequisites are in fact met and must provide sufficient information to the ruling court for it to make the determination that the prerequisites **[**317contd]** are met. Because part II of the majority opinion correctly articulates the appropriate appellate standard of review for class certification decisions and part III(A) of the majority opinion correctly articulates the appropriate legal standard a trial court must apply in ruling on **[***72]** a motion for class certification, I join those sections of the majority opinion.

While I would vacate the entirety of the trial court's class certification decision because it committed a legal error by using the wrong legal standard in certifying the **[*513]** class, the majority determines only that the trial court's analysis of MCR 3.501(A)(1)(c) and (d) was insufficient and requires further explanation. In doing so, the majority also reverses *sub silentio* the determination of the Court of Appeals majority limiting the scope of the proposed class action to issues of liability only. I therefore dissent in part. Because I believe that the trial court's decision was wholly affected by its application of an incorrect standard, I would vacate the class certification in its entirety and remand to the trial court for a completely new ruling on the motion for class certification and limit any certification of the proposed class to issues of liability. The trial court in this case expressly indicated that it *must* "accept the allegations of the plaintiff in support of the motion [for class certification] as true." This is inconsistent with the plain requirement of the court rules, which allow class **[***73]** certification "only if" the prerequisites listed in MCR 3.501(A)(1) are *met*, not merely alleged. I therefore would vacate its class certification regarding liability in its entirety and remand to the trial court so it can apply the appropriate legal standard.

I also dissent from the majority's decision to give discretion to the trial court to certify the class on the issue of damages. The plaintiffs did not cross-appeal the decision of the Court of Appeals majority to vacate class certification on the issue of damages, and therefore this Court cannot vitiate this unappealed ruling of the Court of Appeals.

I. Facts and Procedural History

Plaintiffs commenced the instant action against defendant, Dow Chemical Company, for its alleged pollution of the Tittabawassee River. They claim that the release of dioxin into the Tittabawassee River has **[*514]** either directly contaminated their properties or has otherwise adversely affected their properties. They subsequently moved for class certification. Plaintiffs' proposed class consists of all owners of real property in Saginaw County

within the 100-year flood plain of the Tittabawassee River, as of February 1, 2002. [1] This proposed class contains approximately [***74] 2,000 people. Defendant opposed class certification.

After receiving supplemental briefs and hearing oral arguments on the motion for class certification, the Saginaw Circuit Court issued its opinion and order granting class certification on October 21, 2005. At the outset of its analysis, the court explained that it was bound to accept the plaintiffs' allegations supporting its motion for class certification as true:

> Due to the limited case law in Michigan addressing certification of class action lawsuits, the Court can refer to federal case law that interprets the federal rules on class certification. *Brenner [**318contd] v Marathon Oil Co, 222 Mich App 128, 133; 565 N.W.2d 1 (1997)*. When evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion [***75] as true. The merits of the case are not examined. *Allen v Chicago, 828 F Supp 543, 550 (ND Ill, 1993)*. The plaintiff bears the burden of proving that the class should be certified. *Id.* [2]

The court then listed the five requirements of class certification and discussed the plaintiffs' allegations regarding each of these requirements. I reprint the trial court's analysis of the five requirements in its entirety:

> [*515] a. The first requirement that the Plaintiffs must meet is that "the class is so numerous that joinder of all members is impracticable." *MCR 3.501(A)(1)(a)*. The Plaintiffs define the potential class as:
>
> "All persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan on February 1, 2002. For purposes of this class definition, the one-hundred year Flood Plain of the Tittabawassee River is defined as the geographic area set forth on the map attached as Exhibit A (Exhibit B attached to this order), which is generally bounded on the west and south by River Road and Stroebel Road, including property on the west and south side of such roads, and generally bounded on the east and north by Midland Road, St. Andrews Road, and [***76] Michigan Avenue, including property on the east and north sides of such roads and avenue."
>
> The Plaintiffs also allege and the Court finds that there would be approximately 2,000 persons in the proposed class. The Court finds that the class is so numerous that joinder of all members is impracticable.
>
> b. There are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.
>
> All of the Plaintiffs' claims are based on the allegation that the Defendant polluted the Tittabawassee River, causing damage to the Plaintiffs in the form of reduced value of their home and property. Therefore, the alleged negligence of the Defendant, if any, as to the cause of the alleged pollution is common to all potential Plaintiffs. Equally, any questions of law would be common to the entire class. Although the question of damages may be individualized, the mere fact that damages may have to be computed individually is not enough to defeat a class action. As the Court stated in *Sterling v Velsicol Chem Corp, 855 F2d 1188, 1197 (CA 6, 1988)*:
>
> "No matter how individualized the issues of

[1] A river's "100-year flood plain" is the land area subject to the floodwaters from a flood that has a one percent chance of occurring in any given year. Accordingly, the land at the edge of the 100-year flood plain has a one percent chance of being flooded with water from the Tittabawassee River in any given year, while land closer to the river has a greater chance of being flooded in any given year.

[2] All citations have [***81] been converted to this Court's standard format.

damages may be, these issues may be reserved for individual treatment [***77] with the question of liability tried as a class action. [*516] Consequently, the mere fact that questions peculiar to each individual member of the class remaining [sic] after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." See also *Dix v Am Bankers Life Assurance Co, 429 Mich 410, 417, 418, 419; 415 N.W 2d 206 (1987)*, and the more recent case of *Mejdrech, et al v Met-Coil Sys Corp, 319 F3d 910 (CA 7, 2003)*.

This Court finds that there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.

[**319contd] c. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

In this case, Plaintiffs contend that their property claims arise from the same course of conduct by Defendant Dow and that they share common legal and remedial theories with the members of the class. The court in *Cook v Rockwell Int'l Corp, 151 FRD 378 (D Colo, 1993)*, stated:

"So long as there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class the typicality requirement is [***78] satisfied (citations omitted) . . . . The positions of the named plaintiffs and the potential class members do not have to be identical. Thus, the requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class. The court finds that the representative parties' claims are not adverse or antagonistic to others in the class. Therefore, the court finds that the claims or defenses of all of the representative parties are typical of the claims or defenses of the class and are not antagonistic to the class."

d. The representative parties will fairly and adequately assert and protect the interest of the class.

There presently are approximately seven Plaintiffs who are the representative parties. Further, no proof has been submitted to this Court that would indicate that the [*517] Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class.

e. The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient [***79] administration of justice.

To deny a class action in this case and allow the Plaintiffs to pursue individual claims would result in up to 2,000 individual claims being filed in this Court. Such a result would impede the convenient administration of justice. Further, such a procedure would or could result in inconsistent or varying adjudications with respect to individual members of the class. A class action would also assure legal assistance to the members of the class. Moreover, a class action would achieve economy of time, effort and expense. The Court specifically finds that the action would be manageable as a class action based on the facts and the reasons set forth herein. Each member of the class lives in the area alleged to have been damaged. Each member of the class allegedly suffered damages as a result of the release of contaminates in the Tittabawassee River. Almost identical evidence would be required to establish negligence and causal connection between the alleged toxic contamination and Plaintiffs' damages and the type of damages allegedly suffered. The Court stated in *Sterling v Velsicol Chem Corp, supra at 1197*:

"In the instant case, each class member lived in

> the vicinity **[***80]** of the landfill and allegedly suffered damages as a result of ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered and the defendant's liability. A single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided **[**320contd]** duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its **[*518]** discretion in certifying this action as a rule of [sic] 23(b)(3) class action. However, individual members of the class still would be required to submit evidence concerning their particularized damages, damage claims and subsequent proceedings."
>
> The Court finds that the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [3]

The Court of Appeals rendered three individual opinions in ruling on defendant's appeal. Judge Meter and Judge Fort Hood affirmed the trial court's certification with regard to the issue of Dow's liability, [4] while Judge Meter and Judge K.F. Kelly determined that the individual issues predominate over class-wide issues with respect to damages. [5] Defendant appeals the Court of Appeals judgment and claims that the trial court erred in certifying the plaintiff class. [6] It argues that certification should be vacated, first, because the trial court applied an erroneous legal standard in accepting the plaintiffs' allegations in support of their motion for class certification as true and, second, because the plaintiffs' proposed class fails as a matter of law.

II. Standard of Review

This Court has not expressly established a standard for reviewing certification of a class action, although in a peremptory order we impliedly reviewed a class certification **[*519]** decision for clear error. [7] The Court of Appeals has accordingly employed a clear error standard. [8] "In Michigan, the clear error standard has historically been applied when reviewing a trial court's factual findings whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion." [9] I concur in part II of the majority opinion and agree that legal determinations are reviewed under a de novo standard, that findings of fact are reviewed under a clear error standard, and the court's ultimate certification decision is reviewed for abuse of discretion. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. [10]

III. **[***83]** To Be Certified as a Class of Plaintiffs in Michigan Courts, the Requirements Provided in *MCR 3.501* Must, *in Fact*, be Met

The Michigan Court Rules govern the certification

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[3] All internal citations have been converted to this Court's standard format.

[4] *Henry v Dow Chem Co, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 266433), 2008 Mich App LEXIS 180.* Accord *id.* (Meter, P.J., concurring in part and dissenting in part).

[5] *Id.* (Meter, P.J., concurring in part and dissenting in part). Accord *id.* (K.F. Kelly, J., dissenting).

[6] Plaintiffs did not **[***82]** file a cross-appeal of the Court of Appeals ruling that damages must be determined individually.

[7] ***Hill v City of Warren, 469 Mich 964; 671 N.W.2d 534 (2003).***

[8] See, e.g., *Neal v James, 252 Mich App 12, 15; 651 NW2d 181 (2002).*

[9] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents, 475 Mich 463, 471; 719 NW2d 19 (2006).*

[10] *Maldonado v Ford Motor Co, 476 Mich 372, 388; 719 NW2d 809 (2006).*

of class actions. MCR 3.501(A)(1) provides:

> **[**321contd]** One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action *only if*:
> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> **[*520]** (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [11]

The plain language of MCR 3.501(A)(1) is clear: representative plaintiffs may pursue a class action lawsuit "only if" the enumerated prerequisites have been met.

The procedure for certifying a class in Michigan underscores this **[***84]** requirement. Because a "plaintiff must move for certification that the action may be maintained as a class action," [12] the plaintiff bears the burden of satisfying the trial court by a preponderance of the evidence that the prerequisites to class certification have been met. Moreover, once the plaintiff moves to certify a class, the trial court "may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures." [13] In other words, MCR 3.501 expressly contemplates that the trial court should make an independent determination that the proposed class meets the requirements for class certification. Thus, a trial court may certify a class only if the plaintiffs have provided sufficient information that each prerequisite to class certification has been met. Because part III(A) of the majority opinion correctly articulates this standard, I join that section of the opinion.

I also concur in the majority's decision to overrule *Neal v James* [14] to the extent it "require[s] a trial court **[*521]** to accept as true a plaintiff's bare assertion that a class certification **[***85]** prerequisite is met . . . ." [15] The Court of Appeals in *Neal* held that a trial court must "accept the allegations made in support of the request for certification as true." [16] Although the trial court in the instant case did not expressly indicate its reliance on *Neal*, as a published Court of Appeals decision, it is binding on all lower courts. [17] The requirement in *Neal* that a certifying court is bound to accept the plaintiffs' allegations supporting its motion for class certification as true, however, is inconsistent with the plain meaning of MCR 3.501 as articulated above. Moreover, it cites stale federal precedent for its statement of law. [18]

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[11] MCR 3.501(A)(1) (emphasis added).

[12] MCR 3.501(B)(1)(a).

[13] MCR 3.501(B)(3)(b).

[14] *Neal*, 252 Mich App 12; 651 NW2d 181.

[15] *Ante* at 21 n 39.

[16] *Neal*, 252 Mich App at 15. *Neal* has subsequently been cited for this proposition in a published opinion of the Court of Appeals. See *Duncan v Michigan*, ___ Mich App ___; ___ NW2d ___ (decided June 11, 2009 (Docket No. 275652), 284 Mich. App. 246; 774 N.W.2d 89, 2009 Mich. App. LEXIS 1380).

[17] MCR 7.215(C)(2).

[18] Both the *Neal* Court and the instant trial court cited a stale federal district court case for the **[***86]** proposition that a trial court is bound to accept the plaintiff's pleadings on behalf of the motion for certification as true. *Allen v Chicago*, 828 F Supp 543, 550 (ND Ill, 1993) ("In evaluating the motion for class certification, the allegations made in support of certification are taken as true . . . ."). However, the Seventh Circuit Court of Appeals subsequently undermined *Allen* in *Szabo v Bridgeport Machines, Inc*, 249 F3d 672, 676 (CA 7, 2001), which precluded courts from relying uncritically on the allegations contained in motions for class

Accordingly, **[*522]** **[**322contd]** I concur with the majority that *Neal* is overruled to the extent that it is inconsistent with the rule of law articulated today.

IV. The Trial Court Erred by Certifying the Class to the Extent It Stated and Applied an Erroneous Standard of Law

A. The Trial Court Articulated an Erroneous Standard of Law

Before certifying the plaintiff class, the trial court sought briefing and conducted extensive oral arguments on the **[***88]** motion for class certification. Nevertheless, even though it did so, the trial court's opinion made no mention of these facts. Instead, the trial court prefaced its ruling by explaining that "[w]hen evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true." This statement has meaning, and its meaning completely rebuts the plaintiffs' claim that the trial court conducted the appropriate analysis in making its ruling on class certification. The trial court's statement indicates that it approached its analysis without the appropriate analytical independence from the plaintiffs' **[*523]** allegations supporting class certification. It is appropriate to vacate the trial court's certification for this legal error alone. [19]

B. The Trial Court Applied an Erroneous Standard of Law

Moreover, a critical reading of the trial court's actual ruling underscores the inappropriate deference that the trial court afforded plaintiffs' pleadings on the motion for class certification. For example, in concluding that "there are questions of law or fact common to the members of the class that predominate over questions affecting **[**323contd]** only individual members," [20] the trial court merely reiterated plaintiffs' claims without discussing the arguments that defendant proffered in opposition to the motion.

Defendant's trial brief listed several questions of law or fact that it alleged required individualized determination:

> . How each proposed property class member uses and enjoys his, her[,] or its property (when, in fact, there are a vast array of different types of commercial, industrial, agricultural, residential, governmental, non-profit and other entities in the 20-mile-long proposed property class area, and each proposed class member uses and enjoys his, her[,] or its property in ways different from others);
>
> . Whether each **[***90]** proposed class

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certification. "Before deciding whether to allow a case to proceed as a class action. . . . a judge should make whatever factual and legal inquiries are necessary under [Federal] Rule [of Civil Procedure] 23." Therefore, even if a Michigan court "can refer to federal cases construing the federal rules on class certification," *Neal*, 252 Mich App at 15, it should look only to cases that *remain* good law.

Applicable federal caselaw does not require that trial courts accept the allegations in support of the motion for class certification as true. Indeed, the United States Supreme Court expressly negated that principle. *Gen Tel Co of the Southwest v Falcon*, 457 U.S. 147, 160; 102 S Ct 2364; 72 L Ed 2d 740 (1982). **[***87]** The Court of Appeals' citation of *Falcon in Duskin v Dep't of Human Services*, ___ Mich App ___; ___ NW2d ___, decided June 11, 2009 (Docket No. 279151), 284 Mich App 400; 775 NW2d 801; 2009 Mich App LEXIS 1375, is consistent with the use of applicable federal precedent.

While federal caselaw may be helpful in interpreting a similarly worded but ambiguous provision in the Michigan Court Rules, courts must not forget that it is the *Michigan* Court Rules that they are interpreting. Accordingly, federal caselaw interpreting the *Federal* Rules of Civil Procedure can be instructive at most, but never controlling. As explained earlier, the plain language of *MCR 3.501(A)(1)* requires that the prerequisites for class certification must in fact be met before a trial court can certify a class of plaintiffs. That federal caselaw interprets *FR Civ P 23* similarly is fortuitous but ultimately of less import than the actual text of the Michigan Court Rules.

[19] The trial court's statement that "[t]he plaintiff bears the burden of proving that the class should be certified" does not cure any defect it caused by saying it was bound to accept the plaintiffs' allegations supporting class certification as true. If the plaintiffs' allegations supporting class certification *must* be accepted as true, as the trial court stated, then the plaintiffs can meet their burden **[***89]** of proof merely by alleging that the requirements for class certification have been met.

[20] *MCR 3.501(A)(1)(b)*.

member has suffered a substantial and unreasonable interference with use and **[*524]** enjoyment as a result of misconduct by Dow (when, in fact, such proposed class members already have testified that they have not suffered any such interference, and the alleged interferences from others are highly variable and dissimilar);

. Whether the different levels of dioxin on class properties constitute an unreasonable and substantial interference with use and enjoyment (when, in fact, the levels differ significantly from each other, such that some proposed class members have no level of dioxin on their soil in excess of levels upstream of Dow, some have no level of dioxin on their soil in excess of the DEQ's direct contact criteria, and other proposed class members have higher levels);

. What duty (if any) Dow owes to each particular proposed class member (when, in fact, different types of dioxin have been deposited on different proposed class properties at different times over the past 100 years, by potentially many different entities, who would have faced vastly different standards of care and states of the art at the time of such deposits and, even focusing on the most current version **[***91]** of the DEQ's direct action criteria (which were not applicable until recently), different DEQ criteria apply to different types of property within the class, and those criteria differ from applicable federal criteria);

. Whether Dow violated any duty owed to different proposed class members (when, in fact, the various levels of dioxin on the different properties fall both above and below the various potential standards of care that could have been in effect over the past 100 years);

. Whether any proposed class member's property value was injured (when, in fact, many proposed class members already have sold their class properties at a substantial profit, including some who received more than their asking price and others who have sold for more than their recently appraised value, whereas others have no interest in ever selling their property, and others refuse to sell, and still others contend their property has been rendered "worthless");

* * *

[*525] . Whether and how each proposed class member is situated vis-a-vis Dow's defenses, including the statute of limitations (when, in fact, many proposed class members have believed for many years that Dow polluted the Tittabawassee River, including **[***92]** with dioxin, and thereby diminished the use and **[**324contd]** enjoyment and value of proposed class properties).

Thus, defendant raised several issues in this case that may require individualized determination, and that therefore may bar class certification under *MCR 3.501(A)(1)(b)*. Even if these concerns ultimately do not preclude class certification, the issues raised are ones that a trial court would have rebutted or explained if it had conducted an independent inquiry into whether the prerequisites of class certification had in fact been met. The trial court's failure to respond to *any* of these claims in its ruling, therefore, belies the plaintiffs' contention that the trial court conducted an appropriate analysis of whether the plaintiffs' proposed class met the requirements for class certification. Moreover, it belies the majority's assumption that the trial court conducted an appropriate analysis of *some* of the class certification prerequisites, as the predomination prerequisite is one in which the majority concluded that "the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support [the] prerequisite[] . . . ." **[***93]** [2]

Because the trial court failed to address defendant's arguments in opposition to class certification, not only did it *articulate* a legal standard that was inconsistent with the plain meaning of the

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[2] *Ante* at 21.

Michigan Court Rules, but it also *applied* that inappropriate standard in granting class certification. Accordingly, class certification **[*526]** must be vacated in its entirety, and this case must be remanded to the trial court for reconsideration of *all* the class certification prerequisites in light of the appropriate legal standard.

C. Instructions for Remand

On remand, the trial court must determine whether the plaintiffs' proposed class *in fact* meets the prerequisites for class certification contained in MCR 3.501(A)(1). [22] If the trial court determines that the proposed class meets the prerequisites for class certification, then the trial court may certify the proposed class. However, if it certifies the same class, it may *only* certify that class with regard to the issue of Dow's liability. Two judges on the Court of Appeals held that, as a matter of law, damages must be determined in individual proceedings. [23] I would not disturb that holding; indeed, the plaintiffs did not file **[***94]** a cross-appeal to dispute the majority's determination that proceedings to determine damages must be bifurcated from any class action regarding Dow's liability. Accordingly, I would preclude the trial court from certifying the proposed class on the issue of damages, since that legal issue has been settled for the purposes of this litigation. [24]

[*527] The majority has reversed the Court of Appeals **[***95]** majority's decision that bifurcation on damages is required. Although it **[**325contd]** claims that it "do[es] not reach the question of if, and to what extent, the issues involved in this case should be 'bifurcated,'" [25] it does so by subterfuge in claiming that it "do[es] not think that the circuit court abused its discretion by waiting to determine to what extent bifurcation of the issues involved may be needed." [26] This is in direct contradiction of the majority position of the Court of Appeals, which states unequivocally that "with regard to damages, individualized questions prevail." [27] This gross violation of our procedural rules is yet another indication of the majority's now familiar approach to seek its desired result whatever **[*528]** the consequences. [28]

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[22] Pursuant to MCR 3.501(B)(3)(a)(iii), the trial court may instead divide the proposed class "into separate classes with each treated as a class for purposes of certifying [or] denying certification . . ."

[23] *Henry, supra* (Meter, P.J., concurring in part and dissenting in part); (K.F. Kelly, J., dissenting).

[24] Moreover, the law of the case doctrine would preclude a subsequent appellate court from certifying the proposed class on the issue of damages. *CAF Investment Co. v. Saginaw Twp.*, 410 Mich 428, 454; 302 NW2d 164 (1981) ("[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.").

[25] *Ante* at 23.

[26] *Ante* at 24.

[27] *Henry, supra, at 1* (Meter, P.J., concurring in part and dissenting in part). Accord *id.* (K.F. Kelly, J., dissenting). The majority posits that I am "misreading" the Court of Appeals opinions by "cobbling together three divergent" opinions to come to my conclusion that two judges would have reversed the trial court's certification with respect to damages. *Ante* at 23 n 42. I see no other way of interpreting the three Court of Appeals opinions. Though fractured, they reach a clear *result*. Judge Fort Hood would have affirmed class certification entirely; Judge Meter would have affirmed class certification only with respect to questions of liability; and Judge K.F. Kelly would have vacated class certification entirely. While only one Court of Appeals judge specifically mandated "bifurcation," that result is the only way of reconciling the three divergent Court of Appeals positions. **[***97]** In any event, that result was not appealed by the plaintiffs and, as a result of the majority's opinion, plaintiffs are in a better position than they would have been had *defendant* not appealed. The only principled basis for avoiding the Court of Appeals ruling on damages would be if a *different* class were certified. However, this principled approach is unavailable to the majority because it preserves part of the class certification the trial court rendered and requires only that the trial court reconsider portions of its analysis. Thus, unless the trial court declines to certify on remand or certifies a different class, the majority has enhanced plaintiffs' position.

[28] The majority's determination to ignore facts and precedent inconvenient to its desired outcome has become its *modus operandi*. See, e.g., *Vandenbroock v. Halperin*, 483 Mich 965; 763 N.W.2d 919 (2009), where the new majority ignored *Vega v. Lakeland Hospitals at Niles & St Joseph, Inc.*, 479 Mich 243, 244; 736 NW2d 561 (2007); *Hardacre v. Saginaw Vascular Services*, 483 Mich 918;

[326contd]** The plaintiffs, appellees to this case, have not filed a cross-appeal of the Court of Appeals majority's decision requiring that damages be determined on an individualized basis. It is a basic principle of appellate procedure that appellees who have not cross-appealed "may not obtain a decision more favorable to them than was rendered by the Court of Appeals." [29] The majority's failure to follow this basic **[*529]** principle of law by declaring that the **[***96]** trial court has discretion *not to follow the binding decision of the Court of Appeals*, where the majority does not even state that it is reversing any part of the Court of Appeals' judgment, is contrary to this Court's precedent and unworthy of a Court committed to the rule of law.

[30]

V. Conclusion

The party seeking certification of a class under MCR 3.501 bears the burden of establishing by a preponderance of the evidence that its proposed class *in fact* meets the requirements for class certification as articulated in the Michigan Court Rules. The trial court, therefore, is not bound to accept the allegations of the moving party, but rather must make an independent finding that the prerequisites of class certification have been met. Because the trial court in the instant case did not make such an independent determination, I would vacate class certification in its entirety and remand this case to the circuit court for further proceedings consistent with this opinion. I would not disturb the Court of Appeals majority's decision that the proposed class may not be certified on the issue of damages.

Robert P. Young, Jr.

Maura D. Corrigan

Stephen J. Markman

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762 N.W.2d 527 (2009), where it failed to follow *Boodt v Borgess Med Ctr, 481 Mich 555; 751 NW2d 44 (2008)*; *Sazima v Shepherd Bar & Restaurant, 483 Mich 924; 762 N.W.2d 924 (2009)*, where it failed **[***98]** to follow *Chrysler v Blue Arrow Transport Lines, 295 Mich 606; 295 NW 331 (1940)*, and *Cambern v Northwest School Dist, 459 Mich 471; 592 NW2d 46 (1999)*; *Juarez v Holbrook, 483 Mich 970; 764 N.W.2d 216 (2009)*, where it failed to follow *Smith v Khouri, 481 Mich 519; 751 NW2d 472 (2008)*; *Chambers v Wayne Co Airport Auth, 483 Mich 1081; 765 N.W.2d 890 (2009)*, where it failed to follow *Rowland v Washtenaw Co Rd Comm, 477 Mich 197; 731 NW2d 41 (2007)*; and *Scott v State Farm Mut Auto Ins Co, 483 Mich 1032; 766 N.W.2d 273 (2009)*, where it failed to enforce *Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986)*, and *Putkamer v Transamerica Ins Corp of America, 454 Mich 626; 563 NW2d 683 (1997)*. Chief Justice Kelly contends, as she has elsewhere, that "the accusation that the Court has been ignoring precedent is incorrect." *Ante* at 4. See also *Potter v McLeary, 484 Mich 397, ___; 774 NW2d 1 (2009) (Kelly, C.J., concurring), decided July 31, 2009 (Docket No. 136336), 484 Mich 396; 774 N.W.2d 1; 2009 Mich. LEXIS 1601, *129*; and *Beasley v Michigan, 483 Mich 1025, 1025-1027, 765 N.W.2d 608 (2009)* (Kelly, C.J., concurring). This response has been repeatedly answered in detail. See *Beasley, 483 Mich at 1027-1030* (Corrigan, J., dissenting); *Potter, 484 Mich at ___* (Markman, J., concurring in **[***99]** part and dissenting in part), slip op at ___. More importantly, Chief Justice Kelly's response fails to address the fundamental problem that "[leaving] intact precedents that were inconsistent with new decisions essentially allow[s] future litigants to choose among inconsistent precedents as in columns A and B of a Chinese restaurant menu." *Rowland, 477 Mich at 227* (emphasis and punctuation omitted).

[29] *McCardel v Smolen, 404 Mich 89, 94-95; 273 NW2d 3 (1978)*. See also *Pontiac Twp v Featherstone, 319 Mich. 382, 390; 29 N.W.2d 898 (1947)* ("In the absence of a cross appeal, errors claimed to be prejudicial to appellee cannot be considered nor may appellee have enlargement of relief").

[30] Our order granting leave to appeal asked the parties to brief four issues. *Henry v Dow Chem Co, 482 Mich 1043; 769 N.W.2d 219 (2008)*. Needless to say, due the lack of a cross-appeal, we did not ask the parties to brief whether the Court of Appeals had erred in holding that the trial court had erred in granting class certification regarding the issue of damages. All appellate practitioners should take careful note of today's decision, because an appellant is ending up in a worse position than it was in under the Court of Appeals **[***100]** decision that it appealed, even though no cross-appeal was filed.

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

EXHIBIT # 13 TO

INTERVENORS / APPELLEES' ANSWER IN OPPOSITION TO THE DEFENDANT/APPELLANT, GELMAN SCIENCES, INC.'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT # 13

In re McCarrick/Lamoreaux

Court of Appeals of Michigan

October 23, 2014, Decided

No. 315510, Nos. 317403 & 318475

Reporter
307 Mich. App. 436 *; 861 N.W.2d 303 **; 2014 Mich. App. LEXIS 2039 ***

In re McCARRICK/LAMOREAUX, Minors.In re McCARRICK, Minor.

Prior History: [***1] Chippewa Circuit Court. Family Division. LC No. 13-014227-NA. Chippewa Circuit Court. Family Division. LC No. 2013-014227-NA.

In re McCarrick/Lamoreaux, 2014 Mich. App. LEXIS 314 (Mich. Ct. App., Feb. 18, 2014)

Counsel: For JEMMA MCCARRICK, Appellee: CHARLES J PALMER, SAULT STE MARIE, MI.

For DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellee: ELIZABETH C CHAMBERS, SAULT STE MARIE, MI.

For MCCARRICK MICHELLE, Respondent-Appellant: CAMERON ANN FRASER MICHIGAN INDIAN LEGAL SERV, TRAVERSE CITY, MI; JOSHUA B KAY, ANN ARBOR, MI.

For SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS, Intervenor - Miscellaneous-Appellee: ELIZABETH A EGGERT, SAULT STE MARIE, MI.

Judges: Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

Opinion

[306]** **[*439]** PER CURIAM.

This consolidated child welfare dispute involves three dockets. In Docket No. 315510, respondent-mother, M. McCarrick, appeals of right the trial court's March 13, 2013 order removing her three minor children from her home. In Docket No. 317403, McCarrick appeals of right the trial court's June 28, 2013 order removing her minor daughter from her father's care and custody. The child's father is not participating in these appeals. In Docket No. 318475, McCarrick appeals by delayed leave granted[1] the trial court's orders removing the children from her care.

Because the trial court failed to comply with the federal Indian Child Welfare Act (ICWA)[2] and the Michigan Indian Family Preservation Act (the Family Preservation Act),[3] we conditionally reverse and remand for further proceedings.

I. FACTS

A. BACKGROUND FACTS

The children in this case are of Indian heritage and are enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians. On February 26, 2012, the Department of Human Services (the Department) petitioned the trial court to remove the children from McCarrick's care. The Department contended

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[1] *In re McCarrick, unpublished order of the Court of Appeals, entered March 28, 2014 (Docket No. 318475), 307 Mich. App. 436; 861 N.W.2d 303; 2014 Mich. App. LEXIS 2039* **[***2]**

[2] *25 USC 1901 et seq.*

[3] *MCL 712B.1 et seq.*

that since 2005, McCarrick had been involved in four abuse or neglect proceedings in which she had physically abused, neglected, improperly supervised, and contributed to the [*440] delinquency of her children. The Department alleged that McCarrick and the children were abusing alcohol, marijuana, cocaine, and heroin in McCarrick's home. The Department detailed the services that it had previously provided to McCarrick.

On February 26, 2013, the trial court issued an interim ex parte order authorizing the Department to remove the children from the home [***3] pending a preliminary hearing. The trial court found that leaving the children in the home would be contrary to their welfare. It also found that the Department had made active efforts to prevent the breakup of McCarrick's family, as ICWA and the Family Preservation Act required it to do before the trial court could authorize the children's removal. On February 27, 2013, the trial court adjourned the preliminary hearing to allow the parties to secure counsel and to allow a tribal representative to appear at the removal hearing.

At the March 8, 2013 removal hearing, Jennifer Sheppard, a services specialist for the Department, testified that McCarrick provided the children with inadequate parental supervision because she allowed them to abuse drugs. According to Sheppard, the Department received a complaint that McCarrick allowed her older daughter to smoke marijuana in a car that McCarrick was driving and that the daughter tested positive for marijuana. Sheppard [**307] testified that McCarrick's son also smoked marijuana in the home and was on probation for marijuana use. She also stated that McCarrick's son indicated that McCarrick's older daughter was "shooting up." The children told Sheppard [***4] that McCarrick was unaware of or ignored their substance abuse in the home.

Sheppard testified that the son disclosed that McCarrick's friend, J. Vincent, also used drugs in the home [*441] and that he had observed Vincent's toddler holding a syringe. Sheppard believed that McCarrick's younger daughter was obtaining drugs from Vincent. According to Sheppard, the Department had investigated McCarrick 10 times in the past 4 years and had substantiated neglect allegations in 2010. McCarrick tested negative for drugs and Sheppard did not believe that McCarrick was supplying the children with drugs. Gary McLeod, the older children's probation officer, testified that the children were on probation for retail fraud, illegal entry, truancy, and violating probation. McLeod testified that McCarrick cooperated with the children's probation.

B. CHILD-REARING PRACTICES WITHIN THE TRIBE

The parties stipulated that Stacey O'Neil was an expert on child-rearing practices within the tribe. O'Neil testified that she works for the Sault Tribe and she provided McCarrick with in-home care services from September to December 2011. O'Neil detailed the services that she provided to McCarrick, including: (1) behavioral [***5] health and psychological assessments, (2) random drug screens, (3) assistance with obtaining a personal protection order against her previous partner, (4) financial assistance to obtain housing, (5) services to pay for her utilities, (6) gas vouchers for work transportation, (7) ongoing services through the Department, and (8) parenting services. O'Neil opined that these services qualified as active efforts to prevent the breakup of McCarrick's family. O'Neil testified that she successfully closed McCarrick's case in December 2011 and that she had no further contact with McCarrick.

C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

On March 8, 2013, the trial court found that probable cause existed to assume jurisdiction over the children. [*442] The trial court found that the Department proved by clear and convincing evidence that it had made active efforts to prevent the breakup of McCarrick's family, and that

continued placement with McCarrick would subject the children to serious emotional or physical damage. The trial court found that O'Neil provided McCarrick with active efforts in December 2011, and that the efforts were not successful because McCarrick actively or passively permitted the children to use drugs.

The [***6] trial court found that McCarrick's continued custody of the children was likely to result in serious emotional or physical damage to the children, and that it was dangerous to the children to remain in her care. It placed the children with the Department for care and supervision.

D. THE SUPPLEMENTAL PETITIONS AND SECOND REMOVAL HEARING

On May 2, 2013, the Department filed a supplemental petition against McCarrick. According to the Department, McCarrick maintained contact with the older daughter despite the trial court's order restricting their contact to supervised visitation. According to the Department, the younger daughter told McCarrick that she was suicidal and wanted to run away from her placement, but McCarrick did not report [**308] this to anyone. The Department alleged that the younger daughter later ran away and attempted suicide. The Department also alleged that in April 2013, Children's Protective Services workers found McCarrick's home in a "deplorable" condition and McCarrick acknowledged that drug users were living in her home.

On June 7, 2013, the Department petitioned to remove the older daughter from her father's care. The [*443] Department asserted that the child's father was incarcerated [***7] for assault and was unable to care for the child. On June 26, 2013, the trial court held a hearing on whether to remove the older daughter from her father's care. O'Neil testified about the services that she provided to the father. The trial court noted that the child was removed from McCarrick's care by a previous court order, and found that its previous determinations regarding active efforts and the potential harm to the children supported continuing their removal.

E. PROCEDURAL HISTORY

As previously discussed, McCarrick filed her initial appeals in Docket Nos. 315510 and 317403 as of right. This Court dismissed both appeals, reasoning that nondispositional removal orders are not appealable in this Court as of right.[4] McCarrick sought leave to appeal this Court's dismissals in the Michigan Supreme Court.

In Docket No. 318475, McCarrick applied in this Court for delayed leave to appeal the trial court's removal orders. On March 28, 2014, in Docket [***8] No. 318475, this Court granted McCarrick's application for leave to appeal.

On April 11, 2014, the Michigan Supreme Court vacated this Court's judgment in Docket No. 315510 and directed us to reconsider our dismissal in light of unpublished decisions from this Court:

> [W]e vacate the February 18, 2014 judgment of the Court of Appeals, and we remand this case to the Court of Appeals for its reconsideration of the respondent's jurisdictional issue, in light of *In re White, unpublished opinion per [*444] curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 313770), 2013 Mich. App. LEXIS 2179; In re McClain/Waters/Skinner, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 302460), 2011 Mich. App. LEXIS 2296*; and *In re Klemkow, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 295488), 2010 Mich. App. LEXIS 1711*[5]

The Michigan Supreme Court also vacated this

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[4] *In re McCarrick/Lamoreaux, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2014 (Docket No. 315510), 2014 Mich. App. LEXIS 314; In re McCarrick, unpublished order of the Court of Appeals, entered September 16, 2013 (Docket No. 317403), 2013 Mich. App. LEXIS 2420.*

[5] ***In re McCarrick/Lamoreaux, 495 Mich. 986, 844 N.W.2d 126 (2014).***

Court's dismissal order in Docket No. 317403 and remanded the case for consideration of the same issue.[6]

On remand, McCarrick describes the jurisdictional question at issue here as follows:

> MCR 3.993(A)(1) permits an appeal by right to the Court of Appeals of "an order of disposition placing a minor under the supervision of the court or removing the minor from the home." This Court previously dismissed Ms. McCarrick's appeals by right of removal orders **[***9]** issued after preliminary hearings because **[**309]** the appealed orders were not orders of disposition issued under MCR 3.973. Yet in other recent cases, this Court has decided such cases on the merits. Does MCR 3.993(A)(1) afford appeals by right of removal orders issued after preliminary hearings?[7]

II. INTERPRETATION OF MCR 3.993(A)(1)

A. OVERVIEW

MCR 7.203(A)(2) provides that this Court may hear appeals of right from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." MCR 3.993(A)(1) provides that a party may appeal by right "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]"

[*445] To answer the question presented on appeal, this Court must decide the meaning of the phrase "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]" MCR 3.993(A)(1). McCarrick contends that that this phrase means that a respondent parent may appeal *as of right* "an order . . . removing the minor from the home." In other words, McCarrick contends that the clause "of disposition" modifies the clause "placing a minor under the supervision of the court" rather than the previous clause "an order." Therefore, **[***10]** under McCarrick's reading, a parent could appeal by right *either* (1) *an order of disposition* that places a minor under the supervision of the court, or (2) *an order* removing the minor from the home.

For the reasons set forth in this opinion, we disagree. We conclude that MCR 3.993(A)(1) provides that a respondent parent may appeal by right (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home. Thus, we conclude that the order involved must be an *order of disposition*. Accordingly, we conclude that McCarrick is not entitled to an appeal of right in Docket Nos. 315510 and 317403 because neither order was an order of disposition.

B. STANDARD OF REVIEW

This Court reviews de novo the scope of this Court's jurisdiction.[8] This Court reviews de novo questions of law, including the interpretation and application of our court rules.[9]

[*446] C. RULES OF INTERPRETATION

This Court interprets court rules using the "same principles that govern the interpretation of statutes."[10] Our purpose when interpreting court rules is to give effect to the intent of the Michigan Supreme Court.[11] The language of the court rule itself is the best indicator of intent.[12] **[**310]** If

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[6] *In re McCarrick, 495 Mich 986, 844 N.W.2d 126 (2014).*

[7] Emphasis omitted.

[8] *Elher v Wayne State Univ, 284 Mich App 172, 191; 771 NW2d 820 (2009).*

[9] *People v Cole, 491 Mich 325, 330; 817 NW2d 497 (2012).*

[10] *Ligons v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011).*

[11] *ISB Sales Co v Dave's Cakes, 258 Mich App 520, 528-529; 672 NW2d 181 (2003).*

[12] See ***US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing), 484 Mich 1, 13; 795 NW2d 101 (2009).***

the plain [***11] and ordinary meaning of a court rule's language is clear, judicial construction is not necessary.[13]

When interpreting a court rule, we must read the rule's provisions "reasonably and in context."[14] We should not read court rules in isolation.[15] Generally, this Court affords every word and phrase in a court rule its plain and ordinary meaning.[16] But when the Michigan Supreme Court chooses a word that has acquired "a peculiar and appropriate meaning in the law," we must construe that term according to its legal meaning.[17] We construe identical language in various provisions of the same rule identically.[18] And we read different rules that share the same subject or share a common purpose together as one law.[19]

[*447] When interpreting a court rule, we must presume that every word has some meaning.[20] Therefore, we must avoid any interpretation that renders any part of the court rule surplusage or nugatory.[21] This Court must give effect to every sentence, phrase, clause, and word in a court rule.[22] If at all possible, this Court should interpret a court rule to avoid inconsistencies.[23]

D. BACKGROUND LAW

1. CHILD PROTECTIVE PROCEEDINGS

Child protection law is [***12] procedurally complex. The family division of the circuit court has jurisdiction over minors whose parents or persons responsible for their care neglect or fail to support them or whose homes are unfit places to live.[24] A child protective proceeding typically commences with the child's emergency removal from the home, or a petition filed with the family division of the circuit court to remove the child from the home.[25] When the child is removed from the home on an emergency basis, the Department must contact a judge or referee "immediately" to seek an ex parte placement order.[26] Generally, if the child is taken into protective custody, the trial court must hold a hearing within 24 hours.[27] But the trial court may adjourn the hearing for the purpose of securing an attorney, parent, or legal [*448] guardian, for up to 14 days to obtain a witness, or for up to 21 days to provide notice to the child's tribe if the child is an Indian child.[28]

[**311] 2. INDIAN CHILDREN

If the child is an Indian child, MCR 3.967(A) provides that a removal hearing must be held within 14 days of the child's removal from the home unless the child's parent or Indian custodian has requested an additional 20 days.[29] The trial court

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[13] See People v Breidenbach, 489 Mich 1, 8; 798 NW2d 738 (2011).

[14] See McCahan v Brennan, 492 Mich 730, 739; 822 NW2d 747 (2012).

[15] See id. at 740.

[16] See *United States Fidelity & Guaranty Co, 484 Mich at 13*.

[17] See Ferz v Mercy Mem Hosp, 475 Mich 663, 673; 719 NW2d 1 (2006).

[18] See Robinson v Lansing, 486 Mich 1, 15; 782 NW2d 171 (2010).

[19] See Sinicropi v Mazurek, 273 Mich App at 149, 157; 729 NW2d 256 (2006).

[20] See Hinsley v Shanty Creek Mgt, Inc, 459 Mich 361, 372; 592 NW2d 360 (1999).

[21] See id.

[22] See *US Fidelity Ins & Guaranty Co, 484 Mich at 13*.

[23] See Nowell v Titan Ins Co, 466 Mich 478, 482-483; 648 NW2d 157 (2002).

[24] MCL 712A.2(b).

[25] MCR 3.963.

[26] MCR 3.963(A)(3).

[27] MCR 3.965(A)(1); MCL 712A.13a(2).

[28] MCR 3.965(B)(1) and (10).

[29] MCR 3.967(A).

may remove **[***13]** an Indian child from the child's parent or Indian custodian, or the child may remain removed,

> only upon clear and convincing evidence, including the testimony of at least one qualified expert witness . . . who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[30]

3. PRELIMINARY HEARINGS

The trial court may combine the removal hearing with the preliminary hearing.[31] At the preliminary hearing, "the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial."[32] If the trial court **[*449]** authorizes the petition at the preliminary hearing, the trial court may release the child to a parent, guardian, or legal custodian, or "may order placement of the child . . . ."[33]

> The trial court may order placement of the child **[***14]** into foster care if the court finds all of the following:
>
> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.
>
> (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
>
> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.[34]

If the trial court orders placement of the child in foster care, it must make (1) an explicit finding that placement in the child's home is contrary to the child's welfare and (2) the reasonable efforts findings outlined earlier in this opinion.[35]

4. DISPOSITIONAL HEARINGS

After the preliminary hearing, the case progresses either by the parent's plea of admission or no contest to the allegations in the petition[36] or by a trial on the **[*450]** allegations in the petition.[37] Following a plea or trial, the trial court **[***15]** conducts a dispositional hearing to determine what actions to **[**312]** take with respect to the child or any adult.[38] "When the child is in placement, the interval [to the dispositional hearing] may not be more than 28 days, except for good cause."[39] The trial court must find whether the Department made reasonable efforts to prevent the child's removal or return the child to the home.[40] Following the hearing, "[t]he court shall enter an order of

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[30] MCR 3.965(C).

[31] See MCR 3.965(E).

[32] MCR 3.965(B)(11).

[33] MCR 3.965(B)(12).

[34] MCR 3.965(C)(2). Also see MCL 712A.13a(9).

[35] MCR 3.965(C)(3) and (4).

[36] MCR 3.971.

[37] MCR 3.972.

[38] MCR 3.973(A).

[39] MCR 3.973(C).

[40] MCR 3.973(F)(3).

disposition . . . ."[41]

If the trial court does not terminate its jurisdiction over the child at the dispositional hearing, the trial court must "follow the review procedures of MCR 3.975 for a child in placement[.]"[42] MCR 3.975 provides dispositional review procedures that the trial court must follow if a child is in foster care. Under MCR 3.975(F)(1), the trial court must evaluate the case service plan and the parent's progress with services. The trial court must also consider "any likely harm to the child if the child continues to be separated from his or her parent, guardian or custodian," "any likely harm to the child if the child is returned to the parent, guardian, or legal custodian," and "if the child is an Indian child, whether the child's placement remains appropriate . . . ."[43] Following **[***16]** dispositional review, the trial court may return the child home, change the child's placement, modify the case service plan, or modify, continue, or replace the dispositional order.[44]

[*451] E. UNPUBLISHED OPINIONS

1. *KLEMKOW*

The Michigan Supreme Court has instructed this Court to consider McCarrick's jurisdictional issue in light of three unpublished opinions of this Court. In the first opinion, *Klemkow*, the respondent-mother appealed as of right the trial court's order terminating her parental rights to her minor children.[45] The mother attempted to challenge the Department's alleged failure to comply with its obligation to notify the court of what efforts it made to prevent the child's removal.[46] The *Klemkow* Court concluded that the issue was not properly before the Court because it was an improper collateral attack:

> Respondent could have directly appealed the September 2007 order removing the child. MCR 3.993(A)(1). She did not do so and cannot now collaterally challenge that decision in this appeal from the October 2009 termination order.[47]

The remainder of the *Klemkow* decision **[***17]** did not concern the Court's jurisdiction under MCR 3.993.

2. *MCCLAIN/WATERS/SKINNER*

In the second opinion, *McClain/Waters/Skinner*, a panel of this Court considered two consolidated appeals, one in which the respondent "appeal[ed] as of right . . . the trial court's January 25, 2011, order denying her objections to the court's preliminary hearing decision . . . continuing the children's placement outside respondent's home pending a trial on the petition," and **[*452]** one in which the respondent "appeal[ed] as of right from the trial **[**313]** court's February 24, 2011, initial dispositional order in which the court determined that it had jurisdiction over the children . . . ."[48] The *McClain/Waters/Skinner* Court did not address the respondent-mother's arguments regarding the trial court's probable cause finding at the preliminary hearing because it determined that the trial court subsequently acquired jurisdiction over the children, rendering the probable cause issue moot.[49]

However, the Court did consider the trial court's order removing the children from the home at the preliminary hearing. **[***18]** The trial court

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[41] MCR 3.973(F)(1).

[42] MCR 3.973(G).

[43] MCR 3.975(F)(1)(e), (f), and (g).

[44] MCR 3.973(G).

[45] Klemkow, 2010 Mich. App. LEXIS 1711 at *1.

[46] Id.

[47] Id.

[48] McClain/Waters/Skinner, 2011 Mich. App. LEXIS 2296 at *1.

[49] 2011 Mich. App. LEXIS 2296 at *3.

reasoned that

> [t]he trial court's exercise of jurisdiction over the children pursuant to the fathers' pleas did not render the removal decision moot. Indeed, it was the removal of the children from the home that enabled respondent to file an appeal as of right in Docket No. 302460. See MCR 3.993(A).[50]

The *McClain/Waters/Skinner* Court did not otherwise consider MCR 3.993(A).

3. *WHITE*

In the third opinion, *White*, a panel of this Court considered two consolidated appeals, one in which the respondent "appeal[ed] as of right the trial court's removal order and the preliminary order authorizing a petition for temporary jurisdiction over the minor child[,]" and the other in which the respondent "directly appeal[ed] as of right the trial court's initial dispositional order in which the court determined that **[*453]** it had jurisdiction over the child."[51] The *White* Court determined that the trial court applied the correct legal standard and satisfied the statutory requirements when it removed the minor child from the respondent-mother's care.[52]

The *White* Court appears to have assumed that this Court had jurisdiction to **[***19]** hear an appeal from an order removing the child as an appeal of right. There is no indication that either party raised the issue, and the *White* Court at no point in its analysis considered its jurisdiction under MCR 3.993.

4. CONCLUSION REGARDING UNPUBLISHED OPINIONS

We conclude that the three unpublished opinions are neither helpful nor instructive in determining the meaning of MCR 3.993(A)(1). In each of these opinions, prior panels of this Court have assumed—without deciding—that this Court has jurisdiction to hear an appeal from an order removing a child from the home as an appeal of right. There is no indication in any of these cases that the parties raised, or that this Court considered sua sponte, the issue of the extent of this Court's jurisdiction under MCR 3.993(A)(1).

Further, each of these appeals concerned, or was consolidated with, an order from which a respondent parent unquestionably had an appeal of right: in *Klemkow*, the order terminating parental rights,[53] and in *McClain/Waters/Skinner* and *White*, the first dispositional order after the trial court removed the child from **[*454]** the home.[54] Accordingly, even if this **[**314]** Court did not have jurisdiction to hear the parents' appeals of the initial order removing the children **[***20]** from their home as of right, the Court certainly had the authority to hear and address the parties' issues with the prior removal proceedings in the first appeal as of right. We are unable to find a case in which this Court considered an appeal from the order removing the children *alone*, on its own merits, as compared to those circumstances in which the respondent parent also had an appeal of right.

F. INTERPRETING MCR 3.993(A)(1)

1. OVERVIEW

MCR 3.993(A)(1) allows an appeal of right of "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]" This phrase has several constituent clauses. On the basis of the interaction

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[50] *Id.*

[51] *White*, 2013 Mich. App. LEXIS 2179 at *1.

[52] 2013 Mich. App. LEXIS 2179 at *7.

[53] MCR 3.993(A)(2).

[54] *In re SLH*, 277 Mich. App. 662, 668-669, 747 N.W.2d 547 (2008); *In re Gazella*, 264 Mich. App. 668, 680-682, 692 N.W.2d 708 (2005) (stating that the initial dispositional order contains a finding that the adjudication was held, that the children come within the jurisdiction in the court, and places the children out of the home, that order is appealable as of right).

of these clauses, McCarrick contends that MCR 3.993(A)(1) allows a respondent parent to appeal as of right "an order . . . removing the minor from the home." McCarrick asserts that the clause "of disposition" must modify the clause "placing a minor under the supervision of the court" rather than the clause "an order." McCarrick asserts that any other interpretation will **[***21]** render the phrase "placing a minor under the supervision of the court" surplusage because the trial court *never* places a minor under the court's supervision without also removing the child from the home.

[*455] 2. ORDER OF DISPOSITION

In order to resolve this question, we must consider the meaning and interaction of each clause in MCR 3.993(A)(1). One of the primary questions on appeal is whether the first clause is simply "an order" or "an order of disposition." We conclude that the more natural reading of the first clause of MCR 3.993(A)(1) is that the order appealed must be an "order of disposition."

First, our reading is consistent with the grammar of the clause. Generally, an order is "[a] command, direction or instruction," or "[a] written direction or command delivered by a court or judge."[55] The word "of" typically indicates possession or association.[56] The word "of" is also used as a preposition to "indicate inclusion in a number, class or whole," such as in the phrase "one of us," or to "indicate qualities or attributes," such as in the phrase "a woman of courage."[57]

It is not grammatically correct to split the clauses of MCR 3.993(A)(1) into two sections **[***22]** between the word "order" and the word "of." This split would make the clause "of disposition placing a minor under the supervision of the court" start with a preposition and read awkwardly. Further, as we have explained, the placement of the word "of" between the noun "order" and the noun "disposition" typically indicates either that the second noun is included in a class of, or is a quality of, the first noun. In context, the word "of" converts the word "disposition" into an adjectival phrase, modifying the noun "order" to specify that the type or kind of order is a *dispositional* order.

[*456] Second, this reading is consistent with the context of the rule. The words "order of disposition" appears as a single phrase **[**315]** in another portion of the court rules concerning child protective proceedings. Specifically, the court rules provide that, at the dispositional hearing, "[t]he court shall enter an order of disposition . . . ."[58] There is no question in that rule, the phrase "order of disposition" means that the type of order is a *dispositional* order.

Finally, this reading is consistent with this Court's prior interpretation of the meaning of this clause. In *SLH*, this Court noted that "an initial order of disposition is the first **[***23]** order appealable as of right . . . ."[59] While this statement was not crucial to the holding of the case and was thus dictum,[60] the Court's reading in *SLH* illustrates that this Court has previously interpreted MCR 3.993(A)(1) to require a *dispositional order* for an appeal of right.

Therefore, this clause, examined on its own, indicates that a parent may only appeal as of right "an order of disposition," not merely an order. However, we cannot consider this clause in isolation. We must consider the other clauses in the phrase to determine whether this interpretation renders portions of MCR 3.993(A)(1) surplusage.

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[55] *Black's Law Dictionary* (9th ed).

[56] *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 113; 724 NW2d 485 (2006).

[57] *Random House Webster's College Dictionary* (1997) (emphasis omitted).

[58] MCR 3.973(F)(1).

[59] *In re SLH*, 227 Mich App at 669 n 13.

[60] See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007).

3. TYPES OF CASES TO WHICH *MCR 3.993* APPLIES

We first note that *MCR 3.993* does not apply *solely* to child protective proceedings. Chapter 3 of the Michigan Court Rules concerns several types of special **[*457]** proceedings, and Subchapter 3.900 more specifically concerns a variety of special proceedings involving juveniles. Subjects included in Subchapter 3.900 are not only child protective proceedings, but also juvenile delinquency proceedings,[61] juvenile waiver proceedings and other designated proceedings in which a juvenile is tried as an adult for a crime,[62] juvenile guardianships,[63] and personal protection orders against minors.[64] *MCR 3.993* *specifically* applies to *both* delinquency and child protective proceedings.[65] Accordingly, we will discuss both types of proceedings in this **[***24]** opinion.

4. PLACING A MINOR UNDER THE SUPERVISION OF THE COURT

a. OVERVIEW

At oral argument, counsel for McCarrick indicated that the standard interpretation of the phrase "placing a minor under the supervision of the court" is that the trial court places the child under court supervision when the trial court exercises jurisdiction over the child. However, we conclude that this is not the plain meaning of this phrase.

b. CHILD PROTECTIVE PROCEEDINGS

As can be seen in the background law section of this opinion, the trial court does not place a minor "under the supervision of the court" in child protection law. Rather, it places the child in the parent's home, out of **[*458]** the home, or in foster care.[66] *MCR 3.921* states that the trial court shall notify "the *agency* responsible for the care and supervision of the child" regarding **[**316]** dispositional review hearings.[67] Other court rules indicate that the agency is "responsible for the care and supervision of the child" as well.[68]

c. JUVENILE DELINQUENCY PROCEEDINGS

In juvenile delinquency proceedings, the trial court issues orders of disposition.[69] It may place the minor "under supervision **[***25]** in the juvenile's own home or in the home of an adult who is related to the juvenile," and it may "order the terms and conditions of probation or supervision . . . ."[70] The trial court may also "place the juvenile in a suitable foster care home subject to the court's supervision."[71] Finally, the trial court may place the juvenile in a private or public agency, institution, or facility.[72]

Accordingly, we conclude that we need not determine the common usage of the phrase "under the supervision of the court." Instead, on the basis of the context in which the phrase is used in *MCR 3.993(A)(1)* and its placement in the general scheme of the court rules, we conclude that it means exactly what it says: a trial court places a minor under the supervision of the court when the trial court *orders* the minor placed under the supervision of the court. The trial court may place a **[*459]** minor under the supervision of the court in juvenile delinquency proceedings, and it does so by issuing an order of disposition.

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[61] See *MCR 3.931*.

[62] See *MCR 3.950* and ***MCR 3.951***.

[63] See *MCR 3.979*.

[64] See *MCR 3.981*.

[65] *MCR 3.901(B)(1)*.

[66] See *MCR 3.965(B)(11)*; *MCR 3.973(G)*.

[67] *MCR 3.921(B)(2)(a)* (emphasis added).

[68] *MCR 3.973(E)(2)* and *(F)(3)*. See also *MCR 3.975(C)(2)*.

[69] *MCL 712A.18(1)*.

[70] *MCL 712A.18(1)(b)*. See also *MCL 712A.18(2)*.

[71] *MCL 712A.18(1)(c)*.

[72] *MCL 712A.18(1)(d)* and *(e)*.

5. REMOVING A MINOR FROM THE HOME

a. CHILD PROTECTIVE PROCEEDINGS

The trial court may remove a minor from the home in both child protection and juvenile delinquency proceedings. In child protective proceedings, the trial **[***26]** court may remove the minor from the home through the use of an order before or after an emergency removal,[73] at the preliminary hearing,[74] or at a dispositional review hearing.[75] If the trial court removes the child before the initial dispositional hearing and does not terminate its jurisdiction in its dispositional order, it must review its placement decision under *MCR 3.975*.[76]

b. JUVENILE DELINQUENCY PROCEEDINGS

In juvenile delinquency proceedings, the trial court may also issue an order of disposition removing the minor from the home,[77] and it may "place the juvenile in a suitable foster care home subject to the court's supervision"[78] or in a public or private institution, agency, or facility.[79]

Accordingly, there is no conflict regarding the meaning of the phrase "removing the child from the home." **[*460]** The trial court removes the child from the home when the trial court places the child in a location outside the parent's home.

[317]** 6. INTERACTION OF THE COMPONENT CLAUSES

McCarrick contends that requiring a parent to appeal from a dispositional order renders portions of *MCR 3.993(A)(1)* surplusage because every order of disposition removing the minor from the home is also an order of disposition that places the minor under the supervision of the court. We **[***27]** disagree.

McCarrick's assertion rests on the asserted common understanding of the phrase "placing a minor under the supervision of the court." McCarrick asserted at oral arguments that attorneys commonly understand this phrase to mean that the trial court places a minor under the supervision of the court when it exercises its jurisdiction over the child. But for the reasons previously stated, we conclude that the Michigan Supreme Court did not refer to this common understanding when it used this phrase. Reading *MCR 3.993* in context with the statutes that govern the types of actions to which it applies, we conclude that the Michigan Supreme Court used the phrase "placing a minor under the supervision of the court" to refer to the specific action the trial court may take in a juvenile delinquency proceeding.

Accordingly, we reject McCarrick's assertion that our more natural reading of *MCR 3.993(A)(1)*—requiring the order appealed by right to be a dispositional order—renders portions of *MCR 3.993(A)(1)* surplusage. *MCR 3.993* applies to both juvenile delinquency and child protective proceedings. In juvenile delinquency proceedings, the trial court may issue an order of disposition that (1) places a minor under the supervision of the court, (2) **[***28]** places the minor outside the home, or (3) does **[*461]** both. The more natural reading of *MCR 3.993(A)(1)*—that a parent may appeal as of right (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home—does not render any portion of *MCR 3.993* surplusage.

7. PRACTICAL CONCERNS

McCarrick asserts that it is imperative that this Court interpret *MCR 3.993* in a fashion that allows

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[73] *MCR 3.963*.

[74] *MCR 3.965(B)(11)*.

[75] *MCR 3.973(G)*.

[76] *MCR 3.966(A)(2)* and *MCR 3.973(G)(1)*.

[77] *MCL 712A.18(1)(c)*, *(d)*, and *(e)*.

[78] *MCL 712A.18(1)(c)*.

[79] *MCL 712A.18(1)(c)*, *(d)*, and *(e)*.

a parent to appeal the child's removal as of right because it will lead to speedy review of removal issues. We do not disagree with the importance of the trial court's removal decision and the impact that such a decision can have on the child's well-being and the progress of the case. However, as *McClain/Waters/Skinner* and *White* illustrate, claiming an appeal of right from the order removing the child from the home is not likely to result in a faster resolution than claiming an appeal of right from the first dispositional order. Further, a respondent parent may file an application for leave to appeal the trial court's removal decision,[80] and may file the application on an emergency basis in appropriate cases.[81]

8. CONCLUSION

We conclude that MCR 3.993(A)(1) requires the order appealed **[***29]** to be an order of disposition. Therefore, a respondent parent may appeal (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home. But a respondent parent may not **[*462]** appeal by right *any* order that removes the minor from the home. The order must be an order *of disposition*.

Accordingly, we conclude that McCarrick was not entitled to appeal by right the **[**318]** trial court's removal orders following the preliminary hearings in Docket Nos. 315510 and 317403. While this Court could, at its discretion, grant leave in these dockets to address McCarrick's substantive issues, we conclude that it is not necessary to do so because those dockets raise the same issues that McCarrick raises in Docket No. 318475, in which this Court has already granted leave.

III. ORDER REMOVING THE INDIAN CHILDREN

In Docket No. 318475, this Court granted McCarrick's delayed application for leave to appeal the substantive issues she raised in Docket Nos. 315510 and 317403 regarding the sufficiency of the trial court's order removing the children from her home under ICWA and the Family Preservation Act. This Court granted McCarrick's application **[***30]** limited to the issues raised in the application and supporting brief. McCarrick's application challenged both the sufficiency and substance of the trial court's findings at both the March 8, 2013 and the June 26, 2013 removal hearings. We conclude that the trial court erred when it removed McCarrick's children from the home without any testimony from a qualified expert witness regarding the potential damage to the children.

A. STANDARD OF REVIEW

This Court reviews de novo issues of law, including the interpretation and application of ICWA and the **[*463]** Family Preservation Act.[82] We review for clear error the trial court's findings of fact underlying the legal issues.[83] A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[84]

B. LEGAL STANDARDS

Congress enacted ICWA in 1978 to respond to abusive child welfare practices that separated large numbers of Indian children from their families and harmed the children, their parents, and the Indian tribes.[85] "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children."[86] ICWA requires the trial court **[***31]** to consider

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[80] See MCR 3.993(B).

[81] See *MCR 7.205(F)*.

[82] *In re JL, 483 Mich 300, 318; 770 NW2d 853 (2009)*; *In re Morris, 491 Mich 81, 97; 815 NW2d 62 (2012)*.

[83] *Morris, 491 Mich at 97*.

[84] *In re Mason, 486 Mich 142, 152; 782 NW2d 747 (2010)*.

[85] *Morris, 491 Mich at 97-98*.

[86] *Id. at 99*.

the testimony of a qualified expert witness to determine whether the Indian child is likely to be seriously damaged if he or she remains in the parent's care:

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[87]

On January 2, 2013, the Family Preservation Act became effective.[88] The Family Preservation Act provides **[*464]** that an Indian child may not be removed, placed in foster care, or remain removed unless an expert witness testifies regarding the active efforts **[**319]** provided to prevent the break up of the family and the likelihood of damage to the child if he or she is not removed:

> An Indian child may be removed from a parent or Indian custodian . . . only upon clear and convincing evidence, that includes testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the **[***32]** Indian family, that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[89]

C. SERIOUS EMOTIONAL OR PHYSICAL DAMAGE

First, McCarrick contends that the trial court's findings were not sufficient because it only found that the children were likely to suffer harm, not that the children were likely to suffer damage. We conclude that the trial court's finding complied with both ICWA and the Family Preservation Act. McCarrick provides no authority from which this Court could conclude that "harm" and "damage" are different things. As commonly defined, the word "harm" means "injury or damage," the word "injury" means "harm or damage done or sustained," and the word "damage" means "injury or harm that reduces value, usefulness, etc."[90] Given that each of these words refers to the other in its definition, we conclude that these words are synonymous for the purposes of these acts. Therefore, we **[*465]** conclude that the trial court's finding of harm was sufficient to satisfy both ICWA and the Family Preservation Act.

Next, McCarrick **[***33]** contends that the trial court failed to comply with ICWA and the Family Preservation Act when it ordered the children removed from McCarrick's care because O'Neil did not opine about whether McCarrick's continued custody was likely to result in serious emotional or physical damage to the children. We agree.

Both ICWA and the Family Preservation Act provide that the trial court may not place an Indian child in foster care without a determination in that regard supported by the testimony of a qualified expert witness. ICWA provides that "[n]o foster care placement may be ordered in such proceeding in the absence of a determination, . . . *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[91] Similarly, MCL 712B.15(2) provides that the trial court may remove an Indian child "only upon clear and convincing evidence, *that includes* the testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that . . . the continued custody of the

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[87] 25 USC 1912(e).

[88] 2012 PA 565.

[89] MCL 712B.15(2).

[90] *Random House Webster's College Dictionary* (1997).

[91] 25 USC 1912(e).

child by the parent or Indian custodian is likely to result in serious emotional or physical [***34] damage to the child." (Emphasis added.)

We note that, according to the Bureau of Indian Affairs, one of the major purposes of the qualified expert witness is to "speak specifically to the issue of whether continued custody . . . is likely to result in [*466] serious physical or emotional damage to [**320] the child."[92] While agency interpretations are not binding and cannot conflict with the plain language of the statute, such interpretations are entitled to respectful consideration.[93] Further, this Court and other courts have recognized that one of the purposes of the expert witness is to diminish the risk of cultural bias in the proceedings.[94]

In this case, O'Neil testified at the hearing regarding the efforts provided to McCarrick and the success of those efforts. However, O'Neil did not testify about the possible damage to the children. Sheppard, who was not an expert on the child-rearing practices in the children's tribe, testified that one of the children indicated that one of the other children was "shooting up drugs." Sheppard also testified that one of the children told her that McCarrick was aware that the children were using marijuana [***35] and only asked them not to smoke in the house. But Sheppard, like O'Neil, failed to testify regarding the possibility of emotional or physical damage to the children if McCarrick retained custody.

While it may appear obvious that drug use has the potential to damage children, ICWA and the Family Preservation Act require the trial court's determination of damage to include the testimony of a qualified expert witness. *Here, there was simply no testimony in that regard, much less testimony by O'Neil, the qualified expert witness.* We conclude that the trial court's determination [*467] regarding the damage to the children did not comply with ICWA or the Family Preservation Act because the trial court's determination of damage did not include the testimony of a qualified expert witness.

D. ADDITIONAL ISSUES

McCarrick contends that the trial court erred by continuing the children's removal with the June 26, 2013 order without considering whether the children were at a continued risk of damage. Given our conclusion regarding the trial court's March 8, 2013 removal order, we need not address this issue.

McCarrick also contends that the trial court's "active efforts" findings[95] were insufficient under the Family Preservation Act. We disagree. [***36]

"The timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation."[96] McCarrick contends that there was no evidence (1) that the Department made active efforts to address substance abuse, and (2) of the timing of the services. However, O'Neil testified that she provided the services from September 2011 to December 2011. And the Department never alleged that McCarrick abused substances. The Department alleged that McCarrick improperly supervised the children, who were abusing substances. O'Neil testified about the extensive services McCarrick received in 2011, including behavioral health and parenting services. These types of [**321] services target a parent's parenting ability, which is directly relevant to whether the Department made active efforts to assist McCarrick to properly supervise the children.

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[92] Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed Reg 67584, 67593, § D.4(a) (November 26, 1979).

[93] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

[94] See *In re Elliott*, 218 Mich App 196, 207; 554 NW2d 32 (1996). Also see, e.g., *In re NL*, 1988 OK 39; 754 P2d 863, 867-868 (Okla, 1988); *State ex rel Lane Co Juvenile Dep't v Tucker*, 76 Or App 673, 682-683; 710 P2d 793 (1985).

[95] See *MCR 3.002*.

[96] *IL*, 483 Mich at 325.

The services **[*468]** occurred a little more than a year before the inception of the current case.

Accordingly, we conclude that the trial court did not clearly err when it found that the Department made active efforts to prevent the breakup of McCarrick's family. O'Neil's testimony provided evidence about the timing **[***37]** of the services and the relevance of the services to McCarrick's situation.

Finally, McCarrick contends that the evidence was insufficient to support the trial court's active-efforts finding because no one testified regarding each element of the active-efforts definition as set forth in *MCL 712B.3(a)*. That statute defines active efforts through a list of twelve elements, which identify things the Department must do or address in order to engage in active efforts. McCarrick contends that there was no evidence that the Department complied with several elements, such as using culturally appropriate services or having the child's tribe evaluate McCarrick's family. O'Neil, however, testified that she works for the Sault Tribe of Chippewa Indians and had provided McCarrick with referrals to Sault Tribe Behavioral Health and other extensive services. Having reviewed O'Neil's testimony, we conclude that the trial court had sufficient evidence from which to conclude that the Department had complied with *MCL 712B.3(a)*.

E. REMEDY

McCarrick contends that the trial court's failure to comply with ICWA and the Family Preservation Act renders the trial court's removal invalid. We conclude that conditional reversal is an appropriate remedy in this case.

ICWA provides **[***38]** that "[a]ny Indian child who is the subject of any action for foster care placement . . . [and] **[*469]** any parent or Indian custodian . . . may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of *[25 USC 1912]*."[97] The Family Preservation Act provides the same remedy for a violation of *MCL 712B.15*.[98] In cases in which the trial court has violated ICWA by failing to provide the child's tribe with notice, this Court conditionally reverses.[99]

McCarrick does not provide any argument to support her contention that this Court should automatically reverse in this case. We note that the provisions of ICWA and the Family Preservation Act at issue in this case are not jurisdictional requirements.[100] Automatic reversal is also not consistent with this Court's disfavor of automatic reversals.[101] And when the trial court improperly removes an Indian child, the trial court need not return the child if doing so would subject the child to a risk of immediate danger.[102] Given that the record evidence includes that one child was injecting drugs and attempted suicide, we decline to automatically reverse the trial court's order in this case because **[**322]** doing so could place the child in danger and this Court is **[***39]** not in a position to determine whether the danger would be immediate.

We conditionally reverse and remand for the trial court to determine whether McCarrick's continued custody would result in serious emotional or physical damage to the children. If the trial court cannot support **[*470]** its finding with testimony from a qualified expert witness at a hearing, it must return the children to McCarrick's home. But if a qualified expert witness testifies that McCarrick's continued custody would result in serious

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[97] *25 USC 1914*.

[98] *MCL 712B.39*.

[99] *Morris, 491 Mich at 122*; *In re Johnson, 305 Mich App 328, 333-334, 852 NW2d 224 (2014)*.

[100] See *Morris, 491 Mich at 118-119*.

[101] *Id. at 120*.

[102] *25 USC 1920*; *Morris, 491 Mich at 118*.

emotional or physical damage to the children, the trial court may continue the children in their current placements.

IV. COURT RULE CHANGE

We also suggest that the Supreme Court consider modifying *MCR 3.993* in order to permit a parental appeal of right, at least under some circumstances, from a removal order when a child is removed from his or her parents at a stage prior to adjudication.

When a parent's action or neglect sufficiently threatens a child's safety to justify removal at the outset of a child protective proceeding, it is neither surprising nor objectionable that such removal would correlate with a higher likelihood of termination. However, as several recent cases have shown, the **[***40]** decision to remove a child can substantially affect the balance of the child protective proceedings even when the initial concerns are eventually determined to have been overstated.[103] In such cases, the parent may find his or her parental rights terminated not because of neglect or abuse, but because of (1) a failure to adequately comply with the Department's directives and programs and (2) a loss of bonding because of a lack of parental visitation.

Permitting a parent to appeal a removal order as a matter of right may be one way to minimize the likelihood of this unfortunate occurrence. But this Court does not have rulemaking authority; that authority lies solely with the Michigan Supreme Court.[104] That Court has the power to issue proposed rules, obtain comment from the bench, bar, and broader community, and then determine as a matter of judicial policy whether and how to modify the relevant procedure. Whether or not the Supreme Court ultimately decides that a rule change is wise, we have little doubt that an **[***41]** inquiry into the question will be of benefit to the children and parents of Michigan.

V. CONCLUSION

In Docket Nos. 315510 and 317403, we conclude that McCarrick is not entitled to appeal as of right the trial court's order removing the child from the home because the order is not a *dispositional order*. In Docket No. 318475, we conclude that the trial court erred when it removed the children from McCarrick's home without testimony from a qualified expert concerning the potential damage to the children.

We conditionally reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ William C. Whitbeck

/s/ Cynthia Diane Stephens

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[103] See *In re Sanders, 495 Mich 394; 852 NW2d 524 (2014)*; *In re Farris, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket No. 311967), 2013 Mich. App. LEXIS 1365*, lv gtd ***497 Mich. 864; 852 NW2d 900 (2014)***; *In re LaFrance, 306 Mich. App. 713, 858 N.W.2d 143, 2014 Mich. App. LEXIS 1799 (September 23, 2014; Docket Nos. 319219 & 319222)*.

[104] See *MCR 1.201*.

STATE OF MICHIGAN
IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF GREAT LAKES AND AND ENERGY,

Plaintiffs-Appellees,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT,WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,
Intervenors-Appellees,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant-Appellant.

Supreme Court Docket No. 163603

Court of Appeals Docket No 357598

Washtenaw County Circuit Court Case No. 88-034734-CE

PROOF OF SERVICE

I served the Intervenors / Appellees' Answer in Opposition to The Defendant/Appellant's Application For Leave To Appeal, and Proof of Service, upon the attorneys of record and/or parties on October 27, 2021, by using this Michigan Supreme Court's electronic filing system.

By: **/S/ Robert Charles Davis**

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Dated: October 27, 2021