Michigan
Law Revision Commission

THIRTY-FIRST ANNUAL REPORT
1996

MICHIGAN
LAW REVISION COMMISSION

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MICHIGAN LAW REVISION COMMISSION
Thirty-First Annual Report to the Legislature
for Calendar Year 1996

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its thirty-first annual report pursuant to section 403 of Act No. 268 of the Public Acts of 1986, MCL § 4.1403.

The Commission, created by section 401 of Act No. 268 of the Public Acts of 1986, MCL § 4.1401, consists of two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. The terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1996 were Senator Bill Bullard, Jr. of Milford; Senator Gary Peters of Pontiac; Representative Michael Nye of Litchfield; and Representative Ted Wallace of Detroit. As Legislative Council Administrator, Dianne M. Odrobina was the ex-officio member of the Commission. The appointed members of the Commission were Richard McLellan, Anthony Derezinski, Maura Corrigan, and George Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kevin Kennedy of the Detroit College of Law at Michigan State University served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1996 Commission members and staff are located at the end of this report.

The Commission's Work in 1996

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers, and the public generally as to defects and anachronisms in the law.

4. To recommend such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the civil and criminal law of this state into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees related to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States. Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission sometimes found that the subjects treated had been considered by the Michigan Legislature in recent legislation and, therefore, did not recommend further action. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

In 1996, the Commission studied the six topics listed below. The Commission recommends immediate legislative action on the first two topics. On the third topic, the

Commission recommends that the Legislature make government e-mail subject to public disclosure, but further recommends postponing such action until the Commission and the Legislature have addressed the issue of exceptions to such disclosure. On the fourth topic, the Commission in some instances recommends that legislative action be taken, but in others that no action be taken. On the fifth and sixth topics, the Commission presents study reports.

The six topics are:

(1) A Statutory Definition of Gross Negligence.

(2) Clarifying the Term "The Proximate Cause" in the Government Tort Liability Act.

(3) Public Disclosure of Government E-Mail.

(4) Recent Court Opinions Suggesting Legislative Action.

(5) Police Officer Liability in High-Speed Pursuits (study report).

(6) Proposed Administrative Procedures Act (study report).

Proposals for Legislative Consideration in 1997

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1996:

(1) Revisions to the Michigan "Lemon Law", 1995 Annual Report, page 7.

(2) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13.

(3) Consolidated Receivership Statute, 1988 Annual Report, page 72.

(4) Condemnation Provisions Inconsistent with the Uniform Condemnation Procedures Act, 1989 Annual Report, page 15.

(5) Proposed Administrative Procedures Act, 1989 Annual Report, page 27.

(6) Judicial Review of Administrative Action, 1990 Annual Report, page 19.

(7) Amendment of Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 141.

(8) Amendment of the Uniform Contribution Among Tortfeasors Act, 1991 Annual Report, page 19.

(9) International Commercial Arbitration, 1991 Annual Report, page 31.

(10) Tortfeasor Contribution Under Michigan Compiled Laws §600.2925a(5), 1992 Annual Report, page 21.

(11) Amendments to Michigan's Estate Tax Apportionment Act, 1992 Annual Report, page 29.

(12) Uniform Trade Secrets Act, 1993 Annual Report, page 7.

(13) Amendments to Michigan's Anatomical Gift Act, 1993 Annual Report, page 53.

(14) Ownership of a Motorcycle for Purposes of Receiving No-Fault Insurance Benefits, 1993 Annual Report, page 131.

(15) Repeal of UCC Article 6: Bulk Transfers, 1994 Annual Report, page 111.

(16) The Uniform Putative and Unknown Fathers Act and Revisions to Michigan Laws Concerning Parental Rights of Unwed Fathers, 1994 Annual Report, page 117.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act.
(2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal).
(3) Health Care Consent for Minors.
(4) Health Care Information, Access, and Privacy.
(5) Public Officials -- Conflict of Interest and Misuse of Office.
(6) Uniform Statutory Power of Attorney.
(7) Uniform Custodial Trust Act.
(8) Legislation Concerning Teleconference Participation in Public Meetings.
(9) Michigan Legislation Concerning Native American Tribes.
(10) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.
(11) Government E-Mail.
(12) Police Officer Liability in High-Speed Pursuits.
(13) Michigan's Borrowing Statute.
(14) Amendments to the Government Tort Liability Act regarding good-faith conduct by police officers.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the Detroit College of Law at Michigan State University, Detroit, Michigan 48201. The Executive Secretary of the Commission is Professor Kevin Kennedy, who was responsible for the publication of this report. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 70 Michigan statutes passed since 1967 upon the recommendation of the Commission.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
Maura Corrigan
George Ward
Senator Bill Bullard, Jr.
Senator Gary Peters
Representative Michael Nye
Representative Ted Wallace
Dianne M. Odrobina

A RESOLUTION COMMENDING THE HONORABLE DAVID HONIGMAN

Whereas, It is with great respect and appreciation for his valuable contributions that the Michigan Law Revision Commission is pleased to honor Senator David Honigman on his retirement from the State Senate and his departure from the Commission. As a member of the Commission since 1987, Mr. Honigman has served with distinction as a member of the body statutorily charged with the responsibility of examining and discovering defects in the laws and recommending needed reform; and

Whereas, David Honigman, a legislative member of the Commission, brought to his assignment on the Commission his integrity, intellect, commitment, and a broad knowledge of the law. A graduate of the University of Michigan and Yale University, Mr. Honigman was Republican State Representative from 1984 to 1990 and Republican State Senator from 1990 to 1996; and

Whereas, He was also a Commissioner of the National Conference of Commissioners on Uniform State Laws. His contributions to the Michigan Law Revision Commission will be long remembered; now, therefore, be it

Resolved, That a copy of this resolution be printed in the 31st Annual Report of the Michigan Law Revision Commission.

A STATUTORY DEFINITION OF GROSS NEGLIGENCE: RECOMMENDATION TO THE LEGISLATURE

I. Introduction.

As part of its statutory charge to examine the common law and statutes of the state and its current judicial decisions, the Michigan Law Revision Commission undertook a two-year study of the law of gross negligence in Michigan. The Commission published a special report in the summer of 1996 that was distributed to interested members of the Michigan legal community for their comments and suggestions.

A major impetus for the Commission's examination of this subject was a 1994 Michigan Supreme Court decision, *Jennings v. Southwood.*[1] The Supreme Court in *Jennings v. Southwood* was asked to define gross negligence in the context of the Emergency Medical Services Act. In *Jennings*, the Michigan Supreme Court overruled the 70-year-old landmark, *Gibbard v. Cursan,*[2] which had defined gross negligence in a way that was both anachronistic and unique to Michigan. *Gibbard* and its progeny defined gross negligence to mean that the negligent individual had the last clear chance to avert the harm. Even though Michigan had adopted a pure comparative negligence standard of conduct in 1979 and had abolished the "last clear chance" doctrine in common law tort actions, Michigan retained the "last clear chance" definition of gross negligence, an obvious holdover from the days of contributory negligence.

Rather than fashioning its own gross negligence definition, the Court in *Jennings* instead borrowed the definition contained in the Government Tort Liability Act (GTLA), one of only two statutes in Michigan that defines that term, the other being 1995 P.A. 249, M.C.L. § 600.2945(d).[3] As

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1 Jennings v. Southwood, 446 Mich. 125, 521 N.W.2d 230 (1994).

2 225 Mich. 311, 196 N.W. 398 (1923).

3 In 1995, the Legislature enacted 1995 P.A. 249, dealing with, among other things, product liability and joint and several liability in personal injury actions, the Legislature enacted the following definition of "gross negligence":

> "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

1995 P.A. 249, section 1, codified at M.C.L. § 600.2945(d). This definition, of course, tracks verbatim the GTLA's definition of gross negligence, bringing to three the number of statutes that use the same definition of gross negligence.

explained in the Report that immediately follows the Commission's recommendation, the GTLA extends immunity from suit to government employees, unless their conduct is grossly negligent and "the proximate cause" of the plaintiff's injuries. Under the GTLA[4] and M.C.L. § 600.2945(d), "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

II. The Term "Gross Negligence" In Michigan Statutes.

As a result of the Supreme Court's decision in *Jennings* and of recent statutory developments, three statutes -- the GTLA, the Emergency Medical Services Act, and the 1995 product liability legislation -- use the same statutory definition of gross negligence. Forty other Michigan statutes, however, also use the term "gross negligence," but do not have a gross negligence definition. The term "gross negligence" is most frequently used in Michigan in statutes granting qualified immunity from suit to individuals and organizations engaged in governmental activities or public service. In statutes that grant immunity from suit to specific persons and organizations for acts committed in the line of duty, immunity is usually qualified as not extending to acts that are grossly negligent. Typical is the qualified immunity from liability in the Ambulance and Inhalator Service Act which provides:

> Any municipal or private ambulance driver or attendant or policeman or fireman engaged in emergency first aid service, who, in good faith renders emergency care at the scene of an emergency, *shall not be liable for any civil damages as a result of acts or omissions* in rendering the emergency care, *except acts or omissions constituting gross negligence or wilful and wanton misconduct.*[5]

Nearly identical language is found in statutes granting immunity from liability to the owners of land leased for hunting, owners of land used without compensation for recreational purposes, mass immunization personnel, doctors and nurses in emergency or sports situations, hospital

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4 M.C.L. § 691.1407(2)(c), M.S.A. § 3.996(107)(2)(c), provides:

(c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

5 M.C.L. § 41.711a, M.S.A. § 5.160(1)(emphasis added). This section was added in 1967.

personnel in emergency situations, CPR volunteers, block parents in emergency situations, ski patrols in emergency situations, peace officers taking mental patients into protective custody, persons filing commitment petitions for mental patients, and school officials administering medicine to students on a doctor's orders.

A similar, but not identical, phraseology is found in statutes granting immunity from suit to firefighters, hazardous waste cleanup volunteers, government disaster relief workers, and emergency medical technicians. In these statutes the immunity is qualified by excluding conduct that constitutes "gross negligence or *willful* misconduct," instead of the "gross negligence or *willful and wanton* misconduct" standard found in the Ambulance and Inhalator Service Act. These statutes can be found in the attached Report.

III. Defining "Willful And/Or Wanton Misconduct".

In *Jennings v. Southwood*, the Supreme Court was also asked to interpret the term "wilful misconduct" contained in the EMSA. The Court noted in passing that "it is unfortunate that the judiciary and the Legislature have used the phrase 'wilful and wanton misconduct,' as opposed to 'wilful or wanton misconduct.'"[6] but concluded that the phrases "wilful misconduct" and "wilful and wanton misconduct" possess distinct meanings.[7] The term "wilful" requires a finding of actual intent to harm, the Court concluded, while the term "wanton" is an intent inferred from reckless conduct.[8]

IV. Proposals For Legislative Reform.

The upshot of these case law and statutory developments is that the law is unsettled as to defining gross negligence in contexts other than the GTLA, the EMSA, and product liability. Case law and statute also have created a knot of legal standards for culpability, with formulations ranging

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6 Jennings, 446 Mich. at 141.

7 Jennings, 446 Mich. at 139.

8 *Id.*, 446 Mich. at 141. Compare Ill. Ann. Stat. § 10/1-210, which defines "willful and wanton conduct" as follows:

> "Willful and wanton conduct" as used in this [Governmental Employees Tort] Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

from gross negligence or willful misconduct, or gross negligence or willful or wanton misconduct, or gross negligence or willful and wanton misconduct. The Commission considered several suggestions, all of which were variations on the theme of enacting a statutory definition of gross negligence.

One suggestion was to enact a statutory definition of gross negligence that would be applicable solely to immunity statutes. Nearly one-half of all the statutes using the term "gross negligence" are of the immunity type. Under this proposal, the GTLA's definition of gross negligence -- "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results" -- would become the uniform definition for all immunity-type statutes.

A second suggestion was to enact a uniform definition of gross negligence that would be applicable to all statutes using the term "gross negligence." Again, the GTLA's definition of "gross negligence" would be the model.

A third suggestion, made by Commissioner George Ward, was to amend all the statutes that used the alternative formulation of "gross negligence, or wilful or wanton misconduct," and substitute this with three levels of culpability: ordinary negligence, gross negligence, and intentional conduct, with the GTLA definition for gross negligence. Mr. Ward further suggested the following two refinements. First, when conduct is intentional, but performed pursuant to a claim of privilege, such as by a police officer, the conduct amounts to gross negligence only if there is no basis for a good faith belief in the existence of the privilege or if the circumstances indicate that the actor intentionally exceeded the limits of the privilege.[9] Second, in all other cases, conduct shall be deemed to be "so reckless as to demonstrate a substantial lack of concern for whether an injury results" when the mental attitude accompanying the conduct amounts to conscious indifference to the rights, welfare, and safety of others. Such a mental attitude can be inferred from an intentional failure to perform a manifest duty imposed to protect others from serious injury (i.e., from a showing that the actor knew about a serious peril to another, but his acts or omissions demonstrate that he did not care.[10]

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[9] *Compare* Anderson v. Creighton, 483 U.S. 635 (1987).

[10] *See, e.g.*, Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981); Fox v. Oklahoma Memorial Hospital, 774 P.2d 461 (Okla. 1989).

At the Commission's September 23, 1996 meeting, Mr. Bruce Timmons, Legal Counsel, House Republican Office, informed the Commission that the GTLA definition of "gross negligence" is in fact not a definition for "gross negligence," but rather is closer to a definition of reckless misconduct that was adapted from the Restatement (Second) of Torts. The Restatement notes, however, that "[i]n the construction of statutes which specifically refer to gross negligence, that phrase is sometimes construed as equivalent to reckless disregard."[11] The Restatement also notes that reckless misconduct is synonymous with "wanton or willful misconduct."[12] The Restatement distinguishes reckless misconduct from intentional wrongdoing in that "[w]hile an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it."[13]

Mr. Timmons informed the Commission that at the time the 1986 amendments to the GTLA were drafted, groups representing state employees urged the Legislature to adopt a definition of gross negligence that would be most protective of public employees, which the Legislature did in M.C.L. § 691.1407(2)(c), M.S.A. § 3.996(107)(2)(c).

Thus, the present definition of "gross negligence" in the GTLA and in 1995 P.A. 249 traces its pedigree to the Restatement (Second) of Tort's definition of recklessness.

V. Recommendation.

To eliminate the confusion created by the many statutes that use an undefined standard of culpability based alternatively on gross negligence, willful misconduct, willful and/or wanton misconduct, or reckless conduct, the Michigan Law Revision Commission makes the following recommendations to the Legislature:

1. Enact a uniform definition for all these terms in Chapter 8 of the Michigan Compiled Laws, to provide:

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[11] RESTATEMENT (SECOND) OF TORTS § 82, cmt. e. The comment states that "reckless disregard overrides the contributory negligence defense, permits punitive damages, results in a looser application of causation principals, and is the only situation in which gratuitous licensees or trespassers can recover. Readers are referred to §500-§503 of the text for a discussion of reckless disregard."

[12] RESTATEMENT (SECOND) OF TORTS, § 282, cmt. e.

[13] *Id.* § 500 cmt. f.

> As used in the statutes of this state, the term or terms "gross negligence," "willful misconduct," "willful or wanton misconduct, "willful and wanton misconduct," or "reckless misconduct" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

The Commission fully recognizes that the definition being recommended is based on an adaptation of a definition of reckless misconduct found in the Restatement (Second) of Torts. Nevertheless, gross negligence has been construed as being synonymous with reckless misconduct, and reckless misconduct has been construed as being synonymous with wanton or willful misconduct.[14] Accordingly, since the recommended definition covers not only acts that are grossly negligent, but also misconduct that is willful, wanton, or reckless, the Commission believes that the proposed definition is an appropriate one under the circumstances.

In addition, the enactment of a uniform definition will bring a much needed measure of predictability to an area of the law that is currently in a state of confusion.

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[14] The District of Columbia defines "gross negligence" as "wilful intent to injure" or "a reckless or wanton disregard of the rights of another . . . ." D.C. Code § 4-162.

GROSS NEGLIGENCE IN MICHIGAN: A REPORT TO THE MICHIGAN LAW REVISION COMMISSION[1]

I. Summary.

As part of its statutory charge to examine the common law and statutes of the state and its current judicial decisions, the Michigan Law Revision Commission undertook a study of the law of gross negligence in Michigan. On August 2, 1994, the Michigan Supreme Court decided *Jennings v. Southwood*,[2] a significant case law development in the area of gross negligence. Despite the important change this decision has made, however, major gaps in the law of gross negligence nevertheless persist in Michigan.

In *Jennings v. Southwood*, the Supreme Court overruled the 70-year-old landmark, *Gibbard v. Cursan*,[3] which had defined gross negligence in a way that was both anachronistic and unique to Michigan. *Gibbard* and its progeny defined gross negligence to mean that the negligent individual had the last clear chance to avert the harm. Even though Michigan had adopted a pure comparative negligence standard of conduct in 1979 and had abolished the "last clear chance" doctrine in common law tort actions, Michigan retained the "last clear chance" definition of gross negligence, an obvious holdover from the days of contributory negligence. Michigan's common law definition of gross negligence had led to more than a little confusion in the Michigan courts.

The Supreme Court in *Jennings* was asked to define gross negligence in the context of the Emergency Medical Services Act. The Court first rejected the *Gibbard* definition of gross negligence, a definition that was grounded in legal principles that were no longer good law in Michigan. But rather than fashioning its own gross negligence definition, the Court

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[1] An earlier draft of this study report was prepared by Professor Kent D. Syverud, University of Michigan School of Law. The final report was prepared by Professor Kevin Kennedy, Detroit College of Law at Michigan State University. Professor Kennedy wishes to acknowledge the invaluable research assistance of Russell Meyers, Class of 1998, Detroit College of Law.

[2] Jennings v. Southwood, 446 Mich. 125, 521 N.W.2d 230 (1994).

[3] 225 Mich. 311, 196 N.W. 398 (1923).

instead borrowed the definition contained in the Government Tort Liability Act (GTLA), the only statute in Michigan that defines that term. (As explained below, the GTLA extends immunity from suit to government employees, unless their conduct is grossly negligent and "the proximate cause" of the plaintiff's injuries.) Under the GTLA, "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

As a result of the Supreme Court's decision in *Jennings*, two statutes, the GTLA and the Emergency Medical Services Act (EMSA), now use the same statutory definition of gross negligence. The Supreme Court has rejected Michigan's outdated definition of gross negligence, but left a vacuum in its wake. Filling it will require action either by the Legislature or the courts. The *Jennings* decision may signal a trend in which the Michigan courts borrow the Legislature's only definition of gross negligence and makes general use of it in other gross negligence settings. For the forty other Michigan statutes that use the term "gross negligence," but which do not have a gross negligence definition, current case law leaves unsettled how to define gross negligence in contexts other than the GTLA and the EMSA.

II. Introduction.

Part III of this report traces the legal contexts in which the term "gross negligence" is and has been used in Michigan case law and statutes. Part IV examines definitions of gross negligence generally. Part V reviews definitions of gross negligence in Michigan. Part VI examines the contexts and definitions of gross negligence in other jurisdictions. Finally, Part VII considers options available to the Legislature should it decide to enact a comprehensive, uniform definition of gross negligence.

III. Contexts in Which the Term "Gross Negligence" Is and Was Used in Michigan.

This Part examines the contexts in which the term "gross negligence" is used in Michigan, including current definitions of gross negligence, their origin, and the development and eventual demise of last clear chance as the preeminent definition of gross negligence in Michigan.

A. Statutory Contexts In Which the Term "Gross Negligence" Is Currently Used in Michigan.

Michigan statutes employ the term "gross negligence" approximately 40 times,[4] but only twice, in the Government Tort Liability Act,[5] and in the tort reform legislation enacted in 1995 P.A. 249,[6] do statutes contain their own definition of gross negligence. The Legislature has enacted at least one statute using the term "gross negligence" nearly every year from 1974 to 1990.[7] Only five statutes that use gross negligence are more than twenty years old, and the oldest, which was passed in 1953, is only forty years old.[8]

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4 M.C.L. § 29.7c, M.S.A. § 4.559(7c) (firefighters); M.C.L. § 30.407, M.S.A. § 4.824(17)(5) (director of emergency management); M.C.L. § 30.411, M.S.A. § 4.824(21) (disaster relief personnel); M.C.L. § 324.20302(2), M.S.A. § 13A.20302(2) (hazardous waste spills, volunteers); M.C.L. § 41.711a, M.S.A. § 5.160(l) (ambulance drivers, attendants, police, firefighters); M.C.L. § 125.996, M.S.A. § 19.410(36) (mobile home vendors); M.C.L. § 324.8333(8), M.S.A. § 13A.8333(8) (pesticide users); M.C.L. § 324.20127, M.S.A. § 13A.20127(6) (various classes of persons responding to hazardous waste spills); M.C.L. § 300.201, M.S.A. § 13.1485 (owners of recreational land); M.C.L. § 316.605, M.S.A. § 13.1350(605) (lessors of hunting lands); M.C.L. § 317.176, M.S.A. § 13.1482(6)(recreational trespass); M.C.L. § 330.1427b, M.S.A. § 14.800(427b) (officers taking persons into protective custody); M.C.L. § 330.1439, M.S.A. § 14.800(439) (persons filing treatment petitions under Mental Health Code); M.C.L. § 333.6508, M.S.A. § 14.15(6508) (treatment of substance abusers); M.C.L. § 333.9203, M.S.A. § 14.15(9203) (free immunizations); M.C.L. § 333.20965, M.S.A. § 14.15(20965) (providers of emergency medical services); M.C.L. § 338.981, M.S.A. § 18.86(11) (mechanical contractors); M.C.L. § 339.604, M.S.A. § 18.425(604) (violations of occupational code); M.C.L. § 339.2715, M.S.A. § 18.425(2715) (optometrists); M.C.L. § 380.1178, M.S.A. § 15.41178 (administration of medication to students); M.C.L. §§ 445.1672, .1681, .1682, M.S.A. §§ 23.1125(72), (81), (82) (disclosures of information required by law, failure to service mortgage loans); M.C.L. § 450.2209, M.S.A. § 21.197(209) (nonprofit corporation officers); M.C.L. § 484.1604, M.S.A. § 22.1467(604)(emergency telegraph/telephone operators); M.C.L. § 487.1707, M.S.A. § 23.1189(707) (officers of financial institutions); M.C.L. § 500.2124, M.S.A. § 24.12124 (automobile insurers, issuance of policies); M.C.L. § 500.2130, M.S.A. § 24.12130 (automobile insurers, exchange of information); M.C.L. § 554.455, M.S.A. § 27.3178(241.25) (custodians of minor's account); M.C.L. § 559.154, M.S.A. § 26.50(154) (officers of condominium associations); M.C.L. § 600.5839, M.S.A. § 27A.5839 (architects, engineers and contractors); M.C.L. § 691.1407, M.S.A. § 3.996(107) (governmental units, employees); M.C.L. § 691.1501, M.S.A. § 14.563 (physicians and nurses, competitive sports); M.C.L. § 691.1502, M.S.A. § 14.563(12) (medical personnel, emergency care and immunizations); M.C.L. § 691.1504, M.S.A. § 14.563(14) (CPR volunteers); M.C.L. § 691.1505, M.S.A. § 14.563(15) (block parents); M.C.L. § 691.1507, M.S.A. § 14.563(17) (ski patrols); M.C.L. § 691.1522, M.S.A. § 14.16(102) (restaurant employees); M.C.L. § 700.173, M.S.A. § 27.5173 (personal representatives of estate); M.C.L. § 700.553, M.S.A. § 27.5553 (fiduciaries). *See also* MICH. CONST. art. V, § 10 (gross neglect of duty a ground for the governor to discharge officials).

5 M.C.L. § 691.1407, M.S.A. § 3.996(107). This section was added in 1986.

6 M.C.L. § 600.2945(d).

7 *See* notes 8-52, *infra.*

8 The term "gross negligence" was added to the following statutes in the year noted. M.C.L. § 41.711a, M.S.A. § 5.160(1)(1967) (a Good Samaritan act); M.C.L. § 300.201, M.S.A. § 13.1485 (1953) (liability of owners for recreational uses of their land); M.C.L. § 691.1501, M.S.A. §

One explanation for the Legislature's increased use of the gross negligence standard in recent years is legislative tort reform to limit the liability of certain classes of persons who would otherwise be held to an ordinary negligence standard of care.

As explained in the next section, gross negligence is most frequently used in statutes granting qualified immunity from suit to individuals and organizations engaged in governmental activities or public service. It is also used as a basis for awarding extraordinary damages, as a ground for disciplining professional licensees, and as a restriction on private organizations which seek to indemnify or release from liability their officers and directors.

1. *Gross Negligence As A Statutory Exception to Immunity From Suit*

In statutes that grant immunity from suit to specific persons and organizations for acts committed in the line of duty, immunity is usually qualified as not extending to acts that are grossly negligent. Typical is the qualified immunity from liability in the Ambulance and Inhalator Service Act which provides:

> Any municipal or private ambulance driver or attendant or policeman or fireman engaged in emergency first aid service, who, in good faith renders emergency care at the scene of an emergency, *shall not be liable for any civil damages as a result of acts or omissions* in rendering the emergency care, *except acts or omissions constituting gross negligence or wilful and wanton misconduct.*[9]

Nearly identical language is found in statutes granting immunity from liability to the owners of land leased for hunting,[10] owners of land

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14.563 (1963) (a Good Samaritan act); M.C.L. § 380.1178, M.S.A. § 15.41178 (liability of teachers administering medication to students; the Act was passed in 1971 as a codification of prior law); M.C.L. § 554.455, M.S.A. § 27.3178(241.25) (1960) (liability of custodians of gifts to minors). *See also* M.C.L. § 559.154, M.S.A. § 26.50(154) (liability of condominium association officers; passed in 1978 as a recodification of prior section M.C.L. § 559.13).

9 M.C.L. § 41.711a, M.S.A. § 5.160(1)(emphasis added). This section was added in 1967.

10 M.C.L. § 316.605, M.S.A. § 13.1350(605) ("A cause of action shall not arise for injuries to persons . . . unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee"). This section was added in 1986.

used without compensation for recreational purposes,[11] mass immunization personnel,[12] doctors and nurses in emergency or sports situations,[13] hospital personnel in emergency situations,[14] CPR volunteers,[15] block parents in emergency situations,[16] ski patrols in emergency situations,[17] peace officers taking mental patients into protective custody,[18] persons filing commitment petitions for mental patients,[19] and school officials

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[11] M.C.L. § 300.201, M.S.A. § 13.1485 ("No cause of action shall arise for injuries to any person. . . unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee"). This Act was passed 1953; the section was amended in 1964 to include motor cycling and snowmobiling to the list of recreation uses, and again in 1987 to include u-pick farms.

M.C.L. § 317.176, M.S.A. § 13.1482(6) ("No cause of action shall arise for injuries to any person . . . unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, his lessee or agent"). This Act was passed in 1976.

[12] M.C.L. § 333.9203, M.S.A. § 14.15(9203) ("[A mass immunization official] is not liable to any person for civil damages as a result of an act or omission . . . except for gross negligence or wilful and wanton misconduct"). This Act was passed as a codification of prior law in 1978.

[13] M.C.L. § 691.1501, M.S.A. § 14.563 ("[Doctors and nurses] shall not be liable for civil damages as a result of acts or omissions . . . in rendering emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This Act was passed 1963. This section was amended in 1964, adding the term "professional" to the definition of nurse, and again in 1987, adding sports situations.

[14] M.C.L. § 691.1502, M.S.A. § 14.563(12)("[Hospital personnel] shall not be liable for civil damages as a result of acts or omissions . . . in rendering emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This section was added in 1975.

[15] M.C.L. § 691.1504, M.S.A. § 14.563(14)("[CPR volunteers] shall not be liable for civil damages as a result of an act or omission in rendering cardiopulmonary resuscitation, except an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1986.

[16] M.C.L. § 691.1505, M.S.A. § 14.563(15)("[Block parents] shall not be liable for civil damages as a resulting from an act or omission in the rendering of that assistance except an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1985.

[17] M.C.L. § 691.1507, M.S.A. § 14.563(17)("[Ski patrol members] shall not be liable for civil damages as a result of acts or omissions . . . in rendering the emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This section was added in 1987.

[18] M.C.L. § 330.1472b, M.S.A. § 14.800(427b)(A peace officer . . . is not civilly liable . . . [unless he or she] engages in behavior involving gross negligence or wilful and wanton misconduct"). This section was added in 1978.

[19] M.C.L. § 330.1439, M.S.A. § 14.800(439)("A cause of action shall not be cognizable in a court of this state against a [petitioner] . . . unless the petition is filed as the result of an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1986.

administering medicine to students on a doctor's orders.[20]

A similar, but not identical, phraseology is found in provisions granting immunity from suit to firefighters dealing with hazardous waste,[21] hazardous waste cleanup volunteers,[22] government disaster relief workers,[23] and emergency medical technicians.[24] In these statutes the immunity is qualified by excluding "gross negligence or *willful* misconduct," instead of the "gross negligence or *willful and wanton* misconduct" standard found in the Ambulance and Inhalator Service Act.[25] In a similar vein, statutes granting immunity from suit to individuals providing disaster aid,[26] pesticide users,[27] and restaurant employees trying

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20 M.C.L. § 380.1178, M.S.A. § 15.41178("[A school official] is not liable in a criminal action or for civil damages as a result of the administration [of medicine] except for an act or omission amounting to gross negligence or wilful and wanton misconduct"). This Act was passed as a codification of prior law in 1971; this section was amended in 1978 to include officials other than teachers.

21 M.C.L. § 29.7c, M.S.A. § 4.559(7c)("[Firefighters] shall not be liable in a civil action for damages as a result of an act or omission by the person arising out of and in the course of the person's good faith rendering of that assistance unless the person's act or omission was the result of that person's gross negligence or wilful misconduct"). This section was added in 1984.

22 M.C.L. § 324.20302(2), M.S.A. § 13A.20302(2)("[Hazardous waste volunteers] shall not be liable in a civil action for damages resulting from an act or omission arising out of and in the course of the volunteer's good faith rendering of that assistance. [This immunity] shall not apply to a volunteer whose act or omission was the result of the volunteer's gross negligence or willful misconduct"). The predecessor section (M.C.L. § 30.432, M.S.A. § 13.31(72)) was added in 1990, and was repealed and reenacted in 1994 as part of the Natural Resources and Environmental Protection Act, 1994 P.A. 451.

23 M.C.L. § 30.411, M.S.A. § 4.824(21) ("Disaster relief workers], except in cases of willful misconduct, gross negligence, or bad faith .. shall not be liable for the death of or injury to persons, or for damage to property"). This Act was passed in 1976; this section was amended in 1990 to correct spelling and grammatical errors.

24 M.C.L. § 333.20965, M.S.A. § 14.15(20965)("Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of [emergency medical technicians] do not impose liability . . . "). This section was added in 1990.

25 M.C.L. § 41.711a, M.S.A. § 5.160(1). This section was added in 1967.

26 M.C.L. § 30.407, M.S.A. § 4.824(17)("The director may issue a directive relieve the donor or supplier of voluntary or private assistance from liability for other than gross negligence in the performance of the service"). This Act was passed in 1976; this section was amended in 1990 to accommodate an administrative re-organization.

27 M.C.L. § 324.8333(8), M.S.A. § 13A.8333(8)("A civil cause of action shall not arise for injuries to any person or property if [a pesticide user] was not grossly negligence, and [used the pesticides in compliance with the act]"). The predecessor section (M.C.L. § 286.576, M.S.A. § 12.340(26)) was added in 1988, and was repealed and reenacted in 1994 as part of the Natural Resources and Environmental Protection Act, 1994 P.A. 451.

to aid choking patrons,[28] grant immunity unless the person's conduct amounted to "gross negligence," but do not add the phrase, "or willful and wanton misconduct."

A third variation is found in the statute granting governmental units immunity from liability when attempting to deal with a hazardous waste release,[29] unless the clean-up effort caused injury due to "gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct."

Special language has sometimes been used in statutes that grant immunity in contexts where financial harms, as opposed to the physical harms covered by the statutes described above, are likely to occur. While the act granting telephone companies immunity when they interrupt normal service to establish and maintain 911 service uses the common "gross negligence or willful and wanton misconduct" language,[30] and Michigan's version of the Uniform Gifts to Minors Act uses conventional language that waives immunity for acts that "result from bad faith, intentional wrongdoing or gross negligence,"[31] other statutes in this category use more specialized language. For example, two parts of the Insurance Code of 1956 speak of acts "made with gross negligence or bad faith with malice in fact," rather than the more open-textured "good faith" requirement found in other statutes,[32] while two provisions dealing with probate link "wilful

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28 M.C.L. § 691.1522, M.S.A. § 14.16(102)("[A restaurant employee] shall not be liable for civil damages . . . unless the employee . . . was grossly negligence in his or her actions"). This Act was passed in 1978.

29 M.C.L. § 324.20127(6), M.S.A. § 13A.20127(6)("This subsection shall not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct"). The predecessor section (M.C.L. § 299.612a, M.S.A. § 13.32(12a)) was added in 1990, and was repealed and reenacted as part of the Natural Resources and Environmental Protection Act, 1994 P.A. 451.

30 M.C.L. § 484.1604, M.S.A. § 22.1467(605)("[A telephone company] shall not be liable for civil damages to any person as a result of an act or omission [necessary to comply with the statute] unless the act or omission amounts to gross negligence or willful and wanton misconduct"). This Act was passed in 1986.

31 M.C.L. § 554.455, M.S.A. § 27.3178(241.25)("A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this act"). This Act was passed in 1960.

32 M.C.L. § 500.2130, M.S.A. § 24.12130 ("There shall be no civil liability on the part of, and a cause of action of any nature shall not arise against . . . [various individuals involved with the act] for acts or omissions, other than acts made with gross negligence or in bad faith with malice in fact, related to the exchange of claim information"). This section was added in 1979.

fraud" and "gross negligence" as alternate bases for liability.[33]

Many of these immunity provisions, such as the Ambulance and Inhalator Service Act, also require that in order for conduct to be immune from suit it must be performed in "good faith."[34] A few statutes also provide that the class of persons who are the beneficiaries of the particular act enjoy immunity from criminal sanctions.[35]

What is the interplay of gross negligence, reckless conduct, and wanton and wilful misconduct? Are the three terms synonymous? Gross negligence is usually considered to carry a lower threshold of *mens rea* than that associated with reckless misconduct, willful and wanton

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M.C.L. § 500.2124, M.S.A. § 24.12124("[Immunity from liability for furnishing requested information] shall not apply if a statement made is shown to have been made with gross negligence or in bad faith with malice in fact . . ."). This section was added in 1979.

33 M.C.L. § 700.173, M.S.A. § 27.5172 ("After the final distribution of an intestate or testate estate, a will or another will if one is admitted to probate, shall not be admitted to probate, except if the personal representative or an interested party commits *wilful fraud or gross negligence*"). This Act was passed in 1978.

M.C.L. § 700.553, M.S.A. § 27.5553 ("When a fiduciary continues the business of a decedent or ward, the fiduciary . . . shall not be personally liable . . .[except for] his or her wilful fraud, gross negligence, or other wilful misconduct"). This Act was passed in 1978; this section was amended in 1979 to include creditors of continued businesses in the definition of creditor.

34 *See* M.C.L. § 29.7c, M.S.A. § 4.559(7c)(firefighters); M.C.L. § 324.20302(2), M.S.A. § 13A.20302(2)(hazardous waste spill volunteers); M.C.L. § 41.711a, M.S.A. § 5.160(l)(ambulance and inhalator service); M.C.L. § 330.1439, M.S.A. § 14.800(439)(persons filing mental health commitment petitions); M.C.L. § 380.1178, M.S.A. § 15.41178 (school officials dispensing medicine); M.C.L. § 691.1501, M.S.A. § 14.563 (doctors and nurses in emergency and sports situations); M.C.L. § 691.1502, M.S.A. § 14.563(12) (hospital personnel); M.C.L. § 691.1504, M.S.A. § 14.563(14) (CPR volunteers); M.C.L. § 691.1522, M.S.A. § 14.16(102) (restaurant employees). *See also* M.C.L. § 30.411, M.S.A. § 4.824(21) (no liability "except in cases of willful misconduct, gross negligence, or bad faith"); M.C.L. § 554.455, M.S.A. § 27.3178(241.25) (no liability except for "bad faith, intentional wrongdoing or gross negligence"); M.C.L. § 500.2130, .2124, M.S.A. § 24.12130, .12124 (acts "made with gross negligence or in bad faith with malice in fact").

For examples of statutes with no good faith qualification, *see* M.C.L. § 30.407, M.S.A. § 4.824(17) (disaster assistance donors); M.C.L. § 324.8333(8), M.S.A. § 13A.8333(8) (pesticide users); M.C.L. § 324.20127(6), M.S.A. § 13A.20127(6) (governments and persons responding to hazardous waste releases); M.C.L. § 300.201, M.S.A. § 13.1485 (recreational users of land); M.C.L. § 316.605, M.S.A. § 13.1350(605) (hunters); M.C.L. § 317.176; M.S.A. § 13.1482(6) (recreational trespassers); M.C.L. § 333.6508, M.S.A. § 14.15(6508) (law enforcement officers); M.C.L. § 333.9203, M.S.A. § 14.15(9203) (mass immunization officials); M.C.L. § 333.20965, M.S.A. § 14.15(20965) (emergency medical technicians).

35 *See, e.g.*, M.C.L. § 333.6510, M.S.A. § 14.15(6510) (law enforcement officers placing persons in protective custody); M.C.L. § 380.1178, M.S.A. § 15.41178 (school officials administering medication).

misconduct, willful misconduct, and intentional misconduct. Only if all these various standards of conduct have the same level of *mens rea* would they be synonymous as a matter of law. The Supreme Court's 1923 *Gibbard* decision suggested that that indeed might be the case. However, such an interpretation flouts a fundamental rule of statutory construction that all words of a statute are to be given meaning and effect. A statutory interpretation that treats these phrases as synonymous would render parts of the statute surplusage. Moreover, in 1994 in its decision in *Jennings v. Southwood*, the Supreme Court was asked to interpret the term "wilful misconduct" contained in the EMSA. The Court noted in passing that "it is unfortunate that the judiciary and the Legislature have used the phrase 'wilful *and* wanton misconduct,' as opposed to 'wilful *or* wanton misconduct.'"[36] but concluded that the phrases "wilful misconduct" and "wilful and wanton misconduct" possess distinct meanings.[37] The term "wilful" requires a finding of actual intent to harm, the Court concluded, while the term "wanton" is an intent inferred from reckless conduct.[38]

2. *Other Statutory Contexts in Which Gross Negligence Is Currently Used in Michigan*

a. Indemnification

While some Michigan statutes make gross negligence an exception to a general grant of immunity from suit, another group of Michigan statutes requires private organizations to include a "gross negligence exception" when they hold harmless and indemnify their officers and directors. For example, statutes regulating the formation of non-profit corporations[39] and

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36 Jennings, 446 Mich. at 141.

37 Jennings, 446 Mich. at 139.

38 *Id.*, 446 Mich. at 141. *Compare* ILL. ANN. STAT. § 10/1-210, which defines "willful and wanton conduct" as follows:

> "Willful and wanton conduct" as used in this [Governmental Employees Tort] Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

39 M.C.L. § 450.2209, M.S.A. § 21.197(209)(A charter provision freeing directors from personal liability "shall not eliminate or limit the liability of a director for any of the following: . . . (ii) Acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of the law. . . . (vi) An act or omission that is grossly negligent"). This Act was passed in 1982; this section was amended in 1987 to deal with tax exempt corporations.

condominium associations[40] prohibit these organizations from indemnifying directors from liability for intentional misconduct, wilful and wanton misconduct, or grossly negligent acts or omissions.[41]

b. Damage Awards and the Statute of Limitations

One Michigan statute makes gross negligence a ground for enlarging the statute of limitations for one year,[42] another makes it a ground for an award of treble damages,[43] and a third makes gross negligence a ground for an award of punitive damages, litigation costs, and the appointment of a conservator to run the violating corporation's business.[44] The verbal formulations in these statutes are as varied as those found in the immunity area, with one provision requiring that an act be a "result of gross negligence,"[45] a second requiring that an act be done "wilfully or by gross

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40 M.C.L. § 559.154, M.S.A. § 26.50(154) ("The bylaws [of a condominium association] shall provide an indemnification clause . . . [but] shall exclude indemnification for wilful and wanton misconduct and for gross negligence"). This Act was passed in 1978 as a recodification of prior section M.C.L. § 559.13; this section was amended in 1982 to conform with property tax laws and make grammatical corrections.

41 M.C.L. § 450.2209, M.S.A. § 21.197(209); M.C.L. § 559.154, M.S.A. § 26.50(154).

42 M.C.L. § 600.5839, M.S.A. § 27A.5839 ("[The statute of limitations in actions arising from improvements to real property shall be six years] or 1 year after the defect is discovered or should have been discovered provided that the defect . . . is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement . . ."). This section was added in 1967, and was amended to add the pertinent part in 1986.

43 M.C.L. § 125.996, M.S.A. § 19.410(36) ("A manufacturer or dealer [of mobile homes] who knows or should have known that an alleged defect is covered by the warranty provided by this act and who willfully by gross negligence refuses or fails to take appropriate corrective action may be liable for treble damages"). This Act was passed in 1974.

44 M.C.L. §§ 445.1680, .1681, M.S.A. §§ 23.1125(80), (81) ("[Any person bringing an action under this act may] recover actual damages resulting from a violation of this act, or $250.00, whichever is greater, together with reasonable attorney fees and the costs of bringing the action. . . . [I]f the licensee or registrant establishes by a preponderance of the evidence that the failure to comply with the act was not willful, intentional, or the result of gross or wanton negligence, the amount recovered . . . shall not exceed actual damages. . . . [I]f the commissioner determines that a licensee or registrant is, intentionally or as a result of gross or wanton negligence, not servicing mortgage loans in accordance with the terms of this act or the terms of the servicing contracts, the commissioner may appoint a conservator . . ."). This Act was passed in 1987.

45 M.C.L. § 600.5839, M.S.A. § 27A.5839.

negligence,"[46] and a third requiring that an act be "willful, intentional, or the result of gross or wanton negligence."[47]

c. License Revocation

Michigan statutes make gross negligence either a ground for revoking a license or the basis for imposing a lesser penalty. Such statutes are found in the areas of banking,[48] optometry,[49] and residential building contracting.[50] One banking act uses the phrase "intentionally or due to gross and wanton negligence,"[51] while another requires "dishonesty on the part of the subject person or demonstrates the subject person's gross negligence with respect to the business of the licensee or a willful disregard for the safety and soundness of the licensee."[52]

Finally, a provision in the Michigan Constitution makes "gross neglect of duty" a ground upon which the Governor may discharge public officials.[53]

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46 M.C.L. § 125.996, M.S.A. § 19.410(36).

47 M.C.L. § 445.1680, .1681, M.S.A. § 23.1125(80), (81).

48 M.C.L. § 445.1672, M.S.A. § 23.1125(72) ("It shall be a violation of this act if a licensee or registrant [under the Mortgage Brokers, Lenders, and Servicers Lending Act] . . . (c) Intentionally or due to gross or wanton negligence, repeatedly fails to provide borrowers material disclosures of information as required by state or federal law"). This Act was passed in 1987.

M.C.L. § 487.1707, M.S.A. § 23.1189(707) ("The commissioner may issue an order removing a subject person of a license [under the Michigan Business and Industrial Development Corporation Act] if . . . (c) The act, violation, or breach of fiduciary duty either involves dishonesty on the part of the subject person or demonstrates the subject person's gross negligence with respect to the business of the licensee or a willful disregard for the safety and soundness of the licensee"). This Act was passed in 1986.

49 M.C.L. § 339.2715, M.S.A. § 18.425(2713) ("An ocularist or apprentice shall not do any of the following: (a) commit an act of gross negligence in the practice of ocularism . . . "). This section was added in 1983.

50 M.C.L. § 338.981, M.S.A. § 18.86(11)("The department may investigate the activities of a licensee [under the Forbes Mechanical Contractors Act] if the board finds that any of the following grounds exist: . . . (c) An act of gross negligence . . ."). This Act was passed in 1984.

51 M.C.L. § 445.1672, M.S.A. § 23.1125(72).

52 M.C.L. § 487.1707, M.S.A. § 23.1189(707).

53 MICH. CONST. art. 5, § 10. The section provides:

> The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or

B. Statutory Contexts in Which The Term "Gross Negligence" Was Formerly Used in Michigan: The Guest Passenger Statute.

The term "gross negligence" occupied center stage in Michigan's former automobile guest passenger statute.[54] The guest passenger statute was in force from 1929 until 1975, when the Michigan Supreme Court struck it down as unconstitutional in *Manistee Bank & Trust Co. v. McGowain.*[55] The statute granted the host driver of an automobile immunity from suit brought by a guest passenger, except in cases of "gross negligence or wilful and wanton misconduct."[56] This extensively litigated statute had an associated standard jury instruction defining the phrase "gross negligence or wilful or wanton misconduct."[57] In addition, cases interpreting the phrase have been a rich "definitional source for the terms gross negligence and wilful and wanton misconduct."[58]

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appointive. He may remove or suspend from office for *gross neglect of duty* or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature [emphasis added].

54 Formerly codified at M.C.L. § 257.401.

55 394 Mich. 655, 232 N.W.2d 636 (1975).

56 Formerly codified at M.C.L. § 2567.401, M.S.A. § 9.2101. Cases interpreting the statute can be found from as early as 1938 to as late as 1970. *See* Sargeson v. Yarabek, 24 Mich. App. 557, 180 N.W.2d 474 (1970); Thayer v. Thayer, 286 Mich. 273, 282 N.W. 145 (1938). The law provided that "no person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death, or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator . . . ." M.C.L. § 257.401, M.S.A. § 9.2101.

57 Former SJI 14.03 provided that in cases arising under the automobile guest statute "[t]he terms 'gross negligence or wilful and wanton misconduct' mean more than the failure to use ordinary care. These terms mean conduct which shows (actual or deliberate intention to harm) (or) (a reckless disregard for the safety of others in the face of circumstances involving a high degree of danger."

58 Nationwide Mut. Fire Ins. v. Detroit Edison, 95 Mich. App. 62, 289 N.W.2d 879, 881 (1980).

C. Common Law Contexts in Which the Term "Gross Negligence" Is Used in Michigan.

1. *Michigan's Criminal Law*

Gross negligence is the standard of culpability for two crimes in Michigan,. involuntary manslaughter[59] and felonious-driving.[60] The manslaughter statute provides:

> Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.[61]

The definition of the crime of manslaughter in Michigan is a matter which has been left to common law development. The common law makes gross negligence one of the elements of involuntary manslaughter. In *People v. Roby*,[62] for example, Justice Cooley stated, "I agree that as a rule there can be no crime without criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence." More recently, the Michigan Court of Appeals stated that "to convict of involuntary manslaughter, a defendant must have been grossly negligent."[63] Both the first and second editions of the Michigan Criminal Jury Instructions state that an element of involuntary manslaughter is that the defendant committed the act causing death in "a grossly negligent manner."[64]

The felonious-driving statute provides as follows:

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59 M.C.L. § 750.321, M.S.A. § 28.553.

60 M.C.L. § 752.191, M.S.A. § 28.661.

61 M.C.L. § 750.321, M.S.A. § 28.553.

62 52 Mich. 577, 579, 18 N.W. 365, 366 (1884).

63 People v. Zak, 184 Mich. App. 1, 457 N.W.2d 59, 62 (1990), quoting People v. Sealy, 136 Mich. App. 168, 172-173, 356 N.W.2d 614 (1984). People v. Sealy in turn cited Wayne County Prosecutor v. Recorder's Court Judge, 117 Mich. App. 442, 446, 324 N.W.2d 43 (1982), and People v. Ogg, 25 Mich. App. 372, 386, 182 N.W.2d 570 (1970), in support of the proposition that gross negligence is required to convict of involuntary manslaughter.

64 CJI2d 16.10; CJI 16:4:03 (1977).

> Every person who drives any vehicle upon a highway *carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely endanger any person or property* and thereby injuring so as to cripple any person, but not causing death, shall be guilty of the offense of felonious driving and upon conviction thereof shall be sentenced to pay a fine not exceeding 1,000 dollars or to imprisonment in the state prison not exceeding 2 years or by both fine and imprisonment in the discretion of the court.[65]

Both the courts and prosecutors have equated the italicized language with "gross negligence," and use "gross negligence" as a short-hand expression for the statute's standard of culpability.[66] Both the first and the second editions of the Michigan Criminal Jury Instructions state that an element of felonious driving is that "the defendant drove the vehicle in a grossly negligent manner."[67]

2. *Michigan's Civil Law*

Occasionally, a contract may use the term "gross negligence" which calls upon the courts to interpret its meaning in the context of the particular contract.[68] One case has used the term to underscore its finding that a defendant's conduct was intentional within the meaning of the Worker's Compensation statute.[69] Otherwise, while gross negligence is

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65 M.C.L. § 752.191, M.S.A. § 28.661 (emphasis added).

66 *See, e.g.*, People v. Sherman, 188 Mich. App. 91, 469 N.W.2d 19, 20 (1991).

67 CJI2d 15.10; CJI 15:5:01 (1977).

68 *See* National Mut. Fire Ins. Co. v. Detroit Edison Co., 95 Mich. App. 62, 289 N.W.2d 879, 880-882 (1980).

69 McNees v. Cedar Springs Stamping Co., 184 Mich. App. 101, 457 N.W.2d 68, 70 (1990). The court stated, "This, if proved, is not mere negligence or even gross negligence. It is wilfully forcing an employee to work in the face of a known and certain danger with respect to the specific machine that caused the accident."

frequently pleaded[70] and sometimes used in the course of testimony,[71] it very rarely surfaces in nonstatutory contexts in Michigan.

D. Common Law Use of the Term "Gross Negligence" in Michigan Before the Adoption of Comparative Negligence.

Gross negligence was an important part of Michigan's contributory negligence regime[72] until the Michigan Supreme Court abolished contributory negligence in 1979 and replaced it with a pure comparative negligence regime.[73] At common law the slightest contributory negligence on the part of a plaintiff would completely bar recovery from a tortfeasor who was negligent. However, an important exception to this rule provided that contributory negligence was not a bar to recovery from a tortfeasor who was either grossly negligent or who was guilty of wilful and wanton misconduct.[74] Gross negligence was usually defined in the Michigan cases as meaning that the tortfeasor had the last clear chance to avert the harm, while wilful and wanton misconduct was defined essentially as reckless conduct.[75] Plaintiffs could rely on either theory of recovery.

The rationale for the last clear chance doctrine as a trump card to the contributory negligence defense was that defendant's negligence, not plaintiff's contributory negligence, was the proximate cause of the plaintiff's harm. The wilful and wanton misconduct rejoinder to contributory negligence, on the other hand, was rooted in the notion that wilful and wanton misconduct, being quasi-criminal in nature, was

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70 *See, e.g.*, Group Ins. Co. v. Czopek, 440 Mich. 590, 489 N.W.2d 444, 454 n. 14 (1992); Gruett v. Total Petroleum, 182 Mich. App. 301, 451 N.W.2d 608, 609 (1989).

71 *See, e.g.*, Rouch v. Enquirer & News of Battle Creek, 184 Mich. App. 19, 457 N.W.2d 74, 83 (1990) (court's use of the term); People v. Crawford, 187 Mich. App. 344, 467 N.W.2d 818, 823 (1991) (quoting a prosecutor who used the term).

72 *See, e.g.*, Gibbard v. Cursan, 225 Mich. 311, 196 N.W. 398 (1923).

73 *See* Placek v. Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)(adopting pure comparative negligence). *See also* Callesen v. Grand Trunk W. Ry. Co., 175 Mich. App. 252, 437 N.W.2d 372 (1989); Petrove v. Grand Trunk W. Ry. Co., 437 Mich. 31, 464 N.W.2d 711 (1991) (rejecting the last clear chance doctrine).

74 *See, e.g.*, Gibbard v. Cursan, 225 Mich. 311, 319, 332-333, 196 N.W. 398 (1923).

75 *See, e.g.*, Hoag v. Paul C. Chapman & Sons, Inc., 62 Mich. App. 290, 233 N.W.2d 530, 535 (1975), *quoting* Gibbard v. Cursan, 225 Mich. 311, 322, 196 N.W. 398 (1923).

therefore substantially different in degree from gross negligence, such that a plaintiff's contributory negligence should not relieve from liability a defendant who had behaved in a wilful or wanton manner.[76]

IV. Definitions of Gross Negligence.

There are two leading approaches on defining gross negligence. The traditional approach draws from Roman Law. The prevailing approach equates gross negligence with wilful and wanton misconduct or with recklessness.

1. *The Traditional Approach to Defining Gross Negligence*

The traditional definition of gross negligence uses a three-tiered scheme of negligence: (1) slight negligence (the want of great care), (2) ordinary negligence, and (3) gross negligence (the want of even slight care). This approach has its origins in Roman law and was used primarily in the areas of bailments and automobile guest passenger statutes.[77]

The leading definition of gross negligence using this traditional approach is that of Learned Hand who stated:

> Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is a very great negligence, or the absence of even slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. . . . Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to

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76 *See, e.g.*, Gibbard v. Cursan, 225 Mich. 311, 319, 320-321, 196 N.W. 398 (1923).

77 WILLIAM PROSSER & W. PAGE KEETON, HANDBOOK ON THE LAW OF TORTS §34, at 215 (5th ed. 1984)[hereinafter PROSSER & KEETON].

> a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.[78]

This definition has come under heavy criticism from judges and scholars for causing confusion,[79] a criticism perhaps best captured by Baron Rolfe who described gross negligence as the same thing as ordinary negligence "with the addition of a vituperative epithet."[80] The attempt to create a three-tiered negligence scheme has been discarded in England, where it was first used at common law,[81] as well as in Illinois[82] and Kansas,[83] where this approach was experimented with in the United States.

2. *The Modern Trend in Defining Gross Negligence*

The prevailing approach to defining gross negligence is to place it at an intermediate level of mens rea between negligence and intentional conduct, and alternatively refers to this level of mens rea as gross negligence, willful and wanton misconduct, or recklessness. Both a federal statutory[84] and a federal regulatory[85] definition of gross negligence, and Michigan's only statutory definition of the term,[86] use this formulation. The U.S. Court of Appeals has adopted this description of gross negligence

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78 Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).

79 PROSSER & KEETON, *supra* note 77, at §34.

80 Wilson v. Brett, 11 M. & W. 113, 152 Eng. Rep. 737 (1843).

81 Grill v. General Iron Screw Collier Co., 1866, L.R. 1 C.P. 600.

82 City of Lanark v. Dougherty, 38 N.E. 892 (Ill. 1894).

83 Atchison, Topeka & Santa Fe Ry. v. Henry, 45 P. 576 (Kan. 1896).

84 Model Good Samaritan Food Donation Act, 42 U.S.C. § 12672(b)(7) (West 1993) (defining gross negligence as "voluntary and conscious conduct by a person with knowledge (at the time of the conduct) that the conduct is likely to be harmful to the health or well being of another person").

85 Copyright Regulations, 19 C.F.R. Part 171, App. B (1993)(defining a violation as grossly negligent "if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the offender's obligations under the statute").

86 M.C.L. § 691.1407, M.S.A. § 3.996 (107)(2)(c)(gross negligence is "conduct so reckless as to demonstrate lack of concern for whether an injury results").

in the context of §1983 suits.[87] In 1981, the Texas Supreme Court used a formulation of this type to replace its previous "absence of even slight care" formulation of gross negligence.[88] This is also the formulation used in Oregon[89] and Florida.[90] As previously noted in this report, the Michigan Supreme Court has apparently rejected the view that all of these terms are fungible. In the *Jennings* decision, the Michigan Supreme Court went to great lengths to make clear the distinctions among gross negligence, wilful conduct, and wilful and wanton conduct.

V. Definitions of Gross Negligence In Michigan.

The next Part of this report examines definitions of gross negligence in Michigan, including the common law contributory negligence cases, the guest passenger cases, the criminal law cases, and the Government Tort Liability Act's definition of gross negligence. This Part also briefly reviews the tortured history and final demise in 1994 of the "last clear chance" definition of gross negligence in Michigan.

A. The Contributory Negligence Cases.

This section analyzes the approach of Michigan's early common law cases in using gross negligence as an exception to the defense of contributory negligence in tort actions. After considering the earliest Michigan cases -- which did not use a last clear chance definition of gross negligence -- the discussion turns to an examination of the last clear chance doctrine in Michigan and how the doctrine became confused with gross negligence in Michigan. The final portion of this section examines how gross negligence was defined in the contributory negligence context

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87 Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987)(gross negligence is where a person "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow").

88 Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981)(gross negligence requires a "conscious indifference" by the defendant to the plaintiff's rights, welfare, and safety).

89 Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 464 (9th Cir. 1977)(gross negligence in Oregon is characterized by conscious indifference to or reckless disregard of the right's of others).

90 Glaab v. Caudill, 236 So.2d 180, 183-185 (Fla. App. 1970) ("Gross negligence is that act or omission which a reasonable, prudent man would know would probably and most likely result in injury to another. . . . It presupposes the existence of circumstances which together constitute an 'imminent' or 'clear and present' danger amounting to more than the usual peril").

beginning with *Gibbard,* to the demise of the contributory negligence regime in Michigan in 1979, to the overruling of *Gibbard* in 1994.

In 19th century common law cases in Michigan involving exceptions to the contributory negligence defense, a clear line developed between ordinary negligence and aggravated conduct. Within aggravated conduct, however, the lines between gross negligence and recklessness, on the one hand, and between gross negligence and wilful and wanton misconduct, on the other, were far less clear. Indeed, these terms were often used interchangeably.

Illustrative is *Schindler v. Milwaukee, L.S. & W. Ry. Co.*[91] There, the Michigan Supreme Court offered the following definition of gross negligence:

> The term "gross negligence" has been used in a case decided by this Court, and has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff. It means the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them.[92]

This explanation of what constitutes aggravated conduct was followed in that same opinion by a hopelessly confused description of such conduct. Besides referring to "gross negligence," at various points in the opinion the Court interchangeably described the same aggravated conduct as "gross recklessness,"[93] "wanton and reckless conduct,"[94] and "gross and wanton negligence."[95] A concurring opinion used the term "reckless

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91 Schindler v. Milwaukee, L.S. & W. Ry. Co., 87 Mich. 400, 49 N.W. 670 (1891).

92 Schindler, 49 N.W. at 674.

93 *Id.*, 49 N.W. at 672.

94 *Id.*, 49 N.W. at 673, 674.

95 *Id.*, 49 N.W. at 674.

negligence"[96] to mean gross negligence, and a dissenting opinion described the aggravated conduct variously as "gross negligence,"[97] "gross and wanton negligence,"[98] and "gross negligence and reckless conduct."[99]

In another 1891 decision, *Denman v. Johnston*,[100] the Court did no better than *Schindler* on this score. The *Denman* Court showed a similar lack of analytical rigor by treating gross negligence as the equivalent of a "wanton, willful, and reckless [violation of duty]," "reckless, wanton, and malicious [neglect]," a "negligent act . . . having been wantonly, willfully, recklessly, and negligent committed," and "a reckless and wanton disregard of the personal safety of [a] child."[101] Neither *Schindler* nor *Denman* mentioned last clear chance.

From 1891 to 1923 (the year the *Gibbard* case was decided), many cases quoted the *Denman/Schindler* definition of gross negligence verbatim, and adopted the same analytically fluid resolution of gross negligence cases.[102] Parallel to the *Denman/Schindler* line of cases, however, a competing line of cases was unfolding in the Supreme Court that focused on the importance of differentiating between ordinary and gross negligence in order to preserve the contributory negligence defense. In an effort to derail a threatened merger of gross negligence and ordinary negligence that might eliminate the contributory negligence defense altogether, this line of authorities rejected any gross negligence exception to the contributory negligence defense, and instead substituted the "last clear chance" doctrine. These cases reasoned that it was more consistent to use last clear chance, rather than a gross negligence exception to contributory

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96 *Id.*, 49 N.W. at 676.

97 *Id.*, 49 N.W. at 676.

98 *Id.*, 49 N.W. at 677.

99 *Id.*, 49 N.W. at 677.

100 85 Mich. 387, 48 N.W. 565 (1891).

101 *Id.*, 48 N.W. at 567.

102 *See, e.g.*, Frost v. Milwaukee & N.R. R. Co., 96 Mich. 470, 56 N.W. 19, 22 (1893); Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 215, 137 N.W. 132, 136 (1912); Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1, 138 N.W. 320, 324-325 (1912); Wexel v. Grand Rapids & I. Ry. Co., 157 N.W. 15, 17 (1916); Vought v. Michigan United Traction Co., 160 N.W. 631, 634 (1916); Simon v. Detroit United Ry., 162 N.W. 1012, 1012 (1917).

negligence, because the "last clear chance" doctrine was merely a specific instance of the general principal of proximate cause. The reasoning went that the chain of proximate causation that was broken by the plaintiff's contributory negligence was reestablished when the defendant had the last clear chance to avoid the accident.

The following statements by the Supreme Court in *LaBarge v. Pere Marquette R. Co.*,[103] highlight the split within Michigan between the *Denman/Schindler* line of cases and the competing last clear chance line:

> Counsel in this and many other cases have apparently assumed that where negligence is extraordinary, to a comparative or superlative degree, it is proper to call it "gross," and that, when it can be so denominated, certain legal consequences result. Accordingly in this case it is said that it was extremely negligent to shunt these [train] cars down the street without a lookout on duty, . . . and justified the charge of "gross" negligence, and hence nothing that the plaintiff had done or might do after the discovery of the approaching train could be effective as a defense to the action. We think this is not the rule. The doctrine of responsibility notwithstanding discovered negligence of the plaintiff, does not apply where the plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of the defendant.

A case decided the next year, *Buxton v. Ainsworth*,[104] further muddied already turgid doctrinal waters by making last clear chance an element of gross negligence. Prior cases had used the last clear chance doctrine, and had even rejected the gross negligence exception in the same opinion. But none had so blurred the distinction between the two doctrines.[105] The *Buxton* Court stated:

> [T]he instruction [given at trial] failed to direct the attention of the jury to the important element of so-called gross

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103 134 Mich. 139, 145-46, 95 N.W. 1073, 1075 (1903).

104 138 Mich. 532, 101 N.W. 817 (1904).

105 *See* Richter v. Harper, 95 Mich. 225, 54 N.W. 768, 769 (1893) (applying the last clear chance doctrine and rejecting a gross negligence exception); LaBarge v. Pere Marquette R. Co., 134 Mich. 139, 85 N.W. 1073, 1075 (1903) (applying the last clear chance doctrine and rejecting a gross negligence exception).

> negligence; i.e., that before gross negligence can be made out which warrants recovery notwithstanding the precedent contributory negligence of the plaintiff, the negligence of the latter must have been discovered, or the latter must have neglected the most ordinary precaution in failing to discover it. As the charge was given to the jury, the terms "wanton," "willful," and "reckless" may have been considered as words of emphasis, and, so understood, defined the doctrine of comparative negligence, which does not obtain in this state.[106]

After re-emerging briefly in 1911 in *Knickerbocker v. Detroit, G.H. & M.R. Co.,*[107] last clear chance did not surface again until the landmark case of *Gibbard v. Cursan*[108] in 1923. In analyzing gross negligence in the context of contributory negligence, the *Gibbard* Court discussed gross negligence in the following terms:

> When will gross negligence of a defendant excuse contributory negligence of a plaintiff? In a case where the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the *precedent negligence* of the plaintiff, by his *subsequent negligence* does the plaintiff an injury. Strictly, this is the basis of recovery in all cases of gross negligence. . . . The theory of gross negligence is that the antecedent negligence of the plaintiff only put him in a position of danger and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. . . . Nor can it be said that because a defendant's negligence is great, of a comparative or superlative degree, it may therefore be called "gross," and that a plaintiff's contributory negligence may, for that reason alone be excused. The rule of comparative negligence does not obtain in this State.[109]

Even though *Gibbard* adopted wholesale a last clear chance approach to gross negligence, the Court stated that plaintiffs could use either a

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106 Buxton v. Ainsworth, 138 Mich. 532, 537, 101 N.W. 817, 818 (1904).

107 157 Mich. 596, 133 N.W. 504 (1911).

108 Gibbard v. Cursan, 225 Mich. 311, 196 N.W. 398 (1923).

109 225 Mich. at 319-20 (emphasis in original, citations omitted).

defendant's gross negligence (i.e., last clear chance) or a defendant's wilful and wanton misconduct to overcome the contributory negligence defense.[110] In connection with the latter, *Gibbard* stated that wilful and wanton misconduct required a showing of the following elements:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[111]

In the years after the *Gibbard* case, the *Denman/Schindler* definition of gross negligence was occasionally applied in the contributory negligence context. Sometimes this occurred without distinguishing *Gibbard* and last clear chance.[112] Other cases did acknowledge *Gibbard's* last clear chance rule, but concluded that it was only one approach available under the circumstances. For example, in 1961 in *Nass v. Mossner*, the Supreme Court stated:

> We must not be understood as confining the doctrine of gross negligence in each case to the simple situation of subsequent negligence. Its essence is a reckless disregard of the safety of another.[113]

This view was adopted by the Court of Appeals in 1974 in *McKeever v. Galesburg Speedway*,[114] where the court stated that "[a]lthough Michigan courts have equated 'gross negligence' with 'subsequent negligence,' it is clear that Michigan recognized a separate doctrine of 'gross negligence',"

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110 225 Mich. at 320-21, 332-333.

111 225 Mich. at 322.

112 *See, e.g.*, Patton v. Grand Trunk W. Ry. Co., 236 Mich. 173, 210 N.W. 309, 311 (1926); Graves v. Dachille, 43 N.W.2d 64, 68 (Mich. 1950).

113 363 Mich. 128, 108 N.W.2d 881, 883 (1961).

114 57 Mich. App. 59, 225 N.W.2d 184 (1974).

quoting the *Denman* definition of gross negligence.[115]

Nevertheless, most cases followed *Gibbard* by requiring the subsequent negligence associated with last clear chance up until 1979 when contributory negligence was abolished in Michigan.[116]

2. *The Guest Passenger Statute Cases*

Many cases interpreting the guest passenger statute rejected the *Gibbard* definition of gross negligence, believing that the Legislature had not intended to limit the term "gross negligence" to the "last clear chance" meaning *Gibbard* had assigned it. Typical of these cases was *Oxenger v. Ward*, a 1932 guest passenger case.[117] There, the Court reviewed the *Denman/Schindler* progeny, as well as a number of early last clear chance cases, including *Buxton*.[118] Turning its attention to *Gibbard*, the Court stated that that decision "clearly defined the term 'gross negligence' as 'last clear chance.'"[119] The court concluded its analysis with these words:

> It is obvious that the term "gross negligence" as used in the guest statute was not limited to subsequent negligence, discovered negligence or peril, humanitarian doctrine, last clear chance doctrine, etc., for they would not be ordinarily involved in cases brought by a guest against the owner or a driver of the car in which he was riding. The very purpose of the guest act was to absolve an owner or driver from liability for negligence except where he is guilty of wanton and willful misconduct or gross negligence. Upon examination of the meaning of the term "gross negligence," as judicially defined prior to the enactment of the guest act, and upon consideration

115 McKeever, 225 N.W.2d at 186.

116 *See, e.g.*, Union Trust Co. v. Detroit, G.H. & M. Ry., 239 Mich. 97, 214 N.W. 166, 167-168 (1927); Finkler v. Zimmer, 258 Mich. 336, 241 N.W. 851, 852 (1932); Agrenowitz v. Levine, 298 Mich. 18, 20-21, 298 N.W. 388 (1941); Conant v. Bosworth, 332 Mich. 51, 55, 50 N.W.2d 842, 845 (1952); Richardson v. Grezeszak, 358 Mich. 205, 208, 219, 99 N.W.2d 648, 650, 655 (1959); Shumko v. Center, 363 Mich. 504, 511-12, 109 N.W.2d 854, 857-58 (1961); LaCroix v. Grand Trunk Western R.R. Co., 379 Mich. 417, 152 N.W.2d 656 (1967); Zeni v. Anderson 56 Mich. App. 283, 224 N.W.2d 310 (1974); Hoag v. Paul C. Chapman & Sons, Inc., 62 Mich. App. 290, 233 N.W.2d 530, 536 (1975).

117 256 Mich. 499, 240 N.W. 55 (1932).

118 Oxenger, 240 N.W. at 56-57.

119 *Id.*, 240 N.W. at 57.

> of the statute and the correlation therein of the term with that of "wanton and wilful misconduct," we must conclude that the term "gross negligence" means such a degree of recklessness as approaches wanton and willful misconduct.[120]

Similarly, in *Johnson v. Firemont Canning Co.*, the court relied on the *Denman* definition of gross negligence in the guest passenger setting.[121]

Another guest passenger statute case, *Riley v. Walters*, held that "[g]ross negligence is such negligence as is characterized by wantonness or willfulness."[122] Other cases have also defined gross negligence using the *Gibbard* definition of wilful and wanton misconduct. Illustrative is *Wieczorek v. Merskin*,[123] where the court stated:

> Under the law of this State, gross negligence and ordinary negligence are of different character. The former is not a higher degree of the latter, for we do not subscribe to the doctrine of comparative negligence. . . . Ordinary negligence does not signify the wantonness or wilfulness that are necessary elements of gross negligence, which, however, does include ordinary negligence combined with a wilful and wanton disregard for public safety.[124]

Wieczorek has been cited in support of the proposition that ordinary negligence, coupled with wilful and wanton misconduct, is gross negligence, regardless of subsequent negligence.[125]

The standard jury instruction for gross negligence in the guest passenger statute context provided:

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120 *Id.*, 240 N.W. at 57.

121 270 Mich. 524, 259 N.W. 660, 662 (1935).

122 277 Mich. 620, 270 N.W. 160 (1936).

123 308 Mich. 145, 13 N.W.2d 239 (1944).

124 Wieczorek, 13 N.W.2d at 240.

125 *See, e.g.*, McKeever v. Galesburg Speedway, 57 Mich. App. 59, 225 N.W.2d 184, 186 (1974).

> The terms "gross negligence or wilful and wanton misconduct" means more than the failure to use ordinary care. These terms mean conduct which shows (actual or deliberate intention to harm) (or) (a reckless disregard for the safety of others in the face of circumstances involving a high degree of danger.)[126]

3. *Criminal Law Cases*

Current Michigan case law establishes gross negligence as the requisite standard of culpability for the crime of involuntary manslaughter and employs a definition of that term that is identical with *Gibbard*'s definition of wilful and wanton misconduct. For example, one case stated:

> To convict of involuntary manslaughter, a defendant must have been grossly negligent. Gross negligence requires:
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> 1. Knowledge of a situation requiring the exercise of ordinary care and diligent to avert injury to another.
> 2. Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
> 3. The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[127]

Another case expanded on this definition as follows:

> In order to be convicted of involuntary manslaughter under these facts, the prosecution had to prove beyond a reasonable doubt (1) the existence of a legal duty; (2) that the defendant had the capacity, means, and ability to perform that duty; (3) *that she wilfully neglected or refused to perform that duty;* and (4) that the death . . . was the direct consequence of her failure to perform her duty. . . . *Wilful neglect or gross negligence,* is defined as (1) Knowledge that a situation existed

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126 SJI 14.03.

127 People v. Zak, 184 Mich. App. 1, 457 N.W.2d 59, 62 (1990), quoting People v. Sealy, 136 Mich. App. 168, 172-173, 356 N.W.2d 614 (1984). The case quoted cited Wayne Court Prosecutor v. Recorder's Court Judge, 117 Mich. App. 442, 446; 324 N.W.2d 43 (1982) and People v. Ogg, 26 Mich. App. 372, 386; 182 N.W.2d 570 (1970), in support of the proposition that gross negligence is required to convict of involuntary manslaughter, and People v. Orr, 243 Mich. 300, 307, 220 N.W.2d 777 (1928), and CJI 16:4:08 in support of the definition of gross negligence used.

requiring the exercise of ordinary care to prevent injury; (2) having the capacity, means, and ability to avoid the harm by the use of ordinary care; (3) failing to use ordinary care where it would have been apparent to an ordinary mind that harm would result from such failure.[128]

The Michigan Criminal Jury Instructions direct that gross negligence instructions be given in felonious driving and involuntary manslaughter cases.[129] In the second edition two instructions define gross negligence, one on "Degrees of Negligence"[130] for use in motor vehicle homicide cases, and "Gross Negligence"[131] to be used as appropriate. The instruction on "Degrees of Negligence" provides:

(1) Gross negligence is an element of manslaughter with a motor vehicle; ordinary negligence is an element of negligent homicide; slight negligence is not a crime at all. Because of that, I need to tell you the differences between slight, ordinary, and gross negligence.

(2) Slight negligence means doing something that is not usually dangerous, something that only an extremely careful person would have thought could cause injury. In this case, if you find that the defendant was only slightly negligent, then you must find him not guilty.

(3) Ordinary negligence means not taking reasonable care under the circumstances as they were at the time. If someone does something that is usually dangerous, something that a sensible person would know could hurt someone, that is ordinary negligence. If the defendant did not do what a sensible person would have done under the circumstances, then that is ordinary negligence.

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128 People v. Moye, 194 Mich. App. 373, 487 N.W.2d 777, 778-779 (1992).

129 CJI2d 15.10, CSJ 15:5:01 (felonious driving); CJI2d 16.10, CSJ2d 16.12, 16.13, CJI 16:4:03, 16:4:04, 16:4:07, 16:4:08 (involuntary manslaughter).

130 CJI2d 16.17.

131 CJI2d 16.18.

(4) [Give *CJI2d 16.18 Gross Negligence.*]

(5) The degree of negligence separates negligent homicide from manslaughter. For manslaughter, there must be gross negligence; for negligent homicide, there must be ordinary negligence. If the defendant was not negligent at all, or if he was only slightly negligent, then he is not guilty of either manslaughter or negligent homicide.

(6) The fact that an accident occurred or that someone was killed does not, by itself, mean that the defendant was negligent.[132]

The second instruction on "Gross Negligence" reads:

(1) Gross negligence means more than carelessness. It means willfully disregarding results to others that might follow from an act or failure to act. In order to find that the defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt:

(2) First, that the defendant know of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another.

(3) Second, that the defendant could have avoided injuring another by using ordinary care.

(4) Third, that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury.[133]

The Committee on Standard Criminal Jury Instructions relies on the 1927 case of *People v. Campbell*, and subsequent case law upholding it, for its instruction on degrees of negligence.[134] The three-part test for

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132 CJI2d 16.17.

133 CSJ2d 16.18.

134 People v. Campbell, 237 Mich. 424, 429, 212 N.W. 97 (1927), which stated in pertinent part, "Ordinary negligence is based on the fact that one ought to have known the results of his acts; while gross negligence rests on the assumption that he did know but was recklessly or wantonly indifferent to the

Campbell's instruction on gross negligence finds support in *People v. Orr*, and other cases that have applied it consistently over the years.[135] An examination of the definition used by *People v. Orr* shows it to be identical to the definition of wilful and wanton misconduct introduced five years earlier by *Gibbard*. The predecessor instruction in the first edition of the instructions was substantially the same.[136]

4. *Definitions of Gross Negligence in Secondary Authorities*

Eight opinions of the Michigan Attorney General since 1977 have mentioned the term "gross negligence."[137] In one of those opinions,[138] the Attorney General was asked to interpret the following statute:

> [A school official] is not liable in a criminal action or for civil damages as a result of the administration [of medicine] except for an act or omission amounting to gross negligence or wilful

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results."

135 *See* People v. Orr, 243 Mich. 300, 307, 220 N.W. 777 (1928); People v. Retelle, 173 Mich. App. 196, 199, 433 N.W.2d 401 (1988).

136 CJI 16:4:05 provides:

> (1) Gross negligence means more than carelessness. It means wilful, wanton, and reckless disregard of the consequences which might follow from a failure to act and indifference to the rights of others. (2) In order to find that the defendant was guilty of gross negligence, you must find beyond a reasonable doubts: (3) First, that the defendant knew of the danger to another, that is, that this was a situation requiring ordinary care and diligence to avoid injuring another. (4) Second, that the defendant had the ability to avoid harm to another by exercise of such ordinary care. (5) Third, that the defendant failed to use such care and diligence to prevent the threatened danger when, to the ordinary mind, it must have been apparent that the result was likely to cause serious harm to another.

137 Op. Att'y Gen. 6760, 1993 Mich. AG LEXIS 18 (1993) (addressing M.C.L. §338.981, M.S.A. §18.86(11), mechanical contractors)); Op. Att'y Gen. 6579, 1989 Mich. AG LEXIS 23 (1989) (addressing M.C.L. §691.1407, M.S.A. §3.996(107), government units, employees); Op. Att'y Gen. 6569, 1989 Mich. AG LEXIS 23 (1989)(addressing M.C.L. §691.1407, M.S.A. §3.996(107), government units, employees); Op. Att'y Gen. 6476, 1987 Mich. AG LEXIS 9 (1987)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students); Op. Att'y Gen. 6362, 1985-1986 Op. Att'y Gen. Mich. 284 (1986)(addressing M.C.L. §691.1505, M.S.A. §14.563(15), block parents); Op. Att'y Gen. 5741, 1979-1980 Op. Att'y Gen. Mich. 883 (1980)(addressing M.C.L. §30.411, M.S.A. §4.824(21) as passed in 1976); Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709 (1980)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students); Op. Att'y Gen. 6362, 1977-1978 Op. Att'y Gen. Mich. 689 (1978)(addressing common law of liability of governments towards volunteers).

138 Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709, 1980 Mich. AG LEXIS 154 (1980)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students).

and wanton misconduct.[139]

In response, the Attorney General offered the *Denman/Schindler* definition of gross negligence:

> Gross negligence has been defined as an intentional failure to perform a manifest duty or a thoughtless disregard of the consequences as affecting life or property of another without the exercise of any effort to avoid them. Putt v. Grand Rapids & Indiana R. Co., 171 Mich 215; 137 NW 132 (1912).[140]

The Attorney General went on to cite *Thomas v. Consumers Power Co.*,[141] which applies the definition of wilful and wanton conduct set forth in *Gibbard.*

5. *The Government Tort Liability Act's Definition of Gross Negligence*

Only one statute which uses the term "gross negligence," the Government Tort Liability Act (GTLA),[142] includes its own definition of that term.[143] In response to the liability insurance crisis of the mid-1980s, the Michigan legislature enacted a package of tort reforms in 1986, including amendments to the Government Tort Liability Act (GTLA). The legislature retained most of the earlier statutory provisions for governmental immunity and liability originally enacted in 1964. In the context of this report, however, the most significant amendments to the GTLA are those found at M.C.L. § 691.1407, M.S.A. § 3.996(107). That section for the first time extended immunity to individual government officers and employees from tort liability "for injuries to persons or damages to property caused by the officer [or] employee . . . while in the course of employment . . . while acting on behalf of a governmental agency" if the officer or employee satisfies the following three-prong test:

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139 M.C.L. § 380.1178; M.S.A. § 15.41178.

140 Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709, 1980 Mich. AG LEXIS 154 at *13 (1980).

141 58 Mich. App. 486, 500-501, 228 N.W.2d 786 (1975).

142 M.C.L. § 691.1407, M.S.A. § 3.996(107).

143 The general subject of governmental tort immunity in general is beyond the scope of this study. For a thorough treatment of that subject, *see* RONALD E. BAYLOR, GOVERNMENTAL IMMUNITY IN MICHIGAN (Institute of Continuing Legal Education 1995)[hereinafter BAYLOR].

(a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.[144]

(c) The officer's [or] employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.[145]

As the Michigan Supreme Court observed in *Dedes v. Asch*,[146] "gross negligence is not defined in the [GTLA] as it was at common law. Instead, the Legislature created a specific definition of the term in the statute itself."[147]

In marked contrast to the *Burnett/Gibbard* gross negligence definition, the GTLA has no last clear chance component. Typical of the cases applying the GTLA definition of gross negligence is *Vermilya v. Dunham*, a case where the plaintiff's eleven-year-old son was injured when

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144 The Legislature for the first time defined the term "governmental function" in 1986 as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." M.C.L. § 691.1401(f), M.S.A. § 3.996(101)(f). The Legislature thus substituted a statutory definition for the common-law definition provided by the Michigan Supreme Court two years earlier in Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641 (1984). The Legislature also rejected the Ross "discretionary/ministerial" test by adding that statutory immunity is conferred "without regard to the discretionary or ministerial nature of the conduct in question." M.C.L. § 691.1407(2), M.S.A. § 3.996(107)(2).

The broad definition adopted by the Legislature is just as sweeping as the one formulated by the Supreme Court in Ross. Negative evidence of the breadth of the definition is found in the dearth of cases in which a successful challenge to conduct as being outside a governmental function has been made. *See, e.g.*, Adam v. Sylvan Glynn Golf Course, 197 Mich. App. 95, 494 N.W.2d 791 (1992)(plaintiff's argument that cross-country skiing is not a governmental function rejected); BAYLOR, supra note 143, at 3-7.

145 M.C.L. § 691.1407)2)(a)-(c), M.S.A. § 3.996(107)(2)(a)-(c).

146 446 Mich. 99, 521 N.W.2d 488 (1994).

147 Dedes v. Asch, 446 Mich. 99, 109, 521 N.W.2d 488 (1994). In *Dedes*, the Court held that the definite article "the" before "proximate cause" did not provide governmental tort immunity in cases where the government employee was a proximate cause of the plaintiff's injuries.

a steel soccer goal was pushed over on him at school.[148] The plaintiffs sued the school and the principal, who were aware that the goals could be tipped over. The principal asked his maintenance supervisor to determine how the goals could be anchored, checked with the maintenance supervisor on his progress, made announcements in school instructing the children to stay off the goals, and disciplined students for climbing the goals.[149] On this state of the record, the court concluded that the defendant had shown substantial concern and thus was entitled to a dismissal as a matter of law. Other cases decided under the GTLA definition are to like effect.[150]

a. The GTLA's Definition of Gross Negligence Compared with *Gibbard*'s Definition of Wilful and Wanton Misconduct

What is the relationship, if any, between the GTLA definition of gross negligence and the *Gibbard* definition of wilful and wanton misconduct? Distinguishing "the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another"[151] -- the key phrase in the *Gibbard* definition of wilful and wanton misconduct -- from "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results" -- the GTLA definition -- presents an analytically thorny problem.

One commentator has suggested that in light of the similarity between the statutory definition of gross negligence and the common-law definition of willful and wanton misconduct, "cases that apply the 'willful and wanton misconduct' standard may be of some precedential value."[152] That hope seems to have been dashed, however, by the Michigan Court of Appeals in *Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health*

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148 195 Mich. App. 79, 489 N.W.2d 496, 498 (1992).

149 Vermilya, 489 N.W.2d at 499.

150 *See, e.g.*, Reese v. County of Wayne, 193 Mich. App. 215, 483 N.W.2d 671 (1992)(county has no duty to remove snow and ice from the roads, but any actions taken to increase the dangerousness of the road would constitute gross negligence); Tallman v. Markstrom, 180 Mich. App. 141, 446 N.W.2d 618 (1989)(allegations of a failure to take any safety precautions in a high school woodshop class where power tools were used could be basis for jury finding of gross negligence since omissions as well as positive acts can constitute gross negligence).

151 Gibbard v. Cursan, 225 Mich. 311, 322, 196 N.W. 398 (1923).

152 BAYLOR, *supra* note 143, § 5.11, at 5-16.

Dep't,[153] where the court held that the mens rea for wanton and wilful misconduct is greater than the reckless substantial lack of concern for gross negligence, and by the Supreme Court in the *Jennings* decision, where the Court went to great lengths to make clear the distinctions among gross negligence, wilful conduct, and wilful and wanton conduct.

6. *The Pressing Need for A Change in the Law*

One commentator described the situation prior to 1994 in the following terms:

> The concept of aggravated negligence is aggravating to the Michigan bench and bar. It is exasperating to the bar because the court decisions involving the concept appear to be in hopeless confusion and contradiction. It is annoying to the bench because attorneys lack basic understanding of the principals involved.[154]

Several Michigan Court of Appeals judges have discussed the undesirable state of Michigan's current common law of gross negligence. Some argued for change through legislative action. According to two panels of the Court of Appeals, "few aspects of negligence law have proven more frustrating to the courts of this state than the construction of the term 'gross negligence.'"[155] A 1970 panel stated that "[there are] many decisions on the subject of gross negligence and wilful and wanton misconduct . . . [and] many [a]re irreconcilable."[156] A 1969 panel of the court of appeals stated:

> Many of the authorities have expounded on the definition of gross negligence and some of the older cases seem to confuse more than clarify. No small amount of the confusion stems from the notion that gross negligence is higher in degree and

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153 198 Mich. App. 103, 497 N.W.2d 551 (1993).

154 Grant H. Morris, *Gross Negligence in Michigan -- How Gross Is It?*, 16 WAYNE L. REV. 457 (1970).

155 Pavlov v. Community Emergency Medical Service, Inc., 195 Mich. App. 711, 718, 491 N.W.2d 874 (1992); Jennings v. Southwood, 198 Mich. App. 713 (1993).

156 Sargeson v. Yarabek, 24 Mich. App. 577., 180 N.W.2d 474, 476 (1970).

greater in culpability than simple and ordinary negligence.[157]

In *Pavlov v. Community Emergency Medical Services*, Judge Kelly expressed his frustration:

> [I]t is ludicrous to attempt to portray human suffering and trauma inflicted by the forces of nature or society as negligence in order to establish gross negligence as defined by case law. . . . I would be gratified to see the Legislature insert the government tort liability act definition of gross negligence in the present version of the emergency medical services act. . . . I agree with the plaintiff that the pre-*Placek v. Sterling Heights* . . . case law definitions of gross negligence are obsolete.[158]

Judge Neff echoed and expanded upon these comments:

> In my view, the precedent negligence requirement of a gross negligence claim simply makes no sense in a comparative negligence context. I agree wholeheartedly with Judge Michael J. Kelley's concurring opinion in *Pavlov* that, in the context of emergency medical service, the only definition of gross negligence that makes sense is that provided by [the government tort liability act] . . . . If I were not bound by stare decisis and Administrative Order No. 1990-6, 436 Mich. lxxxiv, as extended by Administrative Order No. 1991-11, 439 Mich. cxliv, as extended by Administrative Order No. 1992-8, 441 Mich. lii, I would find that plaintiff properly pleaded the existence of gross negligence . . . . [The Supreme Court should] dispense with the obsolete and outdated definition of gross negligence set forth in *Gibbard*.[159]

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157 *Id.*

158 Pavlov v. Community Emergency Medical Service, Inc., 195 Mich. App. 711, 724, 491 N.W.2d 874 (1992)(Kelly, J., concurring).

159 Jennings v. Southwood, 198 Mich. App. 713 (1993). Administrative Order No. 1990-6, 436 Mich. lxxxiv, referred to by Judge Neff provides in part that:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990. The prior published decision remains controlling authority unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals [with twelve judges and the Chief Judge who rehear the case] as described *infra*.

Abandonment of the *Gibbard* definition of gross negligence in Michigan was clearly long overdue. The contributory negligence context in which this definition might have made sense at one time no longer existed. In the Government Tort Liability Act, the Legislature had drafted a definition that did not include last clear chance. Judges on the Court of Appeals questioned the continued use of a last clear chance approach. Commentators, including the Attorney General, had refused to state that *Gibbard* was still the law. The time was ripe for overruling *Gibbard.*

7. Gibbard *Overruled*

As previously noted, in 1994 the Michigan Supreme Court relieved some of the mounting pressure by expressly overruling *Gibbard* in *Jennings v. Southwood.*[160] In that case the Supreme Court observed that the major underpinnings of *Gibbard* had been eliminated in Michigan law. First, the adoption of a pure comparative negligence standard signaled the complete demise of both the defense of contributory negligence and the doctrine of last clear chance. Given that *Gibbard*'s formulation of gross negligence was really the doctrine of last clear chance thinly disguised, the Court was forced to conclude that "[w]hile . . . *Gibbard*'s gross negligence is a seventy-year-old doctrine, we must nevertheless discard it because it has outlived its usefulness."[161]

Having rejected *Gibbard*'s definition of gross negligence, the Court next addressed the question of what the term "gross negligence or wilful misconduct" should mean in the context of the Emergency Medical Services Act (EMSA).[162] Starting with the observation that one of the major legislative purposes for the enactment of the EMSA was to limit emergency personnel's exposure to liability, the Court noted that *Gibbard*'s definition of gross negligence failed to carry out that purpose because it permitted recovery upon a finding of ordinary negligence. Indeed, the Court observed, the *Gibbard* definition completely undercut the EMSA immunity provision, frustrating a primary legislative goal of encouraging persons to enter the emergency services field. Turning to the task of adopting an appropriate definition of gross negligence, the Court noted the lack of a

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160 446 Mich. 125, 521 N.W.2d 230 (1994).

161 Jennings, 446 Mich. at 132.

162 M.C.L. § 333.20965(1), M.S.A. § 14.15(20965)(1).

settled gross negligence definition among the states. The Court continued:

> While most jurisdictions acknowledge that gross negligence falls somewhere between ordinary negligence and an intentional act, they fail to agree on the exact definition. This renders comparison of the various standards quite cumbersome and laborious. Fortunately, such a review is unnecessary because our Legislature has already declared what type of conduct constitutes gross negligence.
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> The government tort liability act . . . confers varying degrees of immunity to governments, their agencies, and their agents. . . . Section 7 defines gross negligence as
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> > conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.
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> [T]he GTLA and the EMSA share the common purpose of immunizing certain agents from ordinary negligence and permitting liability for gross negligence. Because the provisions have a common purpose, the terms of the provisions should be read in pari materia.
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> * * * *
>
> Because these provisions should be read in pari materia, we deem it appropriate to use the definition of gross negligence as found in § 7 of the GTLA, as the standard for gross negligence under the EMSA.[163]

The Supreme Court thus cut the Gordian knot of how to define gross negligence by importing wholesale the GTLA definition of that term into the EMSA.

Given that the Legislature enacted both the EMSA and the GTLA gross negligence provisions in order to broaden the scope of immunity for certain protected classes of persons, the Supreme Court's use of the GTLA definition has merit. Putting aside for the moment the wisdom of the Supreme Court's decision to use the GTLA statutory definition of gross

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163 *Id.*, 446 Mich. at 136-37 (footnotes omitted).

negligence to define the same term found in the EMSA,[164] as a matter of statutory construction whatever the Legislature intended when it first used the term "gross negligence" in the EMSA in 1981, it seems problematic to attribute to that earlier legislature the intent of a subsequent Legislature that for the first time formulated a definition of gross negligence five years later for use in a different statute. Further drawing into question the soundness of borrowing the GTLA definition of gross negligence is the Court's own statement made in an opinion handed down the same day as *Jennings*, *Dedes v. Asch*,[165] "The [GTLA] statutory definition of gross negligence was novel. At the time of its enactment, of the thirty-four Michigan statutes that employed the term, only [the GTLA] inserted its own definition."[166]

VI. The Law of Gross Negligence In Other Jurisdictions.

A. State Law.

The term "gross negligence" is used by every state in a variety of legal settings,[167] although the term is rarely defined. The term gross

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164 Elsewhere in the *Jennings* opinion, the Court took a different tack when confronted with the issue of defining "wilful misconduct." "When a statute fails to define a term, we will construe it 'according to its common and approved usage . . . .'" 446 Mich. at 139.

165 446 Mich. 99, 521 N.W.2d 488 (1994).

166 *Id.*, 446 Mich. at 110 n.9.

167 For example, for a list of states which use the term "gross negligence" in the context of Good Samaritan statutes, *see* Frank J. Helminski, Note, *Good Samaritan Statutes: Time For Uniformity*, 27 WAYNE L. REV. 217, 252-267 (1980). Each of the seventeen states which does not use gross negligence in a Good Samaritan statute does use it in some other context. *See, e.g.*, ALA. CODE § 6-5-332.1 (granting immunity to persons assisting or advising as to mitigation of effects of discharge of hazardous waste; Alabama uses the term 22 times in its statutes); COLO. REV. STAT. ANN. § 2-2-403 (West) (indemnifying members of the legislature; Colorado uses the term 28 times in its statutes); COLO. CONST. art. 27, § 6 (personal liability of Great Outdoors Colorado Trust Fund; the only constitutional usage of the term found in the research for this report); FLA. STAT. ANN. § 61.14 (West) (liability of banks for making payments pursuant to child support order; Florida uses the term 45 times in its statutes); GA. CODE ANN. § 10-1-784 (dealer liability under Motor Vehicle Warranty Act; Georgia uses the term 35 times in its statutes); ILL. REV. STAT. ch. 20, para. 405/64.1 (Grounds for excluding state employees from future coverage under state employee's auto insurance plan; Illinois uses the term 38 times in its statutes); IOWA CODE ANN. § 2C.20 (West) (liability of state ombudsman; Iowa uses the term 29 times in its statutes); MASS. GEN. LAWS ANN. ch. 21, § 27 (West) (liability of hazardous waste cleanup volunteers; Massachusetts uses the term 47 times in its statutes); MINN. STAT. ANN. § 18.78 (West) (liability of state officials for trespass while enforcing Noxious Weed Law; Minnesota uses the term 24 times in its statutes); MISS. CODE ANN. § 1717-57 (liability of hazardous waste cleanup officials; Mississippi uses the term 26 times in its statutes); NEB. REV. STAT. § 1-137 (grounds for disciplining accountants; Nebraska uses the term 32 times in its statutes); N.J. STAT. ANN. § 2A:18-61.1 (West) (gross negligence in allowing

negligence is frequently used in Good Samaritan statutes, which grant persons aiding others in emergency situations immunity from suit based on ordinary negligence in order to encourage the rendering of aid. Thirty-two states (including Michigan), the District of Columbia, and the Virgin Islands by statute except grossly negligent assistance from the general grant of immunity in Good Samaritan statutes.[168]

Another common use of the term "gross negligence" -- now of historical interest -- was automobile guest passenger statutes which prevented non-paying guests from suing the car's driver for the driver's negligent operation of the vehicle.[169] Under these statutes, guests typically were not permitted to sue except in cases of gross negligence, willful or wanton misconduct, recklessness, or some similarly standard of conduct

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damages to premises is lawful ground for evicting tenant; New Jersey uses the term 43 times in its statutes); OHIO REV. CODE § 13111.011 (Page) (liability of banks making payments for a mechanic's lien; Ohio uses the term 13 times in its statutes); OR. REV. STAT. § 30.115 (guest statutes for aircraft and watercraft; Oregon uses the term 57 times in its statutes); TEX. CODE ANN. AGRIC. CODE § 143.103 (West) (immunity from liability for cars striking animals; Texas uses the term 64 times in its statutes); UTAH CODE ANN. § 2-4-11 (court costs in suits against airport zoning board of adjustments allowed only in cases of board's gross negligence; Utah uses the term 24 times in its statutes); W. VA. CODE § 6-3-la (liability of sheriff for acts of "reserve" deputies; West Virginia uses the term 32 times in its statutes); WIS. STAT. ANN. § 50.05 (West) (personal liability of receivers of licensed residential facilities placed in receivership; Wisconsin uses the term 16 times in its statutes).

168 *See* Frank J. Helminski, Note, *Good Samaritan Statutes: Time For Uniformity,* 27 WAYNE L. REV. 217, 252-267 (1980). The author notes that gross negligence is used in Good Samaritan statutes in Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wyoming. Of these states, 19 (as well as the Virgin Islands), have Good Samaritan statutes which use the terms gross negligence and willful and wanton misconduct in conjunction with each other: California, Connecticut, Delaware, Hawaii, Indiana, Kansas, Maine, Michigan, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia, Washington, while the remaining 13 states and the District of Columbia use the term by itself. Three other states use the term willful and wanton conduct alone: Illinois, Ohio, Texas. The term gross negligence is also used in the Good Samaritan statutes of the Canadian provinces of Alberta, British Columbia, Newfoundland, and Saskatchewan. At least nine of the states that do not use the term gross negligence in their Good Samaritan statutes (which every state and all but two Canadian provinces have) do so because they grant absolute immunity to Good Samaritans rather than because they are using another term in place of the term gross negligence: Alabama, Colorado, Georgia, Massachusetts, Nebraska, New Jersey, Utah, West Virginia, Wisconsin.

Helminski's Note overlooked one of Kentucky's Good Samaritan statutes, KY. REV. STAT. ANN. § 39.433. This statute grants immunity to state employees or agents in disasters or emergency situations except in cases of gross negligence. This means that, in all, 33 states and the District of Columbia have Good Samaritan statutes which use the term gross negligence.

169 PROSSER & KEETON, *supra* note 77, § 34, at 215.

below ordinary negligence.[170] Today, most of these statutes have either been repealed or struck down as unconstitutional.[171]

B. Federal Statutes.

1. *The Contexts in Which the Term "Gross Negligence" Is Used in Federal Statutes*

The term "gross negligence" is used sixty-six times in the United States Code[172] and 101 times in the Code of Federal Regulations.[173] Except

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170 *Id.* at 215.

171 *Id.* at 216-217.

172 5 U.S.C. § 8321 (federal employee retirement system officers); 5 U.S.C. § 8505 (payments to state unemployment funds); 7 U.S.C. § 87b (violations of grain standards); 7 U.S.C. § 1314e (tobacco marketing quotas); 7 U.S.C. § 1596 (violation of seed regulations); 10 U.S.C. §§ 1074a, 1084 (military medical and dental care eligibility); 10 U.S.C. § 2350e (NATO AWACS officers); 12 U.S.C. § 209 (national bank immunity from liability); 12 U.S.C. § 1749bbb-12 (housing loan intermediary banks and agents); 12 U.S.C. § 1787 (federal credit union insurance); 12 U.S.C. § 1821 (FDIC officers); 12 U.S.C. §§ 1829b, 1955 (bank record keeping); 12 U.S.C. § 4621 (conservators of government-sponsored banks); 15 U.S.C. § 80a-17 (investment company officers); 15 U.S.C. § 1607 (consumer credit cost disclosures); 15 U.S.C. § 2053 (Consumer Products Safety Commission members); 16 U.S.C. § 583j-2 (Forest Foundation officers); 16 U.S.C. § 142le (responses to whale beachings); 16 U.S.C. § 3703 (officers of National Fish and Wildlife Foundation); 17 U.S.C. § 106A (copyright attribution); 18 U.S.C. § 793, App. 4 § 2M3.4 (criminal gathering, transmitting or losing of defense information); 19 U.S.C. §§ 1584, 1592, 1594, 1621 (customs fraud and inaccuracies); 19 U.S.C. § 2112 (negotiations over nontariff trade barriers); 19 U.S.C. § 2314 (customs officers); 20 U.S.C. § 1082 (Federal Family Education Loan Program officers); 20 U.S.C. § 5509 (National Environmental Education and Training Foundation officers); 25 U.S.C. § 450m (grounds for not granting contracts with Indian tribes); 26 U.S.C. § 7431 (IRS privacy violations); 29 U.S.C. § 1574 (job training partnership act corruption); 30 U.S.C. § 1235 (state mining reclamation programs); 33 U.S.C. §§ 1321, 2703, 2704, 2712 (oil and hazardous waste liability); 36 U.S.C. § 5203 (National Fallen Firefighter's Foundation officers); 37 U.S.C. §§ 204, 206, 310, 403 (military pay); 40 U.S.C. § 333 (construction industry safety); 42 U.S.C. §§ 1395h, 1395u (private administrators of Medicare payments); 42 U.S.C. § 3796a (police officer death benefits); 42 U.S.C. § 4082 (flood insurance company officers); 42 U.S.C. §§ 9607, 9619 (hazardous waste liability); 42 U.S.C. § 12672 (charity food donors); 43 U.S.C. § 1334 (off-shore oil drilling leases); 43 U.S.C. § 1653 (Alaska pipeline liability); 45 U.S.C. §§ 6, 12, 13, 34, 43, 64a, 438 (railroad safety); 46 U.S.C. §§ 2302, 4705 (negligent operation of ships and barges); 49 U.S.C. § 521 (penalties under special Dep't of Transportation authority); 49 U.S.C. App. § 26 (railroad safety).

173 7 C.F.R. § 723.216 (tobacco quota transfers); 7 C.F.R. §§ 906.61, 907.89, 908.89, 911.70, 915.70, 916.70, 920.69, 921.70, 922.70, 923.70, 924.70, 925.68, 928.70, 929.75, 931.70, 948.90, 955.85, 958.86, 959.90, 965-90, 966.90, 971.90, 979.90, 985.68, 987.77, 1036.119, 1049.119, 1065.119, 1207.365, 1207.546, 1240.124 (agricultural marketing service committee members); 10 C.F.R. § 10.11 (criteria for granting nuclear information top secret clearances); 10 C.F.R. § 791.36 (grounds for withdrawal of electric car R&D loan guarantees); 12 C.F.R. § 204.7 (failure to maintain banking reserves); 12 C.F.R. § 265.11 (delegation of authority to Federal Reserve Banks); 13 C.F.R. § 121.1305 (self--certification of small business status); 17 C.F.R. § 230.461 (SEC effective dates of rules); 19 C.F.R. §§ 122.175, 162.73, 162.77, Pt. 171 (App. B) (customs violation penalties); 20 C.F.R. § 360.25 (R.R. Retirement Board privacy violations); 20 C.F.R. § 652.8 (state employment service administration standards); 23 C.F.R. §§ 360.25, 652.8 (granting and monitoring highway construction contracts); 24

for a few provisions stating that the term "gross negligence" includes reckless and intentional conduct,[174] however, the term is only defined twice in these sources.[175] As is the case in Michigan, the subject matter of these statutes includes immunity from suit,[176] personal liability of corporate officers and directors,[177] and awards of special damages for particularly serious violations of a statute.[178] One federal law makes gross negligence a ground for the revocation of a contract or lease with the government.[179]

C.F.R. §§ 905.140, 967.308 (certification of HUD projects and officials); 25 C.F.R. § 271.74 (contracts with Indian tribes); 25 C.F.R. § 276.15 (grants to Indian tribes); 26 C.F.R. § 1.401-12 (IRS employee benefit trust qualifications); 26 C.F.R. § 301.7701-2 (IRS association standards); 27 C.F.R. § 194.111 (violations of liquor regulations); 28 C.F.R. § 32.6 (death and disability benefits for police officers); 30 C.F.R. §§ 250.10, 282.13 (grounds for suspending off-shore oil drilling); 31 C.F.R. § 560.701 (transactions with Iranian assets), 32 C.F.R. Pt. 155 (App. A) (defense industry security clearances); 32 C.F.R. §§ 536.40, 537.22 (claims involving the U.S. in under the Uniform Code of Military Justice); 32 C.F.R. §§ 644.86, 644.225 (military real estate law); 32 C.F.R. § 757.18 (claims against the Navy); 33 C.F.R. § 25.705 (Coast Guard claims not payable); 37 C.F.R. § 1.765 (discovery rules in patent hearings); 38 C.F.R. § 21.4202 (VA vocational rehabilitation and education overcharges); 40 C.F.R. Pt. 35, Subpt. E, App. C-1 (consulting engineering agreements); 40 C.F.R. §§ 123.27, 501.17 (requirements for state environmental enforcement authority); 40 C.F.R. § 761.135 (enforcement of PCB regulations); 42 C.F.R. §§ 36.115, 36.233 (Indian health grants and contracts); 43 C.F.R. § 29.3 (Alaska pipeline liability fund officers); 46 C.F.R. §§ 35.01-30, 167.65-3, 185.17-1 (negligent operation of ships); 46 C.F.R. pt. 315 § 2, Pt. 318 § 8 (agreements with and compensation of agents of Dep't of Transportation); 48 C.F.R. PHS § 352.280-4 (Contracts with Indian tribes); 49 C.F.R. Pt. 209 (App. A), §§213.15, 214.5, 215.7, 216.7, 217.5, 218.19, 219.9, 220.7, 221.7, 223.7, 225.29, 228.21, 229.7, 230.0, 231.0, 232.0, 233.11, 234.15, 235.9, 236.0, 240.11 (railroad safety).

174 *See, e.g.*, 12 U.S.C. § 209 ("[Conservators] shall not be liable [for their acts and omissions]. . . unless such acts or omissions constitute gross negligence, including any similar conduct or any form of similar conduct, or any form of intentional tortious conduct, as determined by a court"); 12 U.S.C. §§ 1787, 1821 ("gross negligence including intentional torts"); 30 U.S.C. § 1235 ("For the purpose of the previous sentence, reckless, willful or wanton misconduct shall constitute gross negligence.").

175 42 U.S.C. § 12672 (Model Good Samaritan Food Donation Act)("The term 'gross negligence' means voluntary and conscious conduct by a person with knowledge (at the time of the conduct) that the conduct *is likely to be* harmful to the health or well-being of another person. . . . The term 'intentional misconduct' means conduct by a person with knowledge (at the time of the conduct) that the conduct *is* harmful to the health or well-being of another person. [Emphasis added]").

19 C.F.R. Pt. 171, App. B. (Customs violations) ("A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.")

176 *See, e.g.*, 12 U.S.C. § 209 (national banks).

177 *See, e.g.*, 36 U.S.C. § 5203 (National Fallen Firefighter's Foundation officers).

178 *See, e.g.*, 19 C.F.R. §§ 122.175, 162.73, 162.77, Pt. 171 (App. B) (customs violations penalties).

179 *See, e.g.*, 43 U.S.C. § 13334 (off-shore oil drilling leases); 25 C.F.R. § 271.74

2. *Contexts in Which the Term "Gross Negligence" Is Used in Federal Case Law*

In suits against state-level units of government under 42 U.S.C. §1983 that allege violations of an individual's federally-protected civil rights, in order to overcome the government's qualified immunity it is necessary to show that the violation arose out of the government's "policy, practice, or custom," and that policy, practice, or custom evidences "deliberate indifference, gross negligence, or recklessness," rather than mere negligence, towards the individual's rights.[180]

C. Uniform Laws, Model Acts, and Restatements.

1. *Contexts in Which the Term "Gross Negligence" Is Used in Uniform Laws, Model Acts, and Restatements*

The term "gross negligence" is used sparingly in the Uniform Laws. Gross negligence appears only three times in Uniform and Model Acts prepared by the National Conference of Commissioners on Uniform State Law.[181] In the two versions of the Uniform Gifts to Minors Act, gross negligence is used as an exception to the general rule that custodians of gifts to minors who are not paid for their services are not personally liable for losses as a result of their negligence.[182] In the Uniform Health Care Information Act, gross negligence is the basis for an award of punitive damages.[183]

Turning to the Restatements, gross negligence never appears in the

(contracts with Indian tribes).

180 *See, e.g.*, Hill v. Saginaw, 155 Mich. App. 161, 71, 399 N.W.2d 398 (1986).

181 UNIFORM GIFTS TO MINORS ACT § 5 (1966 Revised Act); UNIFORM GIFTS TO MINORS ACT § 5 (1956 Act); UNIFORM HEALTH CARE INFORMATION ACT § 8-103 (1985 Act).

182 "A custodian not compensated for his services is not liable for loses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this act." UNIFORM GIFTS TO MINORS ACT § 5 (1966 Revised Act); UNIFORM GIFTS TO MINORS ACT § 5 (1956 Act).

183 "If the court determines that there is a violation of this [Act], the aggrieved person is entitled to recover damages for pecuniary losses. . . and, in addition, if the violation results from willful or grossly negligent conduct, the aggrieved person may recover not in excess of [$5,000], exclusive of any pecuniary loss." UNIFORM HEALTH CARE INFORMATION ACT § 8-103 (1985 Act).

text of the black letter rules contained in any Restatement, but it is used in ten different comments in various Restatements.[184] The comments to the Restatement of Contracts state that "'gross negligence . . . is not well defined and is avoided [here] as it is in the Restatement, Second, of Torts."[185] The comments note the use of the term gross negligence in guest statutes,[186] as a way to counter a contributory negligence defense,[187] as grounds for punitive damages,[188] as a ground for lowering the level of causation required in a tort action,[189] as grounds for seeking indemnification,[190] as a minimum level of culpability for an individual to

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184 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7, cmt. f; § 159, cmt. b (liability for gross negligence is determined by guest statute at site of accident but relationship of parties when guest statute is applied is determined by domicile of persons involved); RESTATEMENT (SECOND) OF AGENCY § 242, cmt. c (master sometimes liable to unauthorized guests of servant for servant's negligence and sometimes only for servant's gross negligence); RESTATEMENT (SECOND) OF AGENCY § 347, cmt. b (landowners and hosts liable to guests only in cases of gross negligence but servant's knowledge not master's pertinent to determining if an act was grossly negligence); RESTATEMENT (SECOND) OF CONTRACTS § 157, cmt. a ("Although the critical degree of fault [necessary to prevent a party to a contract who has made a serious unilateral mistake from seeking relief on other grounds] is sometimes described as 'gross' negligence, that term is not well defined and is avoided in this Section as it is in the Restatement (Second) of Torts. Instead, the rule is stated in terms of good faith and fair dealing"); RESTATEMENT (SECOND) OF TORTS § 82, cmt. e ("In the construction of statutes which specifically refer to gross negligence, that phrase is sometimes construed as equivalent to reckless disregard." The comment states that reckless disregard overrides the contributory negligence defense, permits punitive damages, results in a looser application of causation principals, and is the only situation in which gratuitous licensees or trespassers can recover. Readers are referred to §§ 500-503 of the text for a discussion of reckless disregard"); RESTATEMENT (SECOND) OF TORTS § 886B, cmt. k ("[One] type of situation in which indemnity has sometimes been sought is that in which the two parties are guilty of different types of tortious conduct. . . . Thus, if one party is negligent, the other may have been guilty of intentional misconduct or reckless misconduct or gross negligence. (This may provide grounds for indemnification although the states differ)."); RESTATEMENT (SECOND) OF TRUSTS § 222, cmt. a ("[I]f by the terms of the trust it is provided that the trustee shall not be liable except for his wilful default or gross negligence, although he is not liable for mere negligence, he is liable if he intentionally does or omits to do an act which he knows to be a breach of trust or if he act or omits to act with reckless indifference as to the interest of the beneficiary"); RESTATEMENT (THIRD) OF TRUSTS § 228, cmts. f & g ("Where a trust document permitted a trustee discretion in investing but did not explicitly exculpate the trustee from liability, it did [not] have the effect of providing that [the trustee] would be liable only for gross negligence or recklessness").

185 RESTATEMENT (SECOND) OF CONTRACTS § 157, cmt. a.

186 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 156, cmt. f; § 159, cmt. b.

187 RESTATEMENT (SECOND) OF TORTS § 282, cmt. e.

188 *Id.*

189 *Id.*

190 RESTATEMENT (SECOND) OF TORTS § 886b, cmt. k.

be liable to a trespasser or guest,[191] as conduct from which trustees cannot be relieved of liability,[192] and as grounds for limiting extraordinary contract remedies.[193]

VII. Drafting a Statutory Definition of Gross Negligence.

Gross negligence, like many legal terms that are open textured and contextual -- such as "negligence," "proximate cause," "bad faith," "foreseeable," and "reasonable" -- does not lend itself to a bright-line definition that can be applied with certainty and predictability in all cases. Nevertheless, a uniform definition of the term would serve as a foundation upon which the courts could build a body of case law that eventually could be synthesized into workable rules that could then be used in a reasonably predictable manner.

The definition of gross negligence could be made uniform by comprehensive legislation enacted through one of four statutory vehicles. First, a general definition could be enacted applicable to all statutes where the term is not already defined. Second, a less ambitious variation on the first proposal would be to enact a general definition limited to the immunity setting. (Nearly half of all Michigan statutes using the term "gross negligence" fall within the immunity category.) As noted, the Michigan Supreme Court has taken a small step in this direction in *Jennings v. Southwood* by incorporating the GTLA definition of gross negligence into the EMSA. Third, a single bill could be introduced that would provide a definition of gross negligence for each statute that contains the term. Fourth, separate bills, each amending a single law that uses the term "gross negligence" could be introduced.

The first suggestion could be adopted by amending Chapter 8 of the Michigan Compiled Laws. This chapter contains a number of definitions of general application in Michigan law, including definitions of "annual meeting," "grantor," "grantee," "inhabitant," "insane person," "land," "real

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191 RESTATEMENT (SECOND) OF TORTS § 282, cmt. 6; RESTATEMENT (SECOND) OF AGENCY § 242, cmt. c (master sometimes liable to unauthorized guests of servant for servant's negligence and sometimes only for servant's gross negligence); RESTATEMENT (SECOND) OF AGENCY § 347, cmt. b.

192 RESTATEMENT (SECOND) OF TRUSTS § 222, cmt. a; RESTATEMENT (THIRD) OF TRUSTS § 228, cmts. f & g.

193 RESTATEMENT (SECOND) OF CONTRACTS § 157, cmt. a.

estate," "real property," "month," "year," "oath," "person," "preceding," "following," "seal," "state," "United States," "written," "in writing," "general election," and "firearm."[194] The chapter also provides rules of statutory construction for words in the singular and plural and gender specific pronouns, and establishes the general rule that public bodies must make decisions by at least a majority. Under the second suggestion, including in Chapter 8 a definition of gross negligence limited to immunity cases might also be an option.

Two state constitutional provisions have a direct bearing on the first three suggestions. The first is the "single object" clause which provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.[195]

The single object clause has two requirements: first, the title of an act must match its contents; and, second, an act must have only one "object."[196] The raison d'etre for the single object clause was threefold: (1) to insure that legislators do not pass laws without knowing what the act would do, (2) to insure that the public is generally made aware of what is included in a statute, and (3) to prevent the "logrolling" of bills that might not pass if presented separately, but which might pass if "bundled" into a single legislative package.[197]

Also potentially important is the "general revision" clause, which provides:

> No general revision of the laws shall be made. The legislature may provide for a compilation of the laws in force arranged

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194 M.C.L. §§ 8.3, 8.3w (1993).

195 MICH. CONST. art. 4, § 24.

196 *See* People v. Trupiano, 97 Mich. App. 416, 296 N.W.2d 49 (1980).

197 *See, e.g.*, People v. Carey, 382 Mich. 285, 170 N.W.2d 232 (1969); Hildebrand v. Revco Discount Drug Centers, 137 Mich. App. 1, 357 N.W.2d 778 (1984).

without alteration, under appropriate heads and titles.[198]

Arguably, if legislation has only a single object then it cannot violate Article IV, § 36's prohibition against a general revision of the laws. While no reported cases have addressed the general revision prohibition of the Constitution, a 1955 Attorney General's Opinion[199] did address this question under a substantially similar provision of the 1908 Constitution.[200] The opinion stated that because both the School Code of 1955[201] and the Michigan Election Law[202] did not embrace more than a single object, they did not constitute a general revision of the laws.[203] The single object clause, on the other hand, has been the subject of much litigation.[204]

Of the four suggestions, the introduction of a single bill that either creates a uniform definition of gross negligence applicable to all Michigan statutes, or which creates a uniform definition limited to immunity cases, or which through a single bill specifically amends all statutes using the term, might be considered multiple object legislation, as well as a general revision of the laws. On the other hand, if the focus is the subject matter of the legislation, rather than the number of statutes affected by the legislation, then arguably neither the single object clause nor the general revision clauses of the Michigan Constitution would be violated.

As desirable as a single bill approach would be, if for no reason other than efficiency and uniformity of result, actual legislative practice indicates that the fourth option -- a separate bill for each statute using the term "gross negligence" -- may be the preferred, as well as constitutional, course to pursue. For example, in the 1978, 1990, and 1991 legislative

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198 MICH. CONST. art. 4, § 36.

199 Op. Att'y Gen. 2330, 1955-1956 Op. Att'y Gen. Mich. 680 (1955).

200 MICH. CONST. of 1908. art. 5, § 40.

201 M.C.L. § 340.1 (1955), repealed and replaced by comparable provisions at M.C.L. § 380.1 (1993).

202 M.C.L. § 168.1 (1955).

203 Op. Att'y Gen. 2330, 1955-1956 Op. Att'y Gen. Mich. 680 (1955).

204 MICH. CONST. art. 4, § 24 (1963), and its predecessors, MICH. CONST. of 1908, art. 5, §§ 21, 22, and MICH. CONST. of 1850, art. 4, §§ 20, 25, have been considered in more than 250 reported cases and in at least a dozen opinions of the Attorney General.

sessions, the elimination of references to abolished courts in some ten, eight, and nineteen different statutes, respectively, was accomplished through ten, eight, and nineteen separate bills, respectively.[205]

205 *See* 1994 ANNUAL REPORT, MICHIGAN LAW REVISION COMMISSION 199, 202-03.

PROXIMATE CAUSE UNDER THE GOVERNMENT TORT LIABILITY ACT:

RECOMMENDATION TO THE LEGISLATURE

Under the Government Tort Liability Act (GTLA), a government employee is not liable for causing personal injury or property damage, provided his conduct "does not amount to gross negligence that is the proximate cause of the injury or damage."[1]

In *Dedes v. Asch*,[2] the Michigan Supreme Court was asked to interpret the phrase "the proximate cause" contained in the GTLA. The Court held in *Dedes* that the Legislature's use of the definite article ***"the"*** to modify the term "proximate cause" did not mean "the *sole* proximate cause." Instead, the Court interpreted the words, "the proximate cause," to mean "***a*** proximate cause" of the plaintiff's injuries. Consequently, the school bus driver in *Dedes* was not immune from suit when children were hit by a passing car immediately after alighting from the school bus.

As a matter of the plain meaning of words, the dissent in *Dedes* questioned whether the majority had correctly determined the Legislature's intent on this question of statutory interpretation.

RECOMMENDATION

The Commission makes the following recommendation to the Legislature:

> Legislatively overrule *Dedes v. Asch*, and clarify legislative intent, by amending the GTLA, M.C.L. § 691.1407(c), M.S.A. § 3.996(107)(c), to provide that "conduct does not amount to gross negligence that is the *sole* proximate cause of the injury or damage."

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1 M.C.L. § 691.1407(2)(c), M.S.A. § 3.996(107)(c).

2 446 Mich. 99, 521 N.W. 2d 488 (1994).

GOVERNMENT E-MAIL AND PUBLIC DISCLOSURE LAWS: RECOMMENDATIONS TO THE LEGISLATURE

I. Introduction.

In its 1994 Annual Report, the Michigan Law Revision Commission published a study report entitled, ELECTRONIC MAIL AND PUBLIC DISCLOSURE LAWS.[1] That study report noted that employees at almost all major Michigan government agencies and public universities use electronic mail ("e-mail") to communicate with each other and with the public. E-mail has replaced telephone calls and documentary communications in many instances, largely because of its speed and low cost. Michigan's public disclosure laws distinguish between telephone conversations (which are private) and documents (which are often subject to disclosure). As the 1994 study report observed, e-mail is a hybrid of these two communication media.[2]

Whether or not public disclosure laws apply to e-mail will undoubtedly have a significant impact on the mode by which public employees communicate on their jobs. Public disclosure of e-mail could considerably dampen the candor, informality, and ease of communication that makes e-mail so popular among employees of state agencies, schools, and universities. On the other hand, public access to e-mail, like public access to government records generally, would promote the goal of open government embodied in such laws as Michigan's Freedom of Information Act and the Management and Budget Act. The authors of the 1994 study

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1 Michigan Law Revision Commission, 29TH ANNUAL REPORT (1994). The study report was authored by Professor Kent Syverud of the University of Michigan Law School and former Executive Secretary of the Law Revision Commission, and Mr. Daniel F. Hunter, a student assistant to Professor Syverud and currently a practicing attorney in New York City.

2 29TH ANNUAL REPORT, at 7.

In other developments related to public disclosure of government activity, former Senator David Honigman introduced a bill earlier this year, S.B. 877, that would make any agreement to settle a lawsuit against government entities or officials void as contrary public policy if such settlement includes a prohibition on the disclosure of the agreement's provisions. House Bills 5832 and 5726 were also passed by the House in 1996. H.B. 5832 would create a new act entitled, Enhanced Access to Public Records Act, which would allow local and state government agencies to provide electronic access for the inspection and copying of public records which are not confidential or otherwise exempt from disclosure. H.B. 5726 would amend FOIA to allow for electronic access to government information. See also H.B. 5087 (1991), a bill to enact the Michigan Fair Information Practices Act that would have imposed certain duties upon state agencies to keep private and confidential data, whether in computer form or otherwise, relating to individuals.

report concluded that, on balance, government e-mail messages should be deemed to be both a "writing" and a "public record" within the scope of the Freedom of Information Act (FOIA) and the Management and Budget Act and, accordingly, subject to the disclosure and preservation requirements of those two state laws.[3]

II. Public Hearing.

On May 13, 1996, the Michigan Law Revision Commission held a public hearing at the State Capitol on the question of public disclosure of government e-mail. Besides members of the Commission, other persons in attendance included employees of the Department of Agriculture and the State Archivists Office, and members of the press. The following summarizes the proceedings and testimony given at that hearing.

Richard McLellan, Commission Chairman, opened the hearing and introduced the first witness, Daniel F. Hunter. Mr. Hunter, a co-author of the e-mail study report along with Professor Kent Syverud of the University of Michigan Law School, presented a summary of the study report. He noted that although no lawsuits have been filed in the state by persons seeking access to government e-mail, in his view such litigation was inevitable. At the federal level, federal courts have held that government e-mail is a document that must be preserved and retained. Mr. Hunter also stated that e-mail was obtainable under Michigan's FOIA, in view of that Act's broad definition of what constitutes a "writing" prepared by a public official. For purposes of FOIA, Mr. Hunter stated, e-mail constitutes both a "writing" and a "public record."[4] At the same time, Exemption (n) of FOIA[5] provides that communications and notes that are preliminary to a final agency determination of policy or action are exempt from disclosure under FOIA. Arguably, much government e-mail could fall under this exemption, Mr. Hunter noted. Mr. Hunter added that telephone calls are not subject to FOIA, and e-mail shares much in common with a telephone call. In addition, FOIA contains a privacy exception that could be the subject of much litigation over access to e-mail.

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3 *Id.*

4 *See* M.C.L. § 15.232(c) & (e).

5 M.C.L. § 15.243(1)(n).

Although FOIA imposes no obligation to preserve records, Mr. Hunter testified that the Management and Budget Act does impose document preservation requirements for records that are of "archival value," and contains a similarly broad definition of what constitutes a "writing." Nevertheless, the Management and Budget Act's requirement to preserve records that have "archival value" might not include most e-mail. At the federal level, a federal court has concluded that e-mail is a record that must be preserved under the federal records act. From a practical standpoint, the volume of e-mail is so great that storage could present a problem.

In closing, Mr. Hunter identified a few of the unresolved issues, including the following: What kinds of e-mail should be preserved as a record, bearing in mind the ease with which e-mail can be deleted from a computer? What privacy expectations does the sender of e-mail messages have, if any? And how should e-mail messages sent to government agencies from private persons be handled from the perspective of FOIA and the Management and Budget Act? Mr. Hunter has published a law review article entitled, *Electronic Mail and Michigan's Public Disclosure Laws: The Argument for Public Access to Governmental Electronic Mail*, 28 U. MICH. J.L. REFORM 977 (1995), in which he advocates disclosure of government e-mail.

Comments to Mr. Hunter's testimony included some of the following observations. FOIA calls for the disclosure of government information generally, subject to a handful of exceptions. The presumption, therefore, is one of disclosure. Encrypted e-mail messages also present a problem. E-mail requests arise in two contexts: large-scale litigation against the government, and contract-bidding disputes. The most difficult problem is presented by FOIA Exemption (n) for communications leading up to a final decision which are generally excepted from disclosure. The interest in having candid discourse at the discussion phase might be chilled. A related issue is the use of e-mail as a vehicle for circumventing the Open Meetings Act.

Mr. Hunter was asked about the feasibility of amending Exemption (n) of FOIA to make it clear that the e-mail of students and researchers at state universities is exempt from disclosure. It was noted that at the time FOIA was originally enacted, e-mail was not foremost in the Legislature's mind since it was in its infancy. An appropriate legislative response might be enactment of a separate statute dealing with electronic communications and public disclosure. On a related point, many persons might have an interest in preventing disclosure of certain business-confidential

information and might bring a reverse-FOIA action.

In response to a question whether there might be a constitutional argument that certain e-mail is not subject to disclosure based on the right of privacy and freedom of speech, Mr. Hunter conceded that in certain cases that might be true, but added that the primary targets of FOIA would not have such a privacy or free speech claim.

The second witness to testify was Ms. Elsa Cole, General Counsel, University of Michigan. Ms. Cole's primary concern with requiring the disclosure of e-mail was the chilling effect such a requirement could have on the open and free communication that is essential for researchers and scholars at state universities. Keeping an open dialogue among scholars and maintaining the free flow of ideas could be chilled if e-mail was subject to disclosure. Making e-mail a record for purposes of FOIA would discourage scholars from using the medium. Ms. Cole suggested that only e-mail that reflects a final action by a government agency should be subject to disclosure under FOIA. Privacy concerns, especially those involving communications between students and professors, must be respected. A blanket exemption for such communications, in addition to communications between researchers, would be the most desirable outcome, in her view. She added that the federal FOIA was not a good model to follow because there are no federal-level universities that are forced to deal with these e-mail issues. It is uniquely a state-level problem.

Ms. Cole also noted that she handles a large volume of e-mail disclosure requests. A case-by-case defense of such FOIA requests would be extremely burdensome, in her view. Ms. Cole recommended that the definitions of "public record" and "writing" should be clarified so that they cover only that e-mail that has been systematically stored or retained as evidence of a public body's policies, decisions, or procedures.

In response a query about the status of voice mail, Ms. Cole stated that voice mail should generally not be subject to disclosure, given its private and ephemeral nature. She also noted in connection with university research that intellectual pursuit could be severely chilled if a preliminary research proposal was stolen after disclosure of a researcher's e-mail. She concluded her remarks with the observation that the University of Michigan receives a large number of FOIA requests for e-mail, and that her colleagues at other schools in other states are equally concerned about this issue.

When asked whether anyone has drafted guidelines as to what types

of e-mail are and are not FOIAble, Ms. Cole stated that no one had done that, and consequently e-mail requests were being handled on a costly, case-by-case basis. It was suggested that amending the definition of public records to exclude certain types of e-mail might be a desirable approach to the problem. Ms. Cole stated that any guidance or direction from the courts or the Legislature on this score would be helpful.

Ms. Cole responded to a question about e-mail litigation that one district court in Washtenaw County had held that certain e-mail was FOIAble, but the University elected not to appeal the case. It was suggested that a good starting point for dealing with e-mail would be to focus on the original purpose of FOIA and use that as a guideline for drafting a separate statute dealing with e-mail or other forms of electronic communications. Rather than enact a separate statute on e-mail, the view was expressed that it was best to keep the entire matter under the FOIA roof.

When asked whether the solution to the problem was as easy as changing FOIA's definitions of "public record" and "writing," Ms. Cole responded affirmatively.[6] When asked whether he thought the solution was as easy as amending the definitions section of FOIA, Mr. Hunter responded that complicated problems often require complicated solutions, and that he was skeptical of simple solutions to the e-mail issue. He thought the problem was a subtle one, although Ms. Cole was of the view that her solution would not make matters any more unwieldy than they currently are. An illustrative list of e-mail that should be preserved and that would be FOIAble would be helpful, although Mr. Hunter thought that there was too much room for disagreement on this issue to create such an illustrative list. When asked whether changing the definition would cut down on the amount of litigation, Ms. Cole thought that it would.

When asked about the types of FOIA/e-mail requests the University receives, Ms. Cole stated that the nature of the requests were sometimes focused on specific e-mail by date, sender, etc., and that other e-mail requests were broad and unfocused.

III. Recent Developments.

In June 1996, the Colorado General Assembly enacted

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6 Ms. Cole's proposals can be found in her letter to the Commission, reproduced in 29TH ANNUAL REPORT, MICHIGAN LAW REVISION COMMISSION, Appendix 4a, at 89-90.

comprehensive revisions of its statutes to address the issue of access to and preservation of government e-mail. The General Assembly amended three statutes: (1) Colorado's Open Records Act (the Colorado equivalent to Michigan's FOIA), making government e-mail generally available to the public, subject to certain qualifications;[7] (2) Colorado's Open Meetings Law, amending the definition of "meetings" subject to the act to include any kind of gathering convened to discuss public business electronically and, in addition, making e-mail used by elected officials to discuss pending legislation or other public business subject to the Open Meetings Law;[8] and (3) Colorado's State Archives and Public Records Act, excluding e-mail from the definition of "records" that are subject to the preservation requirements of that law, "unless the recipient has previously segregated and stored such messages as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the value of the official governmental data contained therein."[9]

The General Assembly made the following legislative declaration to accompany the amendments:

> The general assembly hereby finds and declares that the use of electronic mail by agencies, officials, and employees of state government creates unique circumstances. Electronic mail shares some features with telephonic communication, which generally is not stored in any form and is generally regarded as private. However, electronic mail differs in that it creates an electronic record that may be used or retrieved in electronic or paper format. The use of electronic mail is becoming more common and more important in facilitating the ability of government officials to gather information and communicate with their staff, other officials and agencies, and the public. However, individual officials are not equipped to act as official custodians of such communications and to determine whether or not the communications might be public records. For these reasons, this act is intended to balance the privacy interests and practical limitations of public officials

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7 COLO. REV. STAT. ANN. §§ 24-72-202--204.5.

8 COLO. REV. STAT. ANN. § 24-6-402(1)(b) & (2)(d)(III).

9 COLO. REV. STAT. ANN. § 24-80-101(1)(f).

and employees with the public policy interests in access to government information.

With regard to the e-mail amendments to Colorado's Open Records Act, first, the General Assembly enacted a broad definition of "electronic mail" as "an electronic message that is transmitted between two or more computers . . . whether or not the message is converted to hard copy format after receipt or stored for later retrieval."[10] The definitions of "correspondence" and "writing" were also amended to include communications sent via electronic mail[11] and "digitally stored data, including without limitation electronic mail messages."[12] Second, while the definition of "public records" includes correspondence and writings, an express exemption is made for "public records" that constitute "work product prepared for elected officials," defined as:

> [A]ll intra- and inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority.[13]

Section 24-72-203 is a general disclosure provision that makes all public records open for inspection by any person, subject to a number of privacy, law enforcement, and security exceptions that in the main track those in M.C.L. § 15.243. However, Colorado includes an exemption not found in the Michigan FOIA for requests that seek "the specific details of bona fide research projects being conducted by a state institution . . . ."[14]

Section 24-72-204.5 directs all state agencies and local governments that operate an electronic mail communications system to adopt a written

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10 *Id.* § 24-72-202(1.2).

11 *Id.* § 24-72-202(1)(c).

12 *Id.* § 24-72-202(7).

13 *Id.* § 24-72-202(6.5). Work product is further defined to include notes and memoranda that serve as background information, preliminary drafts of documents that express a decision by an elected official, draft bills and amendments, and all research projects prepared at the request of a legislator in connection with pending legislation.

14 *Id.* § 24-72-204(2)(a)(III).

policy within one year on any monitoring of e-mail communications and the circumstances under which it will be conducted.

Finally, there is no requirement that e-mail messages be stored, only that if they are stored that they be made available, subject to the exceptions mentioned.

IV. Questions Presented.

1. Should the Freedom of Information Act be amended to make government e-mail subject to the Act's disclosure and exemption provisions?

2. Should the Management and Budget Act be amended to make government e-mail subject to the Act's document preservation requirements?

V. Recommendations.

1. Regarding amendments to FOIA, the Michigan Law Revision Commission believes that government e-mail should generally be subject to FOIA disclosure. The Commission therefore recommends to the Legislature that it amend FOIA and expressly make e-mail subject to FOIA disclosure. However, the Commission further recommends that the Legislature postpone enacting this amendment until after the Legislature and the Commission have both carefully considered what exemptions from disclosure, if any, are necessary and should be included with the e-mail amendment.

With the caveat concerning exemptions from disclosure in mind, the Commission makes the following recommendations to the Legislature:

A. Add the following definition of "electronic mail" to the definitions section of FOIA, M.C.L. § 15.232:

> "Electronic mail" means an electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later

retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

B. Amend the definition of "writing," M.C.L. § 15.232(e), by adding the following sentence:

"Writing" includes digitally stored data, including, without limitation, electronic mail messages.

During the coming year, the Commission will focus its attention on what types of e-mail should be exempt from FOIA requests. Among the areas the Commission will consider are (1) student-to-student e-mail, (2) student-to-third party e-mail, (3) advisory or deliberative materials used to assist elected officials in reaching decisions, and (4) computer programs and software. The Commission notes that in 1994 the Legislature enacted the Confidential Research Information Act, M.C.L. §§ 390.1551-390.1557, which exempts from FOIA disclosure various kinds of intellectual property and commercial information used in research activities at state universities and colleges.

2. Regarding amendments to the Management and Budget Act that might make e-mail subject to the maintenance and preservation provisions of that Act, the Commission believes that a general requirement that all e-mail be preserved would place an undue burden on state agencies. Accordingly, the Michigan Law Revision Commission recommends to the Legislature that it amend M.C.L. § 18.1284(b) by adding the following sentence to the definition of "record" contained therein:

Records shall not include electronic mail messages, regardless of whether such messages are produced or stored using state-owned equipment or software, unless such messages are segregated and stored by a state agency as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government, or because of the value of the official governmental data contained therein.

RECENT COURT DECISIONS IDENTIFYING STATUTES FOR LEGISLATIVE ACTION: RECOMMENDATIONS TO THE LEGISLATURE

As part of its statutory charge to examine current judicial decisions for the purpose of discovering defects in the law and to recommend needed reform, the Michigan Law Revision Commission undertook a review of several Michigan Court of Appeals' opinions brought to the Commission's attention by Judge Maura Corrigan that identify statutes that may be in need of legislative reform. At the least, these cases suggest that the Legislature should review these statutes to confirm that the Court's understanding of what the Legislature intended is, in fact, consistent with that intent.

The Commission reviewed the following cases:

Miller v. Riverwood Recreation Center, Inc., 215 Mich. App. 561, 546 N.W.2d 684 (1996)(dealing with the application of M.C.L. § 600.2925d; M.S.A. § 27A.2925(4), contribution among joint tortfeasors).

People v. Switras, 217 Mich. App. 142, 550 N.W.2d 842 (1996)(dealing with the application of M.C.L. § 750.239; M.S.A. § 28.436, firearms forfeiture).

Ladd v. Ford Consumer Finance Co., 217 Mich. App. 119, 550 N.W.2d 826 (1996)(dealing with M.C.L. § 125.2301; M.S.A. § 19.855(101), transfer of title to mobile homes).

Cooper v. Wade, 218 Mich. App. 649 (1996); and *In the Matter of the Estate of Henderson*, 1996 WL 518017 (1996), *rehearing granted and overruled,* 1996 WL 682922 (1996)(dealing with the issue of government liability to injured passengers in a vehicle fleeing police pursuit).

People v. Poole, 218 Mich. App. 702 (1996)(involving the construction of the repeat drug offender statute, M.C.L. § 333.7413, M.S.A. § 14.15(7413)).

Platte Lake Improvement Ass'n v. Dep't of Natural Resources, 218 Mich. App. 424, 554 N.W.2d 342 (1996)(concluding that costs recoverable in lawsuits brought under the Michigan Environmental Protection Act do not include an award of attorney fees).

Those decisions are analyzed in the attached Report. Copies of the opinions are attached to that Report as Appendices 1-6.

QUESTIONS PRESENTED

1. Should the good faith requirement in the Michigan contribution statute, M.C.L. § 600.2925d; M.S.A. § 27A.2925(4), be amended to include a provision that in assessing the good faith of the settling tortfeasor, courts may inquire whether, among other things, the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries?

Recommendation:

Yes. The Commission recommends that the Legislature overrule *Miller v. Riverwood*, and amend M.C.L. § 600.2925d, M.S.A. § 27A.2925(4), by adding the following language to that subsection:

> In determining whether a settlement agreement has been entered into in good faith under this subsection, the court shall inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of liability for the plaintiff's injuries.

2. Should M.C.L. § 752.862 M.C.L. §§ 28.436(22), dealing with firearms offenses causing property damage, be amended to expressly provide that firearms used in violation of that section are subject to forfeiture?

Recommendation:

Yes. The Commission recommends that the Legislature amend M.C.L. § 752.862; M.S.A. § 28.436(22), by adding the following provision:

> All pistols, weapons, or devices carried, possessed or used contrary to section 752.862 [section 28.436(22)] are hereby declared forfeited to the state, and shall be turned over to the commissioner of the Michigan state police or his designated representative, for such disposition as the commissioner may prescribe.

3. Should the title provisions of the Mobile Home Commission Act be amended to provide that a buyer in the ordinary course of business takes title to a mobile home?

Recommendation:

No. The Commission recommends that the Legislature codify *Ladd v. Ford Consumer Finance* by adding the following sentence to the scope section of the Uniform Commercial Code, M.C.L. § 440.2102, M.S.A. § 19.2102:

> The provisions of this article dealing with title to goods do not apply to transactions subject to the Mobile Home Commission Act, the Motor Vehicle Code, or the Water Certificates of Title Act.

4. Should the Government Tort Liability Act be amended to bar suits against police officers and their employers for injuries suffered by passengers who are in a vehicle that is fleeing police pursuit?

Recommendation:

The Commission recommends that no action be taken.

5. Should M.C.L. § 333.7413, M.S.A. § 14.15(7413), regarding nonparolable life imprisonment for repeat controlled substance offenders, be amended to clarify the circumstances under which a life sentence without parole may be imposed?

Recommendation:

The Commission recommends that no action be taken.

6. Should the Michigan Environmental Protection Act be amended to include attorney fees as an item of awardable costs in MEPA litigation?

Recommendation:

The Commission recommends that no action be taken.

RECENT COURT DECISIONS IDENTIFYING STATUTES REQUIRING LEGISLATIVE ACTION: A REPORT TO THE MICHIGAN LAW REVISION COMMISSION[1]

I. Introduction.

As part of its statutory charge to examine current judicial decisions for the purpose of discovering defects in the law and to recommend needed reform, the Michigan Law Revision Commission undertook a review of seven 1996 Michigan Court of Appeals opinions that identify statutes as potential candidates for legislative reform. Those cases and the statutes they dealt with are *Miller v. Riverwood Recreation Center, Inc.*, 215 Mich. App. 561, 546 N.W.2d 684 (1996)(dealing with the application of M.C.L. § 600.2925d; M.S.A. § 27A.2925(4), contribution among joint tortfeasors); *People v. Switras*, 217 Mich. App. 142, 550 N.W.2d 842 (1996)(dealing with the application of M.C.L. § 750.239; M.S.A. § 28.436, firearms forfeiture); *Ladd v. Ford Consumer Finance Co.*, 217 Mich. App. 119, 550 N.W.2d 826 (1996)(dealing with M.C.L. § 125.2301; M.S.A. § 19.855(101), transfer of title to mobile homes); *Cooper v. Wade*, 218 Mich. App. 649 (1996), and *In the Matter of the Estate of Henderson*, 1996 WL 158017 (1996), *rehearing granted and overruled,* 1996 WL 682922 (1996)(both dealing with the issue of liability to passengers in a vehicle fleeing police pursuit); *People v. Poole*, 218 Mich. App. 702 (1996)(involving the construction of the repeat drug offender statute, M.C.L. § 333.7413, M.S.A. § 14.15(7413)); and *Platte Lake Improvement Ass'n v. Dep't of Natural Resources*, 218 Mich. App. 424, 554 N.W.2d 342 (1996)(concluding that costs recoverable in lawsuits brought under the Michigan Environmental Protection Act do not include an award of attorneys fees).[2]

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[1] This Report was prepared by Professor Kevin Kennedy, Detroit College of Law at Michigan State University.

[2] These opinions are attached to this Report as Appendices 1-6, respectively.

II. The Contribution Among Joint Tortfeasors Act.

A. Background.

At common law there was no right to contribution among two or more joint tortfeasors. Consequently, in Michigan, as in other states, the right to contribution is controlled by statute. The contribution provisions of the Revised Judicature Act authorize a joint tortfeasor "who has paid more than his pro rata share of the common liability" to seek contribution from other tortfeasors, except as otherwise provided in the Act.[3] The Act further provides that "[e]xcept as otherwise provided by law . . . in determining the pro rata shares of tortfeasors in the entire liability as between themselves[,] . . . [t]heir relative degrees of fault shall be considered . . . [and] principles of equity applicable to contribution generally shall apply."[4]

B. The *Miller* Decision.

In *Miller v. Riverwood Recreation Center,* Riverwood and Otto-Dufty were sued by the Millers for a slip and fall accident that occurred on a golf course owned by Riverwood that had been renovated by Otto-Dufty. The jury returned a $328,500 verdict in favor of the Millers and against Riverwood and Otto-Dufty, jointly and severally. The jury determined that Riverwood was 70 percent liable for plaintiffs' injuries and found Otto-Dufty 30 percent responsible. After the verdict was returned but before entry of judgment, Riverwood suggested to Otto-Dufty that they attempt to settle the case with plaintiffs. Riverwood stated that it was prepared to pay $25,000 in settlement. Otto-Dufty rejected that offer. Riverwood nevertheless went ahead and settled with plaintiffs for $25,000, with an order of judgment being entered against Otto-Dufty for the entire jury verdict, reduced by the $25,000 paid in settlement by Riverwood. Otto-Dufty made a post-trial motion for contribution that was denied.

On appeal, the Court of Appeals affirmed. As framed by the Court of Appeals, the issue was the application of M.C.L. § 600.2925d; M.S.A. § 27A.2925(4), which provides:

> When a release or a covenant not to sue or not to enforce judgment is given *in good faith* [emphasis added] to 1

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3 M.C.L. § 600.2925a(2); M.S.A. § 27A.2925(1)(2).

4 M.C.L. § 600.2925b; M.S.A. § 27A.2925(2).

or 2 or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.

(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.

(c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Otto-Dufty's argument that the settlement between the Millers and Riverwood was not "in good faith" because it would result in Otto-Dufty paying an amount grossly disproportionate to its pro rata share of plaintiffs' damages rested heavily on the California Supreme Court's decision in *Tech-Bilt, Inc. V. Woodward-Clyde & Associates,* 38 Cal.3d 488, 213 Cal. Rptr. 256, 698 P.2d 159 (1985). In *Tech-Bilt*, the California Supreme Court observed that the California contribution statute has twin goals, the encouragement of settlements and the equitable sharing of damage awards by joint tortfeasors. In order that neither of these goals be subordinated to the other, the good faith requirement was included in the contribution statute so that courts could inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries.[5]

The Court of Appeals rejected the reasoning in *Tech-Bilt* regarding the meaning of "good faith" as unpersuasive with regard to Michigan's contribution statute. The Court believed that *Tech-Bilt*'s treatment of "good faith" would have the unsalutary effect of undermining the Michigan statute's goal of reaching settlements in tort cases. The Court made the following important observations concerning the Legislature's intent in enacting the Michigan contribution statute:

> Otto-Dufty can point to no Michigan legislative history suggesting any intent to adopt a judicial interpretation of "good faith" that would require a settlement agreement must reflect proportional liability. . . . We note that, at one point, this Act [the Uniform Contribution Among Tortfeasors Act]

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5 Tech-Bilt, 698 P.2d at 166.

included a section providing that a settling tortfeasor was not released from liability unless the release provided that the plaintiff's ultimate recovery would be reduced to the extent of the released tortfeasor's pro rata share of the damages, not just the settlement amount. . . . However, this protection was removed in later versions of the Uniform Act, and it is not included in the Michigan statute at issue here. To the contrary, the Michigan statute specifically provides that a plaintiff's recovery against non-settling defendants is reduced only by the settlement amount.

Beyond that, as in California, the Michigan contribution statute seeks to advance two goals, the equitable sharing of liability and the settlement of lawsuits. However, it appears that the Legislature intended that the first goal should be subservient to the second in situations where they conflict. As previously noted, sections 2925a and 2925b, which provide the right to contribution and advance the equitable sharing goal, are both limited by an "except as otherwise provided" clause. The act otherwise provides, in § 2925d, a strong incentive to settle: a settling tortfeasor is protected from contribution claims made by other tortfeasors.

* * * *

We fully understand Otto-Dufty's basic complaint, that it is unfair to require it to pay most of plaintiff's damages when the jury found it minimally liable. That result is, however, required by the statute, and Otto-Dufty's arguments should be addressed to the Legislature.[6]

The Court concluded that "good faith" should be analyzed with respect to the settling parties' negotiations and intent, not on whether the settlement amount is reasonably related to the settling defendant's proportional liability as compared to other tortfeasors.

C. Discussion.

In its 1991 Annual Report, the Law Revision Commission visited the issue of settlements and releases from vicarious liability under the Michigan Contribution Among Joint Tortfeasors Act.[7] The Commission

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6 Riverwood, 215 Mich. App. at 568, 570, 572 (citations omitted, footnote omitted).

7 MICHIGAN LAW REVISION COMMISSION, 1991 ANNUAL REPORT 19-30.

did not take up the issue presented in the *Miller* case.

In 1995, the Legislature enacted 1995 P.A. 249 (cited in footnote 5 of the *Miller* decision, but not applicable because the case was filed before the effective date of the Act) that radically changes principles of joint and several liability in personal injury actions generally. M.C.L. § 600.6304(1) directs a jury to return a special verdict in personal injury actions that contains the following finding:

> (b) The percentage of the total fault of all persons that contributed to the death or injury, including . . . each person released from liability under section 2925d [M.C.L. § 600.2925d] . . . .

That section then provides as follows:

> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6) [dealing with medical malpractice actions], a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.[8]

If M.C.L. § 600.6304(4) (and with it the abolition of joint and several liability generally in tort actions) had been in effect at the time the *Miller* case was filed, Otto-Dufty's exposure would have been limited to its 30-percent share of liability.

For tort actions in which principles of joint and several liability still apply, the Commission should consider recommending an amendment to section 2925d to include a definition of "good faith" that compares the amount of the settlement with the percentage of the settling tortfeasor's liability.

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[8] Under section 6312, defendants are jointly and severally liable if their conduct was criminal, involved the use of a motor or recreational vehicle, and in other circumstances.

III. The Firearms Forfeiture Statute.

A. Background.

The relevant portion of the Michigan firearms forfeiture statute, M.C.L. § 750.239; M.S.A. § 28.436, provides:

> All pistols, weapons or devices carried, possessed or used contrary to *this chapter* are hereby declared forfeited to the state, and shall be turned over to the commissioner of the Michigan state police or his designated representative, for such disposition as the commissioner may prescribe (emphasis added).

The firearms forfeiture statute, M.C.L. § 750.239; M.S.A. § 28.436, originated as § 239 of 1931 PA 328, the act that created the modern Penal Code. Chapter 37 of Act 328, as designated in the original legislation, was entitled "Firearms," and included §§ 222 through 239. Through the course of various reenactments and amendments to the Penal Code, M.C.L. § 752.862; M.S.A. § 28.436(22), careless discharge of a firearm resulting in property damage, was not included in Chapter 37.

B. The *Switras* Decision.

Following a district court jury trial, Switras was convicted of careless discharge of a firearm resulting in property damage, M.C.L. § 752.862; M.S.A. § 28.436(22). This section was originally enacted as section 2 of 1952 PA 45. Switras was ordered to pay a fine and to forfeit the firearm, pursuant to the forfeiture statute, M.C.L. § 750.239; M.S.A. § 28.436. Switras argued on appeal that forfeiture was not authorized because the forfeiture statute only applied to offenses under "*this chapter*," i.e., Chapter 37, and the statute under which he was convicted was not part of Chapter 37.

The Court of Appeals agreed. Noting that in their respective compilations of Michigan statutes West Publishing (which publishes Michigan Compiled Laws) had not included 1952 PA 45 in Chapter 37, but that Callaghan & Company (which publishes Michigan Statutes Annotated) had, the Court concluded that this was irrelevant because the Legislature had not delegated to either publisher the power to affect the application of any statute. While agreeing that conceptually the two sections of 1952 PA 45 dealing with firearms use belonged in Chapter 37 (covering offenses

related to firearms), the Court stated that "1952 PA 45 . . . does not purport to add any sections to the Penal Code. To add a section to the Penal Code, the Legislature must do so explicitly. Const. 1963, art. 4, § 24."[9] The Court was thus forced to the conclusion that the offense of which Switras was convicted was not within the ambit of Chapter 37 of the Penal Code.

C. Discussion.

It is possible, as the *Switras* court noted, that the scope of the forfeiture provision was inadvertently limited as a result of legislative oversight. As matters currently stand, a person convicted of a firearms violation under M.C.L. § 752.862; M.S.A. § 28.436(22), cannot have his or her firearm forfeited. The Commission should recommend that the Legislature amend M.C.L. § 752.862; M.S.A. § 28.436(22), to make firearms used in violation of that section is subject to forfeiture.

IV. Transfer of Title to Mobile Homes.

A. Background.

The provisions of the Mobile Home Commission Act (MHCA) and the Uniform Commercial Code (UCC) governing transfer of ownership differ radically. The MHCA makes all mobile home sales or transfers subject to the certificate of title provisions of the Act, except for any new mobile home owned by a manufacturer or by a licensed mobile-home dealer.[10] A manufacturer or dealer is not required to apply for a certificate of title while holding the home for sale. Upon sale, however, the purchaser must apply for a certificate of title with the assistance of the dealer. The effective date of the transfer of title is the date of execution of either the application for title or the certificate of title.[11]

M.C.L. § 125.2330(3); M.S.A. § 19.855(130)(3) expressly provides that "a mobile home shall not be sold or transferred except by transfer of the certificate of title for the mobile home pursuant to this act." Pursuant to regulations promulgated by the Mobile Home Commission under

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9 Switras, 217 Mich. App. at 246.

10 M.C.L. § 125.2330(1); M.S.A. § 19.855(130)(1).

11 M.C.L. § 125.2330c(2); M.S.A. § 19.855(130c)(2).

authority of the MHCA, a mobile-home dealer must prepare and file an application for a certificate of title with the Department of Commerce, with the manufacturer's certificate of origin attached to the application.[12]

The UCC provisions governing transfer of ownership are markedly different. Under the UCC, title to goods passes to the buyer at the time and place at which the seller completes performance with respect to delivery of the goods, without regard to a certificate of title.[13]

B. The *Ladd* Decision.

In *Ladd v. Ford Consumer Finance Co.*, Ladd was the purchaser of a new mobile home, the purchase of which was financed by NBD Bank. Under the terms of an inventory financing agreement with the mobile home dealer, Colony Homes Center, Ford Consumer Finance advanced funds to the manufacturer of the mobile homes so that Colony could buy them. Ford in turn held a security interest in Colony's entire inventory and required the manufacturer to send to Ford the certificates of origin, without which an application for a certificate of title is not complete. Ladd, with the NBD financing, paid for a new mobile home, which Colony delivered, but without a certificate of title. In violation of its agreement with Ford, Colony had failed to turn the Ladd purchase money over to Ford as a condition of Ford's surrender of the certificate of origin. Colony shortly thereafter ceased doing business and had no assets. Without the certificate of origin, Ladd could not obtain a certificate of title for the mobile home and NBD could not perfect its security interest in the home.

The Court of Appeals was presented with a case of first impression: Do the general provisions of the UCC or the specific provisions of the MHCA control the transfer of legal ownership in a mobile home? The Court concluded that the MHCA governs. First, the Court noted that in analogous cases involving a conflict over whether the UCC or some other more specific statute governs, the courts have held that the more specific statute controls. The Court of Appeals has ruled in cases involving transfer of title to automobiles and watercraft that the Motor Vehicle Code (MVC)

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12 1991 AACS, R. 125.1217(2); 1985 AACS, R. 125.1232(1).

13 M.C.L. § 440.2401[2]; M.S.A. § 19.2401[2].

and the Watercraft Certificates of Title Act (WCTA) preempt the UCC.[14] Because the MHCA title transfer provisions are analogous to those of the MVC and the WCTA, the Court concluded, that the specific certificate of title provisions of the MHCA control over the general provisions of the UCC.[15]

A subsidiary issue addressed by the Court was whether Ladd, the buyer of the mobile home, was a buyer in the ordinary course of business who, therefore, acquired title to the mobile home under the UCC, M.C.L. § 440.9307; M.S.A. § 19.9307. The Court again concluded that Ladd did not acquire title to the mobile home as a buyer in the ordinary course of business. "Despite our sympathy for these innocent plaintiffs," the Court concluded, "this Court is bound to follow the clear and unambiguous language of the title transfer provisions of the MHCA. Judicial construction of the MHCA title provisions is neither required nor permitted. If the Legislature intends a buyer in the ordinary course of business to take title to a mobile home under the UCC, it should plainly state so in an amended statute."[16]

C. Discussion.

As between the innocent purchaser, who has not had a continuous course of dealing with the mobile-home dealer, and the mobile-home dealer's finance company, who is intimately involved in the dealer's financial affairs, there is a natural impulse to favor the innocent party. As between an innocent purchaser, such as Ladd, and a financial institution, such as Ford Consumer Finance, the latter is much better placed to protect its financial position vis-a-vis the dealer.

On the other hand, most purchases of new automobiles, boats, and mobile homes will involve purchase-money financing arranged by the buyer through a sophisticated lending institution. That lending institution will insist that its security interest is noted on the certificate of title. If such institutions insist that a duly executed application for a certificate of title be completed and submitted before releasing purchase money, innocent

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14 *See* Whitcraft v. Wolfe, 148 Mich. App. 40, 384 N.W.2d 400 (1985)(MVC preempts UCC); Jerry v. Second Nat'l Bank of Saginaw, 208 Mich. App. 87, 527 N.W.2d 788 (1994)(WCTA preempts UCC).

15 Ladd, 217 Mich. App. at 128.

16 Ladd, 217 Mich. App. at 132 (citations omitted).

purchasers should be protected. Mobile-home dealers which have a floor-plan financing arrangement like the one Colony had with Ford will be required to keep relatively minimal cash reserves on hand that they can use to pay their financing institution in order to secure release of the certificate of origin.

On balance, because this is an area involving a delicate balance of consumer, lender, and dealer interests, the Legislature should hold hearings on this question before changing the status quo.

V. Police Officer Liability Arising Out of High-Speed Pursuits.

On September 10, 1996, separate panels of the Michigan Court of Appeals handed down two decisions involving the identical issue, but reached opposite conclusions on the question of whether police officers engaged in a high-speed pursuit owe a duty of care to passengers in a fleeing vehicle. In *Cooper v. Wade*,[17] the Court of Appeals concluded that a duty of care is owed to such passengers. The Court added that "a limitation of liability must come, if at all, from the Legislature or from the Supreme Court's narrowing of *Fiser [v. Ann Arbor*, 417 Mich. 461, 339 N.W.2d 413 (1983), holding the a government employer can be held liable for the negligent operation of a motor vehicle by one of its employees]."[18] In the other case, *In the Matter of the Estate of Henderson*,[19] the Court of Appeals concluded that police officers owe no duty of care to a passenger who is voluntarily in a fleeing vehicle because that person is not an innocent bystander and, thus, does not fall under the rule in *Fiser*. However, given the conflict with the *Cooper* opinion, the court in *Henderson* granted rehearing and deferred to the *Cooper* decision pursuant to Supreme Court Administrative Order 1996-4. The court noted that but for Administrative Order 1996-4, it would have adhered to its earlier decision, describing the reasoning in *Cooper* as "flawed."

These two decisions are discussed in the Report entitled, **POLICE OFFICER LIABILITY IN HIGH-SPEED PURSUITS: A STUDY REPORT**

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17 218 Mich. App. 649 (1996).

18 *Id.*, 218 Mich. App. at 657.

19 1996 WL 158017, *rehearing granted and overruled*, 1996 WL 682922 (1996).

TO THE MICHIGAN LAW REVISION COMMISSION, which is part of this Annual Report.

VI. Sentence Enhancement for Repeat Controlled Substance Offenders.

A. Background.

M.C.L. § 333.7413; M.S.A. § 14.15(7413) prescribes the penalties for repeat controlled substance offenders, and provides in pertinent part:

> (1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> (a) A violation of section 7401(2)(a)(ii) or (iii).
>
> (b) A violation of section 7403(2)(a)(ii) or (iii).
>
> (c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(ii) or (iii) or section 7403(2)(a)(ii) or (iii).

These sections prohibit the manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver, at least 50 grams but less than 225 grams, or at least 225 grams but less than 650 grams of a Schedule 1 or 2 narcotic or cocaine; or possession of at least 50 grams but less than 225 grams, or at least 225 grams but less than 650 grams, of a Schedule 1 or 2 narcotic or cocaine, or conspiracy to commit one of the foregoing offenses.

B. The *Poole* Decision.

In *People v. Poole*,[20] the Court of Appeals reviewed the conviction and sentence of the defendant under the repeat drug offender statute,

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[20] 218 Mich. App. 702 (1996).

M.C.L. § 333.7413; M.S.A. § 14.15(7413). On September 9, 1992, defendant delivered cocaine to a police officer. On September 17, 1992, the police found cocaine in defendant's jacket while executing a search warrant. Poole was subsequently convicted of two drug offenses following separate jury trials for delivery of 50 grams or more, but less than 225 grams, of cocaine; and possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine. He was sentenced to serve consecutive prison terms of 13 to 20 years, and a life term without parole, respectively.

Poole argued that the trial court erred in sentencing him as a repeat drug offender for the possession conviction. In affirming the trial court, the Court of Appeals held that section 7413(1) is not ambiguous and clearly requires a nonparolable life sentence where a defendant was "convicted previously" of an enumerated offense and is thereafter "convicted" of an enumerated offense. Poole's conviction history fit within this sequence. The Court rejected his argument that section 7413(1) does not apply to him because he committed his second offense before he had been convicted of the first offense. "For defendant's argument to prevail," the Court wrote, "we would have to rewrite § 7413(1) . . . [by changing] 'is thereafter convicted' to read '[who] thereafter commits' an offense. This we cannot do."[21]

C. Discussion.

The Court of Appeals' construction of section 7413(1) is consistent with the plain language of that statute. If the Legislature intended the result advanced by the defendant in *Poole*, statutory redrafting would be necessary.

VI. Attorney Fees Awards Under MEPA.

A. Background.

At common law, costs recoverable following successful litigation did not include attorneys fees.[22] "Costs" in the context of litigation is a term of art that has a meaning different from the common meaning. The Michigan Environmental Protection Act (MEPA) contains a section that provides for

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21 *Id.*, Mich. App. at 710.

22 *See, e.g.*, Matras v. Amoco Oil Co., 424 Mich. 675, 695, 385 N.W. 2d 586 (1986); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

an award of costs in litigation brought under MEPA. M.C.L. § 691.1203(3), M.S.A. § 14.528(203)(3) provides that "[c]osts may be apportioned to the parties if the interests of justice require." M.C.L. § 600.2405, M.S.A. § 27A.2405 lists the items which may be taxed and awarded as "costs" in the context of litigation, providing specifically for "[a]ny attorney fees authorized by statute or by court rule."

Thus, unless MEPA specifically authorizes an award of attorney fees, they are not otherwise recoverable as "costs."

B. The *Platte Lake Improvement Ass'n* Decision.

In *Platte Lake Improvement Ass'n v. Dep't of Natural Resources*, 218 Mich. App. 424, N.W.2d (1996), the plaintiff-property owners' association sought an award of attorney fees and costs after successfully suing the DNR for operating a salmon hatchery facility that polluted plaintiffs' property. The Court of Appeals concluded that costs recoverable in lawsuits brought under the Michigan Environmental Protection Act do not include an award of attorneys fees. The Court stated that its conclusion was consistent with legislative intent:

> [I]t is apparent that the Legislature understands the significance of the word "costs" because in other environmental legislation the Legislature has specifically provided for the payment of attorney fees.[23]

Other panels of the Court of Appeals have reached the opposite conclusion. *See, e.g., Superior Public Rights, Inc. v. Dep't of Natural Resources,* 80 Mich. App. 72, 263 N.W.2d 290 (1977). *Contra Oscoda Chapter of PBB Action Committee, Inc. v. Dep't of Natural Resources,* 115 Mich. App. 356, 320 N.W.2d 376 (1982); *Attorney General v. Piller*, 204 Mich. App. 228, 514 N.W.2d 210 (1994).

C. Discussion.

There is little room for disagreement with the Court of Appeals in the *Platte Lake Improvement Ass'n* case regarding statutory construction. In litigation settings the word "costs" is a term of art that does not include an award of attorney fees unless specifically authorized. The only question

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[23] *Id.*, 218 Mich. App. at 428. The Court cited as examples the Water Resources Commission Act and the Hazardous Waste Management Act.

is whether the Legislature intended this result, given that in other environmental laws it has provided for an award of attorney fees as an item of recoverable costs.

Appendix 1

MILLER v RIVERWOOD RECREATION CENTER, INC

Docket No. 176335. Submitted November 9, 1995, at Grand Rapids. Decided February 27, 1996, at 9:00 A.M. Leave to appeal sought.

Mary and Kenneth Miller brought an action in the Isabella Circuit Court against Riverwood Recreation Center, Inc., and Otto-Dufty Architects, P.C., seeking damages for injuries sustained by Mary Miller in a slip and fall accident in a building at Riverwood's golf course that had been renovated with the aid of Otto-Dufty's architectural services. The jury awarded the plaintiffs a verdict of $328,500 against the defendants jointly and severally. The jury also determined that Riverwood was seventy percent liable for Mary Miller's injuries and Otto-Dufty thirty percent liable. Before an order of judgment was entered, Riverwood reached a settlement with the plaintiffs and agreed to pay $25,000. The court, Paul H. Chamberlain, J., entered a judgment making Otto-Dufty liable for the entire amount of the verdict reduced by the $25,000 settlement. The court then denied a motion for contribution brought by Otto-Dufty and imposed sanctions against Otto-Dufty for attempting to mislead the court regarding the proper procedure to be used in attempting to enforce its alleged contribution right against Riverwood. Otto-Dufty appealed, alleging the settlement agreement was not "in good faith" and, therefore, Riverwood was not discharged from its liability for contribution.

The Court of Appeals *held:*

1. The pertinent statute, MCL 600.2925d(b); MSA 27A.2925(4)(b), specifically provides that a plaintiff's recovery against nonsettling defendants is reduced only by the settlement amount. The statute has two goals, the equitable sharing of liability and the settlement of lawsuits. The Legislature intended that the first goal should be subservient to the second in situations where they conflict.

2. Instead of concentrating on whether the settlement amount is reasonably related to the settling defendant's proportional liability as compared to other tortfeasors, "good faith"

REFERENCES

Am Jur 2d, Contribution §§ 68, 71, 75.

See ALR Index under Contribution.

should be analyzed with respect to the settling parties' negotiations and intent. Otto-Dufty did not present evidence of bad faith with regard to the settlement.

3. The trial court did not clearly err in imposing sanctions against Otto-Dufty for arguing that a motion for contribution was appropriate under MCL 600.2925c(2); MSA 27A.2925(3)(2). The statute, which allows a motion for contribution in favor of one judgment defendant against other judgment defendants, requires, as a prerequisite, that a judgment be entered against the party from which contribution is sought, not merely that a judgment be entered in the action generally, as Otto-Dufty contends.

Affirmed.

1. TORTS — CONTRIBUTION — SETTLEMENTS — JUDGMENTS.

The contribution statute provides that a plaintiff's recovery against nonsettling defendants in a tort action is reduced only by the settlement amount (MCL 600.2925d[b]; MSA 27A.2925[4][b]).

2. TORTS — CONTRIBUTION.

The contribution statute seeks to advance two goals, the equitable sharing of liability and the settlement of lawsuits; it is the intent of the Legislature that the first goal should be subservient to the second in situations where they conflict (MCL 600.2925a, 600.2925b, 600.2925d; MSA 27A.2925[1], 27A.2925[2], 27A.2925[4]).

3. TORTS — CONTRIBUTION — SETTLEMENTS — WORDS AND PHRASES — GOOD FAITH.

"Good faith" for purposes of the contribution statute should be analyzed with respect to the settling parties' negotiations and intent, not by concentrating on whether the settlement amount is reasonably related to the settling defendant's proportional liability as compared to other tortfeasors (MCL 600.2925d; MSA 27A.2925[4]).

Sullivan, Ward, Bone, Tyler & Asher, P.C. (by *Thomas M. Slavin*), for Otto-Dufty Architects, P.C.

Kallas & Henk, P.C. (by *Constantine N. Kallas*), for Riverwood Recreation Center, Inc.

Before: MARKEY, P.J., and BANDSTRA and J. M. BATZER,* JJ.

BANDSTRA, J. As often happens, we are asked in this case to creatively interpret the clear language of a statute to avoid an obvious, but arguably unfair, result. We cannot do this. Under the Michigan Constitution and its division of power between the Legislature and the judiciary, we are only authorized to implement statutes, not change them in response to policy arguments, regardless of how persuasive.

Defendant-appellant Otto-Dufty Architects, P.C., brought a cross-complaint against defendant-appellee Riverwood Recreation Center, Inc., seeking contribution. Both Otto-Dufty and Riverwood had been sued in the underlying lawsuit by plaintiffs Mary and Kenneth Miller, not parties to this appeal, who alleged defendants were responsible for Mary Miller's slip and fall accident. The accident occurred at a golf course owned and operated by Riverwood that had been renovated in a project in which Otto-Dufty was architecturally involved. The jury awarded plaintiffs a $328,500 verdict against Riverwood and Otto-Dufty, jointly and severally. The jury also determined that Riverwood was seventy percent liable for Mary Miller's injuries and Otto-Dufty thirty percent liable.

Following the verdict, but before an order of judgment was entered, Riverwood suggested that Otto-Dufty and Riverwood should jointly try to settle the case with plaintiffs and that Riverwood would be willing to pay $25,000 in settlement. Otto-Dufty declined that offer and Riverwood went forward with settlement, agreeing with plaintiffs to pay $25,000. As a result, an order of judgment was entered making Otto-Dufty liable for the en-

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

tire jury verdict reduced only by the $25,000 amount paid in settlement by Riverwood, pursuant to Michigan's contribution statute, MCL 600.2925d(b); MSA 27A.2925(4)(b). Otto-Dufty contested that result in a motion for contribution that was denied pursuant to the statute.

This appeal centers mainly on the judgment order entered and the related denial of Otto-Dufty's motion for contribution. In addition, Otto-Dufty argues that sanctions should not have been imposed against it for attempting to mislead the court regarding the proper procedure to be used in attempting to enforce its alleged contribution right against Riverwood. We affirm.

The right to contribution in Michigan is controlled entirely by statute because there was no right to contribution at common law. *Reurink Bros Star Silo, Inc v Clinton Co Road Comm'rs,* 161 Mich App 67, 70; 409 NW2d 725 (1987). The contribution provisions of the Revised Judicature Act allow a joint tortfeasor "who has paid more than his pro rata share of the common liability" to seek contribution from other tortfeasors. MCL 600.2925a(2); MSA 27A.2925(1)(2). However, this right is limited "as otherwise provided in this act." MCL 600.2925a(1); MSA 27A.2925(1)(1). In another section, the statute specifies that "in determining the pro rata shares of tortfeasors in the entire liability as between themselves[,] . . . [t]heir relative degrees of fault shall be considered . . . [and] [p]rinciples of equity applicable to contribution generally shall apply." MCL 600.2925b; MSA 27A.2925(2). Again, this section contains a caveat that it is to be applied "[e]xcept as otherwise provided by law." *Id.*

At issue here is the application of MCL 600.2925d; MSA 27A.2925(4):

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.
>
> (b) It reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.
>
> (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Otto-Dufty contends that the settlement between Riverwood and plaintiffs was not "in good faith" and, thus, this statute does not discharge Riverwood from its liability for contribution to Otto-Dufty.

Otto-Dufty argues that we should consider the settlement not in good faith because of its result, i.e., because Otto-Dufty must pay far more than its pro-rata share of plaintiffs' damages. Hypothetically, under the jury finding that Riverwood was seventy percent liable for plaintiffs' damages, Riverwood would have paid more than $200,000 to plaintiffs. Otto-Dufty would have paid less than $100,000 as a result of its thirty percent liability. However, as a result of the settlement and the trial court's application of the statute, the judgment against Otto-Dufty was nearly a quarter of a million dollars,[1] Riverwood must pay plaintiffs only $25,000, and Otto-Dufty has no right against Riverwood for contribution. Because this result is

[1] The trial court's computations in the order of judgment resulted from applying interest and present value principles to the jury award under MCL 600.6013; MSA 27A.6013 and MCL 600.6306; MSA 27A.6306. These computations have not been challenged on appeal.

so disproportionate in light of the jury's finding of fact regarding Otto-Dufty's relatively limited liability for Mary Miller's injuries, Otto-Dufty argues that the settlement agreement should not be considered to be "in good faith" under the statute.

In the absence of any compelling Michigan authority regarding the statutory meaning of good faith,[2] Otto-Dufty relies heavily on the majority opinion in *Tech-Bilt, Inc v Woodward-Clyde & Associates,* 38 Cal 3d 488; 213 Cal Rptr 256; 698 P2d 159 (1985), and cases following it.[3] The *Tech-Bilt* majority reasoned that the California contribution statute has two goals, the equitable sharing of costs among parties at fault and the encouragement of settlements. *Id.* at 494. The majority reasoned that neither of these goals should be applied to defeat the other, but, instead, that they should be accommodated even though they are not necessarily always harmonious. *Id.* The majority decided that, by including a requirement that settlement agreements be entered into in good faith, the Legislature intended that courts should "inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." *Id.* at 499.

The *Tech-Bilt* majority came to its conclusion because of legislative action that occurred after

[2] Both parties rely upon *Shaffner v Riverview,* 154 Mich App 514; 397 NW2d 835 (1986), to support their competing interpretations of the good-faith requirement. This is possible because *Shaffner* is somewhat enigmatic. In *Shaffner,* the panel apparently rejected an argument that "the size of the settlements in relation to the fault of the parties [was] evidence of bad faith," but did so using language suggesting that settlements must bear a "reasonable relationship" to relative fault and that a "grossly disparate" settlement might indicate "bad faith as a matter of law." *Id.* at 518.

[3] Otto-Dufty also relies on cases deciding whether federal law bankruptcy filings were in "good faith," precedents we find wholly inapposite.

judicial decisions adopting a proportionate-liability test of good faith. For the majority, this constituted legislative affirmation of that interpretation. *Id.* at 495-497, 498-499. The court also noted that its understanding of good faith was consistent with comments to the Uniform Contribution Among Tortfeasors Act, 12 ULA 63 (1955 rev), upon which the California statute was modeled. *Id.* at 494, n 4.

In dissent, Chief Justice Rose E. Bird persuasively reasoned that the 1955 revisions of the Uniform Contribution Among Tortfeasors Act "represented a policy decision to encourage settlement [which] . . . abandoned as unworkable [the] earlier attempt to protect nonsettling parties from inequity other than that caused by collusive conduct." *Id.* at 504. Chief Justice Bird criticized the majority's conclusion that the legislature had adopted a judicial interpretation of good faith requiring proportionality because the judicial interpretation purportedly relied upon was "mere dictum." *Id.* at 503. Chief Justice Bird adopted a much more limited view of good faith: "[A] settlement satisfies the good faith requirement if it is free of corrupt intent, i.e., free of intent to injure the interests of the nonsettling tortfeasors. A settlement is made in bad faith only if it is collusive, fraudulent, dishonest, or involves tortious conduct." *Id.* at 502.

While the *Tech-Bilt* majority's reasoning regarding the meaning of "good faith" in the California statute may or may not be correct, it is not persuasive with regard to the Michigan statute. Otto-Dufty can point to no Michigan legislative history suggesting any intent to adopt a judicial interpretation of "good faith" that would require that a settlement agreement must reflect proportional liability. As in California, the Uniform Contribution Among Tortfeasors Act was the basis of the

Michigan contribution statute. *Theophelis v Lansing General Hosp,* 430 Mich 473, 481; 424 NW2d 478 (1988). We note that, at one point, this uniform act included a section providing that a settling tortfeasor was not released from liability unless the release provided that the plaintiff's ultimate recovery would be reduced to the extent of the released tortfeasor's pro-rata share of the damages, not just the settlement amount. *Tech-Bilt, supra* at 504. That section provided protection for other tortfeasors, similar to the protection Otto-Dufty seeks here. However, this protection was removed in later versions of the uniform act, *id.,* and it is not included in the Michigan statute at issue here. To the contrary, the Michigan statute specifically provides that a plaintiff's recovery against nonsettling defendants is reduced only by the settlement amount. MCL 600.2925d(b); MSA 27A.2925(4)(b); *Mayhew v Berrien Co Road Comm,* 414 Mich 399, 410-411; 326 NW2d 366 (1982).

Beyond that, as in California, the Michigan contribution statute seeks to advance two goals, the equitable sharing of liability and the settlement of lawsuits. *Id.* at 410. However, it appears that the Legislature intended that the first goal should be subservient to the second in situations where they conflict. As previously noted, §§ 2925a and 2925b, which provide the right to contribution and advance the equitable sharing goal, are both limited by an "except as otherwise provided" clause. The act otherwise provides, in § 2925d, a strong incentive to settle: a settling tortfeasor is protected from contribution claims made by other tortfeasors.

This primary goal of inducing settlements would be undermined by the broad interpretation of "good faith" that Otto-Dufty promotes. "As the cases and commentators note, settlement is depen-

dent upon the degree to which the settling defendant can be assured of the settlement's finality." *Tech-Bilt, supra* at 506-507. A joint tortfeasor has an incentive to settle a case only if the amount agreed upon represents the final and total liability that will have to be paid for the matter to any party. Adopting a "good faith" definition that would allow a court to impose further liability under contribution principles would reduce that incentive. "It will be difficult for a settling defendant to predict whether the trial court will find his settlement to be in good faith. The imprecise nature of the test also produces the added risk that despite the deference paid to the trial court, a favorable good faith determination will be reversed by the appellate court." *Id.* at 507. This definition would make it "impossible for one tortfeasor alone to take a release and close the file." *Id.* at 504.

Otto-Dufty's definition of "good faith" might, in effect, completely eviscerate the settlement incentive that § 2925d clearly seeks to provide. In essence, Otto-Dufty's argument is that a settlement is not in good faith unless a settling defendant pays approximately its proportionate share of damages. But, in that situation, another defendant has no right to contribution from the settling defendant. MCL 600.2925a(2); MSA 27A.2925(1)(2). In other words, Otto-Dufty would have us interpret "good faith" in a fashion that makes § 2925d's protection against contribution claims available only where there is nothing to be protected against. We will not adopt this nugatory interpretation of this section. *Altman v Meridian Twp,* 439 Mich 623, 635; 487 NW2d 155 (1992); *Skene v Fileccia,* 213 Mich App 1, 5; 539 NW2d 531 (1995).

In sum, we disagree with the *Tech-Bilt* majority and believe that its treatment of "good faith" will

severely undermine the settlement goal of the Michigan statute. With similar reasoning, courts in other states have also rejected the *Tech-Bilt* majority approach. *Stubbs v Copper Mountain, Inc,* 862 P2d 978 (Colo App, 1993), aff'd sub nom *Copper Mountain, Inc v Poma of America, Inc,* 890 P2d 100 (Colo, 1995); *Smith v Monongahela Power Co,* 189 W Va 237; 429 SE2d 643 (1993); *Mahathiraj v Columbia Gas of Ohio, Inc,* 84 Ohio App 3d 554; 617 NE2d 737 (1992); *Velsicol Chemical Corp v Davidson,* 107 Nev 356; 811 P2d 561 (1991); *Noyes v Raymond,* 28 Mass App 186; 548 NE2d 196 (1990); *Ruffino v Hinze,* 181 Ill App 3d 827; 537 NE2d 871 (1989); *Lowe v Norfolk & W R Co,* 753 SW2d 891 (Mo, 1988); *Torres v State of New York,* 67 AD2d 814; 413 NYS2d 262 (1979); but see *Int'l Action Sports, Inc v Sabellico,* 573 So 2d 928 (Fla App, 1991).

Instead of concentrating on whether the settlement amount is reasonably related to the settling defendant's proportional liability as compared to other tortfeasors, we conclude that "good faith" should be analyzed with respect to the settling parties' negotiations and intent. This is the usual way in which the "good faith" of agreements is analyzed. See, e.g., *People v Downes,* 394 Mich 17, 26; 228 NW2d 212 (1975); *Shaffner v Riverview,* 154 Mich App 514, 518; 397 NW2d 835 (1986). We see no reason to conclude that the Legislature meant something different in requiring a "good faith" settlement agreement in § 2925d.

"Good faith" has been defined as a standard measuring the state of mind, perceptions, honest beliefs, and intentions of the parties. *Shaffner, supra.* In the commercial law context, the Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct or transaction concerned." MCL 440.1201(19); MSA 19.1201(19); *Downes, su-*

pra. In addition, Black's Law Dictionary (6th ed), p 693, defines "good faith," in part, as "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." In contrast, "bad faith," in the insurance context, has been defined as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins Co v Liberty Mutual Ins Co,* 426 Mich 127, 136; 393 NW2d 161 (1986); *In re Green Charitable Trust,* 172 Mich App 298, 315; 431 NW2d 492 (1988). Furthermore, a claim of bad faith cannot be based upon negligence or bad judgment if "the actions were made honestly and without concealment." *Commercial Union, supra* at 137.

Otto-Dufty argues that Riverwood falsely represented its financial situation to plaintiffs to induce the settlement agreement. Specifically, Otto-Dufty contends that Riverwood threatened to seek bankruptcy protection unless plaintiffs would accept a relatively small amount in settlement, but, in fact, Riverwood was financially secure. Even if this were the case, representations of this sort are commonly made in settlement negotiations and plaintiffs were free to demand whatever financial information they wanted from Riverwood in weighing this factor. Moreover, plaintiffs contended, at a hearing before the trial court, that their settlement with Riverwood was largely entered into to avoid a Riverwood appeal of the jury verdict.[4] Again, this is a common inducement for settlement, and Otto-Dufty has not come forward

[4] Otto-Dufty makes much of the fact that the settlement agreement in this case was entered after a jury verdict, in contrast to, for example, *Shaffner,* where the panel noted that it could not "determine with accuracy the fault of the settling parties." *Id.* at 518. However, while the jury verdict provides some determination of relative fault, that determination is tentative in a case like this where, absent a settlement, an appeal is likely.

with any evidence of "bad faith" in the sense that Riverwood's actions were "arbitrary," "reckless," dishonest, and made with concealment. *Id.* at 136-137.

We fully understand Otto-Dufty's basic complaint, that it is unfair to require it to pay most of plaintiffs' damages when the jury found it minimally liable. That result is, however, required by the statute, and Otto-Dufty's arguments should be addressed to the Legislature.[5]

Finally, Otto-Dufty argues that sanctions should not have been awarded against it because it did not intend to mislead the trial court in arguing that a motion for contribution was appropriate under MCL 600.2925c(2); MSA 27A.2925(3)(2). We review the trial court's findings of fact relating to the imposition of a sanction to determine whether they are clearly erroneous, meaning that we are left with a definite and firm conviction that a mistake has been made. *In re Stafford,* 200 Mich App 41, 42-43; 503 NW2d 678 (1993). We note that the statute at issue allows a motion for contribution "in favor of 1 against other judgment defendants." This seems to require, as a prerequisite, that judgment be entered against the party from which contribution is sought, not merely that a judgment be entered in the action generally as Otto-Dufty contends. Accordingly, we do not conclude that the trial court was clearly erroneous in imposing sanctions.

We affirm.

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[5] Otto-Dufty's predicament stems from the fact that it is jointly and severally liable for all of plaintiffs' damages. We note that the Legislature has recently enacted a law, inapplicable to this case, that significantly changes joint and several liability principles. 1995 PA 249.

Appendix 2

PEOPLE v SWITRAS

Docket No. 172637. Submitted February 13, 1996, at Lansing. Decided June 7, 1996, at 9:25 A.M.

Michael J. Switras was convicted by a jury in the 71A District Court, Laura Cheger Barnard, J., of careless discharge of a firearm resulting in property damage. He was ordered to pay a fine and, pursuant to MCL 750.239; MSA 28.436, forfeit the firearm used during the commission of the offense. He appealed to the Lapeer Circuit Court with regard to the forfeiture order. The court, Martin E. Clements, J., affirmed. The defendant appealed by leave granted, alleging that the forfeiture statute does not apply to violators of the statute regarding careless discharge of a firearm resulting in property damage, MCL 752.862; MSA 28.436(22).

The Court of Appeals *held*:

The forfeiture statute is unambiguous and provides for a forfeiture of firearms if they are carried, possessed, or used contrary to chapter 37 of the Penal Code. MCL 752.862; MSA 28.436(22) is not a weapons offense falling under chapter 37 of the Penal Code. The trial court erred in imposing the forfeiture.

Portion of order relating to forfeiture reversed.

CRIMINAL LAW — WEAPONS — FORFEITURE.

MCL 752.862; MSA 28.436(22), which prohibits careless discharge of a firearm resulting in property damage, is not a weapons offense contained within chapter 37 of the Penal Code; the section of chapter 37 of the Penal Code that provides for the forfeiture of all pistols, weapons, or devices carried, possessed, or used "contrary to this chapter," MCL 750.239; MSA 28.436, refers to violations of statutes contained in chapter 37 of the Penal Code and does not authorize the forfeiture of a firearm used during a violation of MCL 752.862; MSA 28.436(22).

Morrice, Lengemann & Zimmerman, P.C. (by *John L. Lengemann*), for the defendant.

Before: WHITE, P.J., and FITZGERALD and E. M. THOMAS,* JJ.

FITZGERALD, J. Following a district court jury trial, defendant was convicted of careless discharge of a firearm resulting in property damage, MCL 752.862; MSA 28.436(22). Defendant was ordered to pay a fine and to forfeit the firearm used during the commission of the crime, pursuant to MCL 750.239; MSA 28.436. Defendant appealed the forfeiture order as of right to the Lapeer Circuit Court. The forfeiture order was affirmed. Defendant appeals by leave granted. Specifically, defendant argues the forfeiture statute does not apply to the statute under which he was convicted. We agree and reverse the portion of the order relating to the forfeiture.

The relevant forfeiture statute provides:

> All pistols, weapons or devices carried, possessed or used *contrary to this chapter* are hereby declared forfeited to the state, and shall be turned over to the commissioner of the Michigan state police or his designated representative, for such disposition as the commissioner may prescribe. [MCL 750.239; MSA 28.436 (emphasis added).]

Citing *People v Thompson*, 125 Mich App 45, 47; 335 NW2d 712 (1983), defendant contends that the statute is unambiguous and that the phrase "this chapter" refers to violations of chapter 37 of the Penal Code. We agree. The forfeiture statute is unambiguous on its face and provides for a forfeiture of firearms if they are carried, possessed, or used contrary to chapter 37 of the Penal Code. *Id.* at 47. Cf. *Burch v Wargo*, 378 Mich 200, 204; 144 NW2d 342 (1966) (use of "this

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

chapter" refers to chapter 5 of the vehicle code of 1949). Defendant contends that he was not convicted of a crime under chapter 37 of the Penal Code and therefore the provision is inapplicable. The question, therefore, is whether a violation of MCL 752.862; MSA 28.436(22) is a weapons offense falling under chapter 37 of the Penal Code.

MCL 750.239; MSA 28.436 originated as § 239 of 1931 PA 328, the act that created the modern Penal Code. Chapter 37 of the act, as designated in the original legislation, was entitled "Firearms," and included §§ 222 through 239.

Section 235 of Act 328 provided:

> Any person who shall maim or injure any other person by the discharge of any fire-arm pointed or aimed intentionally, without malice, at any such person shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one year or by a fine of not more than five hundred dollars.

The Penal Code was amended with the addition of § 235a by 1939 PA 83.[1] Section 235a, as originally enacted, provided in pertinent part:

> Any person who shall use, carry, handle or discharge any fire-arm carelessly and heedlessly in willful or wanton disregard of the rights, safety or property of others, or without due caution and circumspection, shall be guilty of a misdemeanor.

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[1] 1939 PA 83 was specifically entitled in pertinent part:

> An act to amend act number 328 of the Public Acts of 1931, entitled, "An act to revise, consolidate, codify and add to the statutes relating to crimes."

The present controversy stems from the enactment of 1952 PA 45, which provided:

> Sec. 1. Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court. [MCL 752.861; MSA 28.436(21).]
>
> Sec. 2. Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his control to be discharged so as to destroy or injure the property of another, real or personal, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 90 days or by a fine of not more than $100.00, if the injury to such property shall not exceed the sum of $50.00, but in the event that such injury shall exceed the sum of $50.00, then said offense shall be punishable by imprisonment in the county jail for not more than 1 year or by a fine not exceeding $500.00. [MCL 752.862; MSA 28.436(22).]
>
> Sec. 3. Section 235a of Act No. 328 of the Public Acts of 1931, being section 750.235a of the Compiled Laws of 1948, is hereby repealed. [MCL 752.863; MSA 28.436(23).]

The two different compilations of Michigan statutes treat the sections of law added by 1952 PA 45 differently. The West Publishing Company has followed the numbering used by the compiler, an agent of the Legislative Council that, pursuant to statute, compiles all general laws in force and administrative rules filed with the Secretary of State and publishes them in bound volumes. The numbering used in West's *Michigan Compiled Laws Annotated* follows the numbering adopted by the compiler. Callaghan & Company,

publisher of *Michigan Statutes Annotated*, uses its own numbering system. Callaghan's has included the sections added by 1952 PA 45 in chapter 37 of the Penal Code, while West Publishing Company has not. However, the Legislature has not delegated to either of these private publishing companies, or to the compiler, the power to affect the application and reach of any statute.

Here, in 1931 the Legislature divided the Penal Code into chapters, with chapter 37 covering offenses relating to firearms. An additional section relating to careless use of firearms was specifically added to chapter 37 by 1939 PA 83, and was later repealed by 1952 PA 45. However, in enacting 1952 PA 45,[2] the Legislature did not declare that it was repealing §§ 235 and 235a of the Penal Code. Instead, it repealed § 235a and left § 235 unchanged. Conceptually, the sections of 1952 PA 45 belong in chapter 37 of the Penal Code. However, the Penal Code is an act and 1952 PA 45 is another act that, by its terms, does not purport to add any sections to the Penal Code. To add a section to the Penal Code, the Legislature must do so explicitly. Const 1963, art 4, § 24. Because the Legislature elected not to place these new sections in the Penal Code, the offense of which defendant was convicted is not within the ambit of chapter 37 of the

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[2] 1952 PA 45 was simply titled:

> An act to prohibit the careless, reckless or negligent use of firearms and to provide penalties for the violation of this act; and to repeal certain acts and parts of acts.

Penal Code. Accordingly, the trial court erred in imposing a forfeiture under § 239 of the Penal Code.[3]

The portion of the order relating to the forfeiture is reversed.

[3] It is possible that the limits on the forfeiture provision arose as a result of legislative oversight. However, it is for the Legislature, not the judiciary, to cure the problem. Const 1963, art 3, § 2.

Appendix 3

LADD v FORD CONSUMER FINANCE COMPANY, INC

Docket No. 180810. Submitted March 13, 1996, at Lansing. Decided June 7, 1996, at 9:15 A.M. Leave to appeal sought.

David D. Ladd and NBD Bank, N.A., brought an action in the Genesee Circuit Court against Ford Consumer Finance Company, Inc., alleging interests in, and conversion of, a certificate of origin for a mobile home sold by Colony Homes Center, Inc., to Ladd, who had obtained a secured loan from NBD to make the purchase. Ford, under the terms of an inventory financing agreement with Colony, had paid the mobile-home manufacturer for the mobile home on behalf of Colony and had received the certificate of origin from the manufacturer. Normally, Ford would have released the certificate of origin to Colony once Colony paid Ford for the mobile home. In this case, however, Colony had obtained the proceeds of Ladd's loan from NBD but failed to pay Ford what it owed on the mobile home. NBD also sought a declaration that Ford was similarly liable for conversion with respect to six other mobile-home purchasers. The court, Judith A. Fullerton, J., granted summary disposition for Ladd and NBD, ruling that under the Uniform Commercial Code, MCL 440.1201(9); MSA 19.1201(9), Ladd was a buyer of a good in the ordinary course of business, that title to the mobile home passed from Colony to Ladd upon physical delivery of the home, MCL 440.2401(2); MSA 19.2401(2), and that Ladd's status as a buyer in the ordinary course of business protected NBD's security interest. The court determined that conversion of the title of origin was not proved and denied declaratory relief concerning the six other mobile-home purchasers. Ford appealed, and NBD cross appealed.

The Court of Appeals *held*:

1. The provisions of the Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq.*, MSA 19.855(101) *et seq.*, prevail over the provisions of the UCC with respect to the transfer of title to a mobile home. Under the MHCA and the administrative rules promulgated thereunder, MCL 125.2330(3); MSA 19.855(130)(3), MCL 125.2330c (2); MSA 19.855(130c)(2), 1985 AACS, R 125.1232(1), 1991 AACS, R 125.1217(2), a licensed mobile-home dealer must prepare and file with the Department of Commerce an application for a certificate of title and attach the certificate of origin to the application, and transfer of title occurs on the date of the execution of the applica-

tion for title or the certificate of title. In this case, there was no transfer of title to Ladd because Colony did not file the required application for title.

2. Title must first transfer under the MHCA before a buyer in the ordinary course of business can, under the UCC, take free and clear of a security interest not known to the buyer. Ladd cannot be a buyer in the ordinary course of business because he did not obtain title pursuant to the MHCA.

3. The trial court did not abuse its discretion in denying the requested declaration concerning the six other mobile-home purchasers. Those purchasers were not parties to the case, the trial court was unfamiliar with the facts relating to those purchasers, and nothing prevents those purchasers from seeking relief for themselves.

4. NBD lacks a proprietary interest in the certificate of origin at issue and therefore cannot claim conversion by Ford. 1985 AACS, R 125.1232(2), which requires a lender holding a certificate of origin to surrender it upon the request of a mobile-home dealer, is for the benefit of mobile-home dealers, not other lenders.

Affirmed in part, reversed in part, and remanded.

1. SALES — MOBILE HOMES — TRANSFERS OF TITLE — MOBILE HOME COMMISSION ACT.

Transfers of title to mobile homes are governed by the provisions of the Mobile Home Commission Act and the administrative rules promulgated thereunder; accordingly, provisions of the Uniform Commercial Code dealing with buyers in the ordinary course of business do not apply unless the title-transfer requirements of the act and rules have been met (MCL 125.2301 *et seq.*; MSA 19.855 [101] *et seq.*, 1985 AACS, R 125.1232[1], 1991 AACS, R 125.1217[2]).

2. DECLARATORY JUDGMENTS — APPEAL — ABUSE OF DISCRETION.

A circuit court's decision whether to grant declaratory relief is reviewed for abuse of discretion (MCR 2.605).

3. CONVERSION — ELEMENTS.

A conversion is any distinct act of dominion wrongfully exerted over the personal property of another and occurs at the point that wrongful dominion is asserted.

Robert A. Betts and *Jaffe, Raitt, Heuer & Weiss* (by *Brian G. Shannon* and *Melanie LaFave*), for David D. Ladd.

Charles Milne, for NBD Bank, N.A.

Bodman, Longley & Dahling (by *Lawrence P. Hanson, David W. Barton,* and *Craig Klomparens*), for Ford Consumer Finance Company, Inc.

Before: FITZGERALD, P.J., and CORRIGAN and C. C. SCHMUCKER,* JJ.

CORRIGAN, J. In this case involving an issue of first impression, we hold that the specific provisions of the Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq.*; MSA 19.855(101) *et seq.*, supersede the general provisions of the Uniform Commercial Code, MCL 440.1101 *et seq.*; MSA 19.1101 *et seq.*, regarding the transfer of title to mobile homes.

Defendant Ford Consumer Finance Company, Inc., (Ford) appeals as of right the order granting summary disposition in favor of plaintiffs David D. Ladd and NBD Bank, N.A., and vacating the court's previous order. Plaintiff NBD Bank, N.A., cross appeals the same order. We reverse the order granting summary disposition to plaintiffs and affirm the order on cross appeal denying plaintiff NBD's claim that Ford was liable for conversion.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Colony Homes Center, Inc., operated a mobile-home dealership in Flint, Michigan. To obtain its inventory, Colony entered an inventory financing agreement[1] with Ford in May 1988. Under this agreement, Colony would submit an invoice or other docu-

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

[1] Under a floor-plan financing arrangement, the creditor loans the debtor the necessary funds to purchase the inventory or finance the business' operating expenses. The inventory is then pledged as collateral to secure the loan. As inventory is sold, the debtor applies a set percentage of the purchase price to the floor plan in satisfaction of that account.

ment to Ford describing the mobile-home unit that it desired to acquire. Ford would then advance funds directly to the mobile-home manufacturer to purchase the unit on Colony's behalf. Ford obtained a security interest in Colony's entire inventory as well as all proceeds and accounts pertaining to the inventory.

Ford required the manufacturer to deliver the certificate of origin to it as a condition of financing Colony's purchase. The certificate of origin identified the manufacturer, model and serial number of the mobile home, and the original purchaser. It provided temporary evidence of ownership. Colony agreed that upon the sale of a mobile home, it would immediately repay any sum that Ford had advanced for the purchase. Colony further agreed to hold the proceeds from the sale of the homes in trust for Ford's benefit. After Colony paid in full the amount due on a mobile home, Ford agreed to release the certificate of origin to Colony to attach to the title application. Possessing the certificate of origin gave Ford additional security because Michigan law requires the certificate of origin to accompany the title application submitted to the Department of Commerce before the department issues a certificate of title. 1985 AACS, R 125.1232(1).

Plaintiff Ladd purchased a mobile home that cost $27,856.80 from Colony. Under a separate arrangement with Colony for consumer loans, plaintiff NBD financed Ladd's "out of trust"[2] purchase, without veri-

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Yamaha Motor Corp, USA v Tri-City Motors & Sports, Inc, 171 Mich App 260, 264, n 1; 429 NW2d 871 (1988).

[2] NBD and Colony entered into an agreement under which NBD agreed to finance the consumer retail purchase of Colony's mobile homes. NBD received credit applications from customers of Colony. If the credit application was approved by NBD, the purchaser would sign a promissory note and security agreement at Colony's office. Once the purchaser signed the

fying whether Ford held the certificate of origin and without requiring Colony to pay off Ford. Colony "cashed out" its contract with NBD, without informing Ford of the out of trust sale or paying off the balance due. Colony delivered the mobile home to Ladd, along with an application for a certificate of title for filing with the Department of Commerce. Colony itself never filed the application for certificate of title. However, because Colony never repaid Ford, Ford refused to relinquish the certificate of origin. Consequently, Ladd could not obtain a certificate of title for the mobile home and NBD could not perfect its security interest in the mobile home.

Predictably, Colony ceased doing business and had no assets. Ladd and NBD thereafter sued Ford, alleging a claim and an interest in the certificate of origin. Plaintiffs alleged potential losses because plaintiff Ladd could not obtain title to the mobile home and plaintiff NBD could not perfect its security interest in the mobile home. NBD also alleged that Ford was liable for conversion because it had wrongfully retained the certificate of origin, and sought declaratory relief regarding six other allegedly similar purchases.

The trial court initially granted Ford's motion for summary disposition under MCR 2.116(C)(8) and (C)(10), ruling that no sale of the mobile home had occurred. The court reasoned that the MHCA required a certificate of title to effect a transfer of ownership. Because Ford had refused to deliver the certificate of origin to Colony, the certificate of title could not be

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installment loan contract at the mobile-home dealership, the mobile-home dealer took the agreement to an NBD branch for "cashing." The sale of a mobile home under this arrangement is referred to as an "out of trust" sale.

issued. Thus, the out of trust sale was void and did not transfer an interest in the mobile home to plaintiff Ladd.

On rehearing, the court held that plaintiff Ladd was a buyer in the ordinary course of business under the UCC, MCL 440.1201(9); MSA 19.1201(9), who was protected by MCL 440.9307; MSA 19.9307. The trial court reasoned that title to the mobile home passed from Colony to Ladd upon physical delivery of the home under MCL 440.2401(2); MSA 19.2401(2). The trial court further opined that plaintiff Ladd's status as a buyer in the ordinary course of business protected plaintiff NBD's security interest. Finally, the trial court determined that plaintiff NBD had not proved its claim of conversion against defendant Ford and denied declaratory relief regarding the six other purchases.

II. TITLE TRANSFER: DOES THE MHCA OR THE UCC GOVERN?

Ford initially contends that the trial court erred in holding that Colony validly transferred ownership to plaintiff Ladd under the UCC, MCL 440.2401(2); MSA 19.2401(2), at the time Ladd accepted delivery of the mobile home. We agree. This Court reviews de novo a trial court's ruling on a motion for summary disposition, *Johnson v Wayne Co*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995). MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.* When deciding the motion, the court must consider the pleadings, affidavits, depositions, admissions, and

other documentary evidence available to it in a light most favorable to the opposing party. *Id.*

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. It should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Gazette v Pontiac*, 212 Mich App 162, 167; 536 NW2d 854 (1995). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

The MHCA subjects all mobile-home sales or transfers to the certificate of title provisions of the act, except for any new mobile home owned by a manufacturer or a licensed mobile-home dealer and held for sale. MCL 125.2330(1); MSA 19.855(130)(1). Thus, a manufacturer or dealer need not apply for a certificate of title while holding the home for sale. However, upon a sale, a new owner must apply for a certificate of title with the assistance of the dealer. The effective date of the transfer of title is the date of execution of either the application for title or the certificate of title. MCL 125.2330c(2); MSA 19.855(130c)(2). MCL 125.2330(3); MSA 19.855(130)(3) specifically provides that "a mobile home shall not be sold or transferred except by transfer of the certificate of title for the mobile home pursuant to this act."

The Department of Commerce issues certificates of title for mobile homes. MCL 125.2330b; MSA 19.855(130b). Under the rules promulgated by the Mobile Home Commission under authority of the MHCA, a mobile-home dealer must prepare and file an application for a certificate of title with the Depart-

ment of Commerce. 1991 AACS, R 125.1217(2). The manufacturer's certificate of origin must be attached to the original application for the certificate of title. 1985 AACS, R 125.1232(1). To facilitate the attachment of the certificate of origin to the application for title, a lender holding the certificate of origin must surrender it to the mobile-home dealer upon request. 1985 AACS, R 125.1232(2).

The provisions of the UCC governing transfer of ownership differ radically from the MHCA. Under the UCC, without regard to a certificate of title, title to goods[3] passes to the buyer at the time and place at which the seller completes performance with respect to delivery of the goods, unless otherwise stated in the contract. *People v Lee*, 447 Mich 552, 562; 526 NW2d 882 (1994) (citing MCL 440.2401[2]; MSA 19.2401[2]). Accordingly, we must determine whether the general provisions of the UCC or the specific provisions of the MHCA control the transfer of legal ownership.

No Michigan case has considered this precise question. However, this Court has considered similar issues involving the transfer of title to automobiles and watercraft and held that the title transfer provisions of the watercraft certificates of title act (WCTA) and the Michigan Vehicle Code (MVC) preempt the UCC. *Jerry v Second Nat'l Bank of Saginaw*, 208 Mich App 87; 527 NW2d 788 (1994); *Whitcraft v Wolfe*, 148 Mich App 40; 384 NW2d 400 (1985); *Messer* v *Averill*, 28 Mich App 62; 183 NW2d 802 (1970). *Whitcraft*, *supra* at 50, applied the principle that a specific and particu-

[3] A mobile home is arguably a "good" under the UCC because a mobile home is a moveable thing at the time of identification to the contract. MCL 440.2105(1); MSA 19.2105(1).

lar act governs over a general act when the acts are contemporaneous and involve the same subject matter. The Court concluded that the MVC specifically governs the transfer of title to motor vehicles, and that the general title transfer provisions of the UCC, MCL 440.2401(2); MSA 19.2401(2), did not. Under the MVC, an owner or dealer must endorse on the back of the certificate of title an assignment of the title and must deliver the certificate to the purchaser at the time of delivery of the vehicle. *Whitcraft, supra* at 50 (citing MCL 257.233; MSA 9.1933, MCL 257.235[1]; MSA 9.1935[1], and MCL 257.239; MSA 9.1939). Thus, *Whitcraft* held that failure to comply with MVC dictates relating to endorsement and delivery of the certificate of title to a motor vehicle rendered the transfer void. *Id.*

Later, in construing the WCTA, MCL 281.1201 *et seq.*; MSA 18.1288(1) *et seq.*, currently MCL 324.80301 *et seq.*; MSA 13A.80301 *et seq.*, in *Jerry, supra* at 93, this Court held that the WCTA preempts the UCC regarding the transfer of title to watercraft.[4] The WCTA provides:

> A person acquiring a watercraft from the owner thereof, whether the owner is a manufacturer, importer, dealer, or otherwise, shall not acquire any right, title, claim or interest in or to the watercraft until that person has issued to him a certificate of title to the watercraft, or delivered a manufacturer's or importer's certificate for it. [MCL 281.1204(1); MSA 18.1288(4)(1), currently MCL 324.80305(1); MSA 13A.80305(1).]

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[4] After the *Jerry* decision, the Legislature repealed the WTCA in 1995 PA 58, Part 803 and recodified the act with minor changes in MCL 324.80301 *et seq.*; MSA 13A.80301 *et seq.* The changes merely removed archaic language and references.

The MHCA's provisions, although different in some respects, are analogous to the title transfer sections of the MVC and the WCTA. Applying *Whitcraft*, *Messer*, and *Jerry*, we conclude that the specific certificate of title provisions of the MHCA control over the general provisions of the UCC. The MVC, the WCTA, and the MHCA are more than mere recording devices; all three acts reflect the Legislature's intent that strict statutory compliance is essential to transfer ownership.

Generally, when two statutes conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Frank v William A Kibbe & Associates, Inc*, 208 Mich App 346, 350; 527 NW2d 82 (1995). The title provisions of the UCC, primarily MCL 440.2401; MSA 19.2401, generally govern the transfer of title to goods. The UCC does not require the owner of a mobile home to endorse and deliver a certificate of title to transfer the owner's interest in a mobile home, as does MCL 125.2330c; MSA 19.855(130c).

The transfer of title must also conform to regulations promulgated by the Mobile Home Commission under the MHCA. Colony, as a licensed dealer of mobile homes, was required to prepare and file an application for a certificate of title and to attach the certificate of origin to the application. 1991 AACS, R 125.1217(2); 1985 AACS, R 125.1232(1). Under the MHCA, upon delivery and sale of a mobile home, the effective date of a transfer of title to the home occurs on the date of the "execution of either the application for title or the certificate of title." MCL 125.2330c(2); MSA 19.855(130c)(2). Because Ford refused to relinquish possession of the certificate of origin that must be attached to the application for title, the application

for certificate of title could not be properly executed. Under an identical provision of the MVC concerning the time when title to a motor vehicle transfers, MCL 257.233(5); MSA 9.1933(5), execution of an application for certificate of title occurs when the application is sent with the necessary forms to the Secretary of State. *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 14; 534 NW2d 467 (1995). We apply this construction as MCL 257.233(5); MSA 9.1933(5) to the identical language of MCL 125.2330c(2); MSA 19.855(130c)(2). Because Colony never filed a completed title application accompanied by the necessary form, the certificate of origin, title was not transferred to plaintiff Ladd.

The purchase of the mobile home was thus void. Under the MVC, the sale of a motor vehicle without an accompanying certificate of title will not transfer ownership of a vehicle to the buyer. *Goins*, *supra* at 13-14. Further, sale of a motor vehicle without the delivery of a certificate of title is void. *Michigan Mutual Auto Ins Co v Reddig*, 129 Mich App 631, 634-635; 341 NW2d 847 (1983). The same principle applies in this context. The sale of the mobile home to plaintiff Ladd was void; he did not acquire any right, title, claim, or interest in the mobile home.

III. WAS PLAINTIFF LADD A BUYER IN THE ORDINARY COURSE OF BUSINESS?

Defendant Ford also contends that the trial court erroneously determined that plaintiff Ladd acquired title to the mobile home as a buyer in the ordinary course of business under the UCC, MCL 440.9307; MSA 19.9307. Again, we agree. Plaintiff Ladd did not qualify as a buyer in the ordinary course of business

because he did not first acquire title to the mobile home in conformity with the MHCA.

In *Larson v Van Horn*, 110 Mich App 369; 313 NW2d 288 (1981), this Court held that a buyer in the ordinary course of business takes title to an automobile free and clear of the security interest of a bank when title to the automobile is transferred to the buyer in conformity with the requirements of the MVC. In *Larson*, Oceanside Bank loaned Bloomfield Leasing money to purchase a Rolls Royce and took a security interest in the automobile but failed to note the lien on the vehicle's certificate of title. *Id.* at 372. Bloomfield Leasing sold the Rolls to Larson and presented Larson with a signed certificate of title, without noting Oceanside's security interest. *Id.* at 373. Larson did not apply to the state for a new certificate of title. *Id.* at 374. The trial court found that Larson was the owner of the vehicle. *Id.* at 377.

On appeal, this Court determined that Bloomfield and Larson both violated the MVC by failing to apply for a new certificate of title with the Secretary of State. *Id.* at 379. Nonetheless, the Court concluded that title to the Rolls Royce was transferred to Larson when Bloomfield Leasing signed and delivered the certificate of title to him. *Id.* Because Oceanside failed to perfect its security interest and because Larson purchased the car without actual knowledge of Oceanside's security interest, Larson took title free and clear of Oceanside's security interest. Larson was a buyer in the ordinary course of business under MCL 440.9307(1); MSA 19.9307(1). *Id.* at 379. Thus, *Larson* indicates that title must pass under the titling act before a buyer in the ordinary course of business can

take the automobile free and clear of a secured party's interest that is not known to the buyer.[5]

In *Jerry*, *supra*, this Court considered the conflict between the certificate of title provisions of the WCTA and the provisions regarding a buyer in the ordinary course of business. The defendant in *Jerry* argued that the UCC entrustment provision, MCL 440.2403(2); MSA 19.2403(2), permitted a merchant to transfer the rights of an entruster of a boat to a buyer in the ordinary course of business, even though the merchant did not transfer a certificate of title to the boat to the buyer in conformity with the title transfer provision of the WCTA, MCL 281.1204(1); MSA 18.1288(4)(1) (currently MCL 324.80304; MSA 13A.80304). *Jerry*, *supra* at 92-93. This Court rejected the defendant's argument and held that the UCC entrustment provision could not preempt the certificate of title provisions of the WCTA where title to a watercraft did not transfer by delivery of a certificate of title under the WCTA. *Id.* at 94. The UCC entrustment provision could not be reconciled with the plain meaning of MCL 281.1204(1); MSA 18.1288(4)(1) (currently MCL 324.80304; MSA 13A.80304), which effects transfer of title by issuance or delivery of a certificate of title. *Id. Jerry* did not address whether the buyer in the ordinary course of business takes title to a watercraft free of any security interest under MCL 440.9307; MSA 19.9307. The UCC entrustment provision is the Article II analogue to

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[5] The same conclusion was reached by the United States Bankruptcy Court for the Western District of Michigan in *In re Superior Ground Support, Inc*, 140 Bankr 878, 883 (1992). The bankruptcy court concluded that under Michigan law, the "protection afforded to a buyer in the ordinary course of business of motor vehicles does not result without compliance with the Michigan Vehicle Code's provisions on the transfer of ownership." *Id.*

MCL 440.9307; MSA 19.9307, because both provisions are designed to protect good-faith purchasers from certain priority interests. See White & Summers, Uniform Commercial Code, (3d ed) § 24-16, p 1175. *Jerry* thus provides controlling authority on this issue.

As our decisions in *Larson* and *Jerry* provide, title must first transfer under the acts before a buyer in the ordinary course of business can take free and clear of a security interest not known to the buyer under the provisions of the UCC. Like the defendant in *Jerry*, Ladd cannot take advantage of the protections given a buyer in the ordinary course of business under MCL 440.9307; MSA 19.9307, unless the certificate of title to the mobile home was transferred to him. Likewise, Ladd could not have acquired title to the mobile home under the UCC entrustment provision. Without transfer of the certificate of title, title to the mobile home did not pass to plaintiff Ladd. MCL 125.2330; MSA 19.855(130). The sale was void and Ladd does not qualify as a buyer in the ordinary course.[6] Therefore, the trial court erred in finding that Ladd was a buyer in the ordinary course of business.

Despite our sympathy for these innocent plaintiffs, this Court is bound to follow the clear and unambiguous language of the title transfer provisions of the MHCA, MCL 125.2330; MSA 19.855(130). See *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). Judicial construction of the MHCA title provisions is neither required nor permitted. *Id.* If the Legislature

[6] The UCC does not define the term "buyer," although courts usually focus on whether a completed sale has occurred in order to give a buyer the protection of MCL 440.9307; MSA 19.9307. White & Summers, Uniform Commercial Code, (3d ed) § 24-13, p 1165, n 2. Because Ladd did not receive title to the mobile home from Colony, a completed sale did not occur and Ladd did not qualify as buyer of the home.

intends a buyer in the ordinary course of business to take title to a mobile home under the UCC, it should plainly state so in an amended statute.

IV. DECLARATORY JUDGMENT

On cross appeal, plaintiff NBD contends that the trial court erred in denying a declaratory judgment regarding the rights of six other purchasers of Colony mobile homes, who, like plaintiff Ladd, could not obtain title to their homes because Ford held the certificates of origin. MCR 2.605, the rule governing the trial court's authority to grant declaratory judgments, provides in part:

> (A) Power to Enter Declaratory Judgment.
>
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

A circuit court's decision whether to grant declaratory relief under MCR 2.605 is reviewed for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993). Although this Court has sometimes opined that declaratory judgments are reviewed de novo, see, e.g., *Michigan Residential Care Ass'n v Dep't of Social Services*, 207 Mich App 373, 375; 526 NW2d 9 (1994), the Supreme Court's decision regarding the governing standard of review plainly controls. *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995). Therefore, we are constrained to apply an abuse of discretion standard.

The trial court did not abuse its discretion in denying NBD's request for declaratory judgment. The six other purchasers were not parties in this case. The

trial court stated that it was not familiar with the facts surrounding the six other mobile-home purchases and did not know whether the litigants had been properly notified of the instant proceedings. The court reasoned that nothing would preclude it from considering these six cases in due course. The trial court did not abuse its discretion by denying declaratory relief regarding the six other purchases.

V. CONVERSION

Finally, plaintiff NBD contends that Ford wrongfully converted the certificate of origin by refusing to deliver it to Colony. We disagree. NBD has an unperfected security interest in the mobile home. NBD asserts a proprietary interest in the certificate of origin under a Mobile Home Commission rule, 1985 AACS, R 125.1232(2), that requires the lender holding the certificates of origin immediately to surrender the certificates upon request of the mobile-home dealer.

A conversion is any distinct act of dominion wrongfully exerted over the personal property of another and occurs at the point that wrongful dominion is asserted. *Attorney General v Hermes*, 127 Mich App 777, 786; 339 NW2d 545 (1983). Plaintiff NBD lacks a proprietary interest in the certificates of origin under the Mobile Home Commission's administrative rule. The benefit of the rule runs toward the mobile-home dealer who can request the delivery of the certificate from the lender. Further, the mobile-home dealer must file the original application for mobile-home title at the time of the sale of the mobile home. See 1991 AACS, R 125.1217(2). Therefore, plaintiff NBD had no right or obligation to possess the certificates of origin and defendant Ford had no obligation to release the

certificates to NBD. Accordingly, the trial court properly dismissed plaintiff NBD's conversion claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Appendix 4-A

COOPER v WADE

Docket No. 175952. Submitted March 6, 1996, at Detroit. Decided September 10, 1996, at 9:05 A.M. Leave to appeal sought.

Marlon Cooper, a minor, by his next friend, Brenda Cooper, and Brenda Cooper, individually, and Martell Morris, a minor, by his next friend, Toni Morris, and Toni Morris, individually, brought an action in the Wayne Circuit Court against Detroit Police Officers Lonnie Wade and Arthur Gulley and the City of Detroit, seeking damages for injuries sustained by Marlon Cooper and Martell Morris when a stolen vehicle in which they were passengers crashed into the porch of a house following a high-speed pursuit by a police vehicle driven by Wade and in which Gulley was a passenger. The stolen vehicle was driven by Damian Collins, a minor, who was killed in the accident. The plaintiffs alleged that Marlon and Martell did not know that the vehicle had been stolen and that the defendant officers breached duties owed to Marlon and Martell in the course of the pursuit. The plaintiffs also alleged that the city owed and breached duties to promulgate and implement an appropriate high-speed pursuit policy and to properly and adequately train, direct, and supervise its police officers. The plaintiffs asserted that the defendants' actions were negligent, grossly negligent, wilful and wanton, and in reckless disregard for the safety of Marlon and Martell. The defendants filed a third-party complaint against Collins' estate, alleging that Marlon's and Martell's damages were attributable to their negligence and the negligence of Collins. The court, Edward M. Thomas, J., granted summary disposition for the defendants. The plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court erred in granting the defendants summary disposition on the basis that they owed no duty to Marlon and Martell. The statutes that govern the operation of emergency vehicles, MCL 257.603; MSA 9.2303 and MCL 257.632; MSA 9.2332, require police officers to operate their vehicles with concern for the safety of others. Court of Appeals precedent precludes the driver of a pursued vehicle from asserting that the police failed to perform in accordance with that standard of care. Different considerations come into play when innocent third parties are involved, whether they are pedestrians on a sidewalk, individuals in a nearby vehicle,

or passengers in a fleeing vehicle. The statutes governing the operation of emergency vehicles mandate that the officers take into account the safety of these individuals. To the extent that passengers within a fleeing vehicle are at fault for bringing about or continuing the police pursuit, such factors should be considered by the factfinder when considering causation and apportioning fault.

2. A police pursuit can be deemed to be a proximate cause of an accident that involves the pursued vehicle but not the police vehicle.

3. The trial court erred in determining that the city was entitled to summary disposition on the basis of governmental immunity. The plaintiffs pleaded a claim that falls within the exception to governmental immunity regarding negligent operation of a governmental vehicle. Supreme Court precedent has implicitly included the decision making involved in conducting a police pursuit as being within the ambit of negligent operation of a governmental vehicle.

4. The trial court erred in determining that the plaintiffs failed to plead a claim in avoidance of governmental immunity with respect to the defendant police officers. Reasonable minds could differ regarding whether the officers' conduct amounted to gross negligence under MCL 691.1407(2); MSA 3.996(107)(2). The fact that Officer Gulley did not drive the police vehicle is not dispositive of the plaintiffs' claims that he was grossly negligent in deciding to initiate and continue the pursuit and, therefore, not immune under MCL 691.1407(2); MSA 3.996(107)(2).

5. The issue whether the defendants' conduct was the proximate cause of any injury to Marlon and Martell must be submitted to the trier of fact. Reasonable persons might conclude that the pursuit by the officers was not too remote a cause of Marlon's and Martell's injuries and that the negligent conduct of the driver of the pursued vehicle did not sever that causal connection.

Reversed.

MICHAEL J. KELLY, J., concurring, stated that the Supreme Court should revisit this area of the law. With regard to the pursuit itself, a clarification of the law regarding both liability for negligence by the pursuing officer and the vicarious liability of the employing governmental unit would best be imposed only for gross negligence, defined as reckless disregard for the safety of others.

C. L. BOSMAN, J., concurring in the result, would hold that only if an injured passenger can prove freedom from any criminal responsibility for the actions that caused the attempted police apprehension or encouraged the driver of the fleeing vehicle to flee can the passenger recover for the officers' negligent conduct. The officers' duty to drive with due regard for the safety of others extends only

to those who are criminally innocent third-party passengers taking no part in bringing about or continuing the pursuit. Here, the participation of Marlon and Martell in the criminal wrongdoing remains a question of fact, and the burden of proving their innocence is on them.

1. AUTOMOBILES — POLICE PURSUIT — FLEEING SUSPECTS — NEGLIGENCE.

A police officer and the officer's employing municipality may be held liable for negligence in a police pursuit of a fleeing suspect in a vehicle where the officer does not exercise that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances; the required standard of care includes consideration of the statutes governing the operation of emergency vehicles that require emergency vehicles to be driven with due regard for the safety of others (MCL 257.603, 257.632; MSA 9.2303, 9.2332).

2. AUTOMOBILES — POLICE PURSUIT — FLEEING SUSPECTS — NEGLIGENCE — DUTY.

Police officers in pursuit of a suspect fleeing in a vehicle do not owe the suspect a duty to refrain from chasing the suspect at speeds dangerous to the suspect although they must operate their vehicles with concern for the safety of others such as pedestrians, individuals in nearby vehicles, and innocent passengers in the fleeing vehicle; to the extent that passengers in the fleeing vehicle are at fault for bringing about or continuing the police pursuit, such factors should be considered by the factfinder when considering causation and apportioning fault.

3. AUTOMOBILES — POLICE PURSUIT — FLEEING SUSPECTS — NEGLIGENCE — PROXIMATE CAUSE.

Police pursuit of a vehicle may be determined to be a proximate cause of an accident that involves the pursued vehicle but not the police vehicle; the issue of proximate cause must be submitted to the trier of fact in an action against the police for injuries received by the passengers of the pursued vehicle where reasonable men might conclude that the pursuit by the officers was not too remote a cause of the injuries received by the passengers in the pursued vehicle and that the negligent conduct of the driver of the pursued vehicle did not sever that causal connection.

4. GOVERNMENTAL IMMUNITY — AUTOMOBILES — POLICE PURSUIT — FLEEING SUSPECTS — NEGLIGENCE — "OPERATION" OF POLICE VEHICLE.

The decision of a police officer to initiate and continue pursuit of a fleeing vehicle constitutes "operation" of the police vehicle for purposes of determining whether the exception to governmental

immunity regarding negligent operation of a vehicle owned by the government is applicable; no distinction should be made between the negligent decision to pursue and the negligent operation of the police vehicle during the pursuit (MCL 691.1405; MSA 3.996[105]).

5. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — GROSS NEGLIGENCE — SUMMARY DISPOSITION.

Summary disposition should not be granted for governmental employees on the basis of governmental immunity in an action for damages resulting from conduct of the employees where reasonable minds could differ with regard to whether their conduct amounted to gross negligence; gross negligence means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results (MCL 691.1407[2]; MSA 3.996[107][2]).

6. GOVERNMENTAL IMMUNITY — AUTOMOBILES — POLICE PURSUIT — FLEEING SUSPECTS — GROSS NEGLIGENCE.

A police officer who is grossly negligent in deciding to initiate and continue pursuit of a fleeing vehicle may be found not to be immune from tort liability; whether the officer is a driver or passenger of the pursuing police vehicle is irrelevant (MCL 691.1407[2]; MSA 3.996[107][2]).

Frederic M. Rosen, P.C. (by *Frederic M. Rosen*), for plaintiffs Cooper.

Bendure & Thomas (by *Mark R. Bendure*), for plaintiffs Morris.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Laurel F. McGiffert*).

Before: REILLY, P.J., and MICHAEL J. KELLY and C. L. BOSMAN,* JJ.

REILLY, P.J. Plaintiffs appeal as of right a circuit court order granting defendants' motion for summary disposition in this negligence action. We reverse.

Plaintiffs Marlon Cooper (Cooper) and Martell Morris (Morris) along with Terry Neal were passengers in

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

a stolen Jeep Cherokee driven by Damian Collins, who was fourteen at the time of this incident. A police pursuit of the vehicle ended when it crashed into the porch of a house. Collins was killed, and Cooper and Morris were injured.

Plaintiffs filed this action alleging that the City of Detroit, Officer Lonnie Wade, who operated the police vehicle, and Officer Arthur Gulley, who was a passenger in that vehicle, owed and breached duties to Cooper and Morris in several ways in the course of the police pursuit. Plaintiffs also alleged that the City of Detroit "owed and breached additional duties to promulgate and implement an appropriate high speed pursuit policy and to properly and adequately train, direct and supervise its officers." Plaintiffs asserted the defendants' "actions were negligent, grossly negligent, willful and wanton, and in reckless disregard" for the safety of Cooper and Morris. Defendants filed a third-party complaint against Collins' estate, alleging that plaintiffs' damages were attributable to the negligence of Collins, Cooper, and Morris.

Defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). They argued that (1) defendants had no duty to Cooper and Morris, (2) the decision to pursue does not constitute negligent operation of the police vehicle, (3) the officers' actions were not the proximate cause of the damages, (4) the absence of gross negligence bars the claims against the officers, and (5) Officer Gulley did not operate the police vehicle.

The trial court's explanation for granting defendants' motion indicates that it believed defendants were entitled to summary disposition with regard to more than one ground. The trial court first referred to

Jackson v Oliver, 204 Mich App 122; 514 NW2d 195 (1994), in which this Court held that the police did not have a duty to the driver of a pursued vehicle. In the present case, the court concluded that the "police officers owed no further duty to the passengers than they would have owed to the driver." Therefore, the court stated that summary disposition should be granted pursuant to MCR 2.116(C)(8). The court then went on to address other arguments raised by defendants:

> As it relates to the question of the city and governmental immunity, the Court is of the opinion governmental immunity is applicable as it relates to the city.
>
> There was no gross negligence in the operation of the motor vehicle. The motor vehicle was not involved in the accident. There was no innocent third party bystander injured as a result of the police chase. The accident was caused as a result of the minor deceased first striking another car, losing control, and running into a fixed object which is a porch.
>
> That being the situation, the Court is of the opinion that summary disposition as it relates to the city should, indeed, be granted.
>
> As to the individual officers, they were operating within the scope of their employment.
>
> The Court believes not only are they entitled to governmental immunity, but there is no genuine issue of material fact and the *Dedes* [*v South Lyon Community Schools*, 199 Mich App 385; 502 NW2d 720 (1993), rev'd sub nom *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994)] case applies in this situation to their actions. For that reason, summary disposition is granted as to both the officers and the city of Detroit.

Appellate review of a motion for summary disposition is de novo because this Court must review the record to determine if the moving party is entitled to

judgment as a matter of law. *Kentwood Public Schools v Kent Co Ed Ass'n*, 206 Mich App 161,164; 520 NW2d 682 (1994). As will be explained, we conclude that defendants were not entitled to judgment as a matter of law. We first address the question of duty and then discuss the separate standards for immunity applicable to the city and the individual officers and, lastly, causation issues.

I

The trial court erred in granting defendants summary disposition on the basis that they owed no duty to Cooper and Morris.

In *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983), the Court recognized that individual officers and the municipality could be held liable for negligence in a police pursuit. The standard of care applied in *Fiser* is " 'that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances.' " *Id.* at 470, quoting *McKay v Hargis*, 351 Mich 409, 418; 88 NW2d 456 (1958). That standard includes consideration of the statutes governing operation of emergency vehicles, MCL 257.603; MSA 9.2303, MCL 257.632; MSA 9.2332. Section 603 allows a driver of an emergency vehicle to proceed past stop signals and signs after slowing "as may be necessary for safe operation" and to exceed the speed limit "so long as he does not endanger life or property." According to *Fiser*, "[t]he legislative intent is expressed in these statutes — emergency vehicles must be driven with due regard for the safety of others." Id. at 472. Neither the statutes nor the Court in *Fiser* indicates

that the concern for the safety of others is limited to innocent bystanders.

However, in *Jackson, supra,* this Court concluded that the estate of the driver of a pursued vehicle should not be allowed to recover from the pursuing officers for wrongful death from a collision ending a high-speed chase. This Court referred to the decision in *Fiser* as holding that "police officers owe a duty to innocent bystanders to avoid operating their police vehicles in a negligent manner and that emergency vehicles must be driven with due regard for the safety of others." *Jackson, supra* at 126. This Court held that *Fiser* does not apply "where injuries were suffered by a fleeing wrongdoer," *Jackson, supra* at 126, and that "[p]olice officers in pursuit of a suspect do not owe the suspect a duty to refrain from chasing the suspect at speeds dangerous to the suspect." *Id.* at 127. Therefore, although the statutes require police officers to operate their vehicles with concern for the safety of others, *Jackson* precludes the driver of a pursued vehicle from asserting that the police failed to perform in accordance with the standard of care.

We decline defendants' invitation to extend the holding in *Jackson* to passengers within the pursued vehicle. In *Jackson,* this Court referred to the definition of "duty" as " 'an obligation, to which the law will give recognition and effect.' " *Id.* at 125, quoting *Sierocki v Hieber,* 168 Mich App 429, 433; 425 NW2d 477 (1988). The decision in *Jackson* reflects an unwillingness to recognize an obligation on the part of the police to protect suspects as they flee from apprehension. Different considerations come into play when innocent third parties are involved, whether they are pedestrians on the sidewalk, individuals in a nearby

vehicle, or passengers in a fleeing vehicle. The statutes governing operation of emergency vehicles mandate that the officers take into account the safety of these individuals. To the extent that passengers within a fleeing vehicle are at fault for bringing about or continuing the police pursuit, such factors should be considered by the factfinder when considering causation and apportioning fault.

We recognize the concerns that have been raised about the holding in *Fiser* that the police pursuit can be deemed to be a proximate cause of an accident involving the pursued vehicle but not the police vehicle. See *Frohman v Detroit*, 181 Mich App 400; 450 NW2d 59 (1989), and *Ewing v Detroit (On Remand)* 214 Mich App 495; 543 NW2d 1 (1995) (opinion of DOCTOROFF, C.J.). These concerns about allowing negligence claims to be advanced against officers for their actions in a pursuit situation weigh in favor of limiting liability by distinguishing *Fiser* whenever possible. However, we believe that a limitation of liability must come, if at all, from the Legislature or from the Supreme Court's narrowing of *Fiser*.

II

The trial court also erred in determining that the city was entitled to summary disposition on the basis of governmental immunity. The applicable exception with respect to the city is MCL 691.1405; MSA 3.996(105), which provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public

Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

Defendants argue that the decisions to initiate and continue pursuit do not constitute "operation" of the vehicle. According to defendants, only "the officer's driving during the pursuit, the speed at which he or she proceeds, whether he or she stops or slows at intersections, and other factors pertaining to the physical control of the vehicle fall within the statutory exception for 'operation' of a motor vehicle." The distinction drawn by defendants between the negligent decision to pursue and negligent operation of the police vehicle was recognized by this Court in its opinion in *Fiser. Fiser v Ann Arbor*, 107 Mich App 367, 371-373; 309 NW2d 552 (1981), aff'd in part and rev'd in part 417 Mich 461; 339 NW2d 413 (1983).

Defendants' approach also finds some support in the Supreme Court's opinion in *Fiser*. In that case, the Court stated that "if the pursuit . . . constituted negligent operation of the police vehicles," the claim would fall within the exception to immunity.[1] *Id.* at 469. In affirming summary disposition for one officer because he did not "operate either of the police vehicles involved in the pursuit," *id.* at 469, the Court noted the definition of "operator" in the Michigan Vehicle Code, MCL 257.36; MSA 9.1836, as " 'every

[1] Although MCL 691.1405; MSA 3.996(105) refers only to the liability of governmental agencies and not individuals, the Supreme Court did not address the immunity available to the individual officers separately. The opinion of Justice RYAN suggests that the reason that the issue of individual immunity is not addressed separately is because "if the city has no immunity defense, neither do the police officers." *Fiser, supra* at 477. MCL 691.1407(2); MSA 3.996(107)(2), which basically provides individual immunity except in cases of gross negligence, was not effective until July 7, 1986.

person, other than a chauffeur, who is in *actual physical control* of a motor vehicle upon a highway.' " (Emphasis added.) The use of this definition by the Court supports defendants' argument that the decision to initiate and continue pursuit is not "operation" because it is not "actual physical control" of the vehicle.

However, in *Fiser*, the Supreme Court did not apply the "actual physical control" definition of "operation" in its discussion of the liability of the city and the officers who drove the police vehicles. After indicating that liability depends on whether the pursuit constituted negligent operation of the police vehicles, the Court discussed general negligence principles, set forth the standard of care, and discussed the defendants' assertion that their operation of the vehicles within the terms of MCL 257.603; MSA 9.2303 and MCL 257.632; MSA 9.2332 precluded a finding of negligence. Recognizing that the statutes included provisions that required consideration of the safety of others, the Court examined the reasonableness of the officers' conduct. No further discussion of the definition of "operation" is included in the opinion. The Court could have applied the "actual physical control" definition of operation and held that "operation" does not include the decision to pursue a vehicle. The Supreme Court could have drawn the distinction between the decision to pursue and operation of the vehicle as this Court had. Unfortunately, the opinion is silent with regard to this issue.

Although the Supreme Court in *Fiser* did not directly address whether the decision to initiate and continue pursuit constitutes "operation" of the vehicle, we conclude that the Court's discussion implicitly

included the decision making involved in conducting a police pursuit as being within the ambit of "operation." After discussing the emergency vehicles statutes, the Court identified certain factors for consideration in determining whether the pursuing officers' actions were reasonable. One of the factors identified by the Court is "the reason the officers were pursuing the fleeing vehicle." *Id.* at 472. Although this factor may relate to determining the reasonableness of the officers' conduct in a negligence case generally, the only claim at issue in *Fiser*, the only claim that was excepted from governmental immunity, was a negligent-operation claim. Yet, if the Supreme Court concluded that "operation" meant only "actual physical control," the officers' reasons for the pursuit would have been irrelevant to the analysis of this negligent-operation claim. By stating that the reason for pursuit should be considered in a claim that, because of governmental immunity, is limited to negligent operation, the Supreme Court implicitly rejected the distinction drawn by this Court between the decision to pursue and operation of the police vehicle. Therefore, a holding that distinguishes between decision making and operation would be inconsistent with *Fiser*. Accordingly, we conclude that with respect to the City of Detroit, plaintiffs pleaded a claim that falls within the exception to governmental immunity regarding negligent operation of a governmental vehicle, and the City of Detroit was not entitled to summary disposition pursuant to MCR 2.116(C)(7).

III

With respect to the officers, we conclude that the trial court erred in determining that plaintiffs failed to plead a claim in avoidance of governmental immunity. As recognized by defendants, the officers are not entitled to summary disposition on the basis of immunity unless reasonable minds could not differ regarding whether their conduct amounted to gross negligence under MCL 691.1407(2); MSA 3.996(107)(2). *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Under that statute, gross negligence "means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2); MSA 3.996(107)(2). Viewing the facts in the light most favorable to plaintiffs, the officers continued pursuing a car containing passengers that the officers believed was being driven recklessly by an underage driver who drove at high speeds, who drove the wrong way on a one-way street, and who ignored traffic signals and continued trying to evade the police after sideswiping two cars. Reasonable minds could conclude that the officers should have recognized that the car was not going to stop voluntarily and that, if the police did not discontinue the pursuit, the chase would most likely end with a collision where the driver was rendered unable to continue his flight. Reasonable minds could disagree about whether such conduct demonstrated "a substantial lack of concern for whether an injury results." MCL 691.1407(2); MSA 3.996(107)(2). Therefore, summary disposition should not have been granted on this basis.

Although this argument was not addressed by the trial court, defendants contend that summary disposi-

tion for Officer Gulley can be affirmed because he was not an operator of the vehicle. We disagree. In *Fiser*, the Supreme Court affirmed summary disposition for Officer Terry, who did not drive a police vehicle in the pursuit, because he did not operate the vehicle. However, MCL 691.1407(2); MSA 3.996(107)(2), which governs immunity with respect to governmental officers and employees, was added after *Fiser* was decided. This exception to immunity is not limited to situations in which a vehicle is operated. Therefore, the fact that Officer Gulley did not drive the vehicle is not dispositive of plaintiffs' claims that he was grossly negligent in deciding to initiate and continue the pursuit and, therefore, not immune under MCL 691.1407(2); MSA 3.996(107)(2).

IV

Defendants argue that their conduct was not the proximate cause of any injury to Cooper and Morris. However, we are not persuaded that this case is distinguishable from *Fiser* regarding this issue. In *Fiser*, the Supreme Court held "reasonable men might conclude that the pursuit by [the officers] was not too remote a cause of plaintiff's injuries and that the negligent conduct of [the driver of the pursued vehicle] did not sever that causal connection." *Id.* at 475. The fact that Cooper and Morris were within the pursued vehicle does not make the pursuit more "remote a cause" of the harm than in *Fiser*. As in *Fiser*, *Ewing*, *supra*, and *Frohman*, *supra*, the issue of proximate cause must be submitted to the trier of fact.

Because this Court's holding in *Dedes*, *supra*, was reversed, it no longer supports granting summary disposition for defendants. As previously noted, the trial

court referred to *Dedes* when explaining the reasons for granting summary disposition. However, after the trial court's decision in this case, *Dedes* was reversed by the Supreme Court. *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). Accordingly, defendants no longer contend that *Dedes* entitles them to summary disposition.

In conclusion, because the record and the arguments advanced by defendants do not establish that they were entitled to judgment as a matter of law, the trial court's order granting defendants' motion for summary disposition is reversed.

Reversed.

MICHAEL J. KELLY, J. (*concurring*). I concur but I suggest this area of the jurisprudence of this state should be revisited by the Supreme Court.

With regard to the pursuit itself a clarification of the law regarding both liability for negligence by the pursuing officer and the vicarious liability of the employing governmental unit would best be imposed only for gross negligence, defined as reckless disregard for the safety of others.

C. L. BOSMAN, J. (*concurring*). I concur in the result but would hold that only if an injured passenger can prove that he is free of any criminal responsibility for the actions that caused the attempted police apprehension or encouraged the driver of the fleeing vehicle to flee can the passenger recover for the officer's negligent conduct.

The rule in *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983), is that the operator of an emergency vehicle owes a duty to drive with due regard for the safety of others, taking various factors into

consideration, including the existence of an emergency, the area of pursuit, weather and road conditions, vehicular and pedestrian traffic conditions, and the reason for the pursuit. The Court in *Jackson v Oliver*, 204 Mich App 122; 514 NW2d 195 (1994), ruled that the duty does not extend to a fleeing wrongdoer. I see no reason to impose a duty to a passenger who is in some way a participant in the wrongdoing with the driver of a fleeing vehicle. The lead opinion in this case would hold that the passenger's fault in bringing about or continuing the police pursuit should be considered by the factfinder in apportioning fault. I would hold that the duty extends only to those who are criminally innocent third-party passengers taking no part in bringing about or continuing the pursuit. In this case, the participation of Cooper and Morris in the criminal wrongdoing remains a question of fact and the burden of proving innocence should be on them.

Appendix 4-B

In the Matter of the Estate of Courtney HENDERSON, Deceased.
Debra ROBINSON, Personal Representative, Plaintiff-Appellant/Cross-Appellee,
v.
CITY OF DETROIT, Craig Kailimai, and Michael Cily, Defendants/Third-Party Appellees, Cross-Appellants,
and
Howard Linden, Personal Representative of the Estate of Marcelle Blakeney, Deceased, Third-Party Defendant-Appellee.
No. 176421.
Court of Appeals of Michigan.
Sept. 10, 1996.

Before O'CONNELL, P.J., and GRIBBS and T.P. PICKARD,* JJ.

PICKARD, J.

Plaintiff appeals as of right from the order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (10) in this wrongful death action. Defendants also cross-appeal. We affirm.

The decedent, Courtney Henderson, was a passenger in a vehicle which was involved in a police chase. During the pursuit, the driver, Blakeney, disregarded a red traffic signal and drove into oncoming traffic causing a head-on collision with another vehicle and, as a result, Henderson was killed. It was later determined that the car Blakeney was driving was stolen. Thereafter, the personal representative for Henderson's estate, Debra Robinson, brought an action against defendants alleging that the officers were negligent or grossly negligent in the pursuit of the vehicle. Defendants filed a motion for summary disposition claiming that defendants did not owe a duty to Henderson and that governmental immunity and the absence of gross negligence barred plaintiff's claim. The trial court granted defendant's motion finding that defendants did not owe a duty to Henderson. The trial court also concluded that because defendants' conduct was not the proximate cause of plaintiff's injury, the gross negligence exception to governmental immunity which would at best establish liability against only the individual officers, not the City, Gracey v. Wayne County Clerk, 213 Mich.App 412; 540 NW2d 710 (1995), did not apply, and, as such, governmental immunity precluded plaintiff's action.

The first issue to be decided is whether governmental immunity applied to relieve the individual police officers from liability. In deciding a motion for summary disposition under MCR 2.116(C)(7), the court reviews the plaintiff's complaint to see whether facts have been pleaded justifying a finding that the recovery is not barred by governmental immunity. Vermilya v. Dunham, 195 Mich.App 79, 81; 489 NW2d 496 (1993). The trial court determined that for the gross negligence exception to governmental immunity, M.C.L. s 691.1407(2); MSA 3.996(107)(2), to apply, defendants must be "the" proximate cause of plaintiff's injury and since defendants' conduct was not "the" sole proximate cause, governmental immunity applied and barred plaintiff's claim. The trial judge relied on Dedes v. Asch, 199 Mich.App 385; 502 NW2d 720 (1993). However, the

Michigan Supreme Court has since overruled the Dedes case and rejected a literal interpretation of the word "the" as used in M.C.L. s 691.1407(2); MSA 3.996(107)(2) preceding the words "proximate cause." Dedes v. Asch, 446 Mich. 99; 520 NW2d 488 (1994). Therefore, we find that the trial court erred when it required defendant's conduct to be "the" sole proximate cause of plaintiff's injury. Nevertheless, the officers' conduct did not amount to gross negligence because they had reason to pursue the vehicle where Blakeney was driving erratically and they activated their signals to notify Blakeney and others that they were in pursuit. A police officer confronted with criminal activity is not grossly negligent in resolving to apprehend the criminal, even if deadly force and concomitant danger to innocent civilians inevitably results. Brown v. Shavers, 210 Mich.App 272; 532 NW2d 856 (1995). Reasonable minds could not differ that this conduct did not amount to gross negligence. Pavlov v. Community EMF, 195 Mich.App 711, 719; 491 NW2d 874 (1992). Therefore, the trial court properly granted summary disposition in favor of the individual officers. This Court will not reverse a trial court's decision if the right result is reached for the wrong reason. In re Powers, 208 Mich.App 582, 591; 528 NW2d 799 (1995).

The next issue is whether the motor vehicle exception to governmental immunity found at M.C.L. s 691.1405; MSA 3.996(105) applies to the City of Detroit. MCL 691.1405; MSA 3.996(105) creates an exception to governmental immunity with regard to the government agency, herein the City of Detroit, for the negligent operation of a motor vehicle owned by that government agency. Defendants argued that plaintiff did not plead operation of a motor vehicle because the facts involve a decision to pursue the vehicle which does not constitute operation of a motor vehicle. We find that plaintiff adequately pleaded operation of a motor vehicle by pleading that the officers drove at too high a rate of speed and that the officers did not take proper safety precautions during the pursuit. Nolan v. Bronson, 185 Mich.App 163, 177; 460 NW2d 284 (1990).

The Court finds, however, that a question of law has been presented, that is, whether the officers owed a duty to Henderson. In Fiser v. City of Ann Arbor, 417 Mich. 461; 339 NW2d 413 (1983), Ewing v City of Detroit (On Remand), 214 Mich.App 495; 543 NW2d 1 (1995), and Frohman v. Detroit, 181 Mich.App 400; 450 NW2d 59 (1989), the Courts determined that police officers owe a duty to an innocent third party who is injured as a result of a high speed chase. [FN1] In Jackson v. Oliver, 204 Mich.App 122; 514 NW2d 195 (1994), this Court determined that police officers do not owe a duty to the fleeing suspect in a police pursuit.

Unlike an innocent third party, a passenger has voluntarily placed himself in the hands of the driver. He can exercise control in encouraging the driver to stop and obey the police. This ability greatly outweighs the urge a driver may have to flee pursuing police, since the passenger can directly communicate with the driver.

As in most cases, the police must make split second decisions whether to pursue a vehicle, and if so, whether to break off pursuit. In this case where a stolen car is being driven erratically, harm could come to a passenger, if pursued or not pursued by the police (for example, if the driver was intoxicated and no pursuit was initiated and a passenger later killed, would the decedent have filed an action against the police for failing to attempt to stop). Police should not be judged by hindsight. These types of situations require a bright-line rule. Here, as in Jackson, "the police did not shoot at the decedent or at his vehicle, they did not set a trap

designed to make him lose control of his vehicle, and they did not intentionally ram his vehicle. They did not establish the speed of the chase and did not control the route, they simply attempted to prevent the decedent's escape. This is not the use of excessive force, it is the use of minimal force." Id, at 127. The police did not dictate the degree of speed. What endangered the decedent was the deliberate and reckless conduct of the driver of the car in which decedent was a voluntary passenger.

"Out of concern for public safety, police must sometimes allow fleeing suspects to get away." Id, at 126. Oftentimes, however, police cannot ascertain whether a passenger is encouraging a driver to flee or if there is a passenger in the fleeing car or whether the passenger is otherwise particeps criminis to some other offense. Indeed, if the passenger were a hostage, use of potential deadly force to immediately terminate the ongoing felony would be appropriate. Brown, supra. In making their split second decision in regard to a chase, the police should only have to consider the safety of the innocent public, not what may be going on inside the car they are pursuing or who may be in the car. [FN2]

We hold that a passenger voluntarily in a fleeing car is not an innocent bystander and does not fall under the rule in Fiser. Plaintiff's complaint was properly dismissed as no duty was owed to the decedent by the City of Detroit. In light of our decision above, the issue raised in the defendants' cross-appeal is moot.

Affirmed.

FN1. The Courts in Fiser and Frohman did not specifically address the issue of duty. However, the recognition of a cause of action implied a recognition of a duty to an innocent third party.

FN2. The question of whether an involuntary passenger can or cannot be an innocent bystander under different facts, such as a kidnap victim, is better left for another day. The important policy question of whether the police should attempt to save the kidnap victim from the fleeing suspect or terminate the chase to avoid further injury to the kidnap victim, is also beyond the scope of this opinion.

In the Matter of the ESTATE OF Courtney HENDERSON, deceased.
Debra ROBINSON, Personal Representative, Plaintiff-Appellant/Cross-Appellee,
v.
CITY OF DETROIT, Craig Kailimai, and Michael Cily, Defendants/Third-Party Appellees, Cross-Appellants,
and
Howard Linden, Personal Representative of the Estate of Marcelle Blakeney, deceased, Third-Party Defendant-Appellee.
No. 176421.
Court of Appeals of Michigan.
Nov. 26, 1996.

Before: O'CONNELL, P.J., and GRIBBS and T.P. PICKARD,* JJ.

PER CURIAM.

On our own motion, we granted rehearing to review the apparent conflict between our initial opinion in this case and Cooper v. Wade, --- Mich.App ----; --- NW2d ---- (Docket No. 175952, issued 9/10/96), released fifteen minutes before our decision was issued. After a thorough review of the relevant authority, we are persuaded that we reached the correct result. However, the Cooper opinion reached the opposite conclusion and, pursuant to Supreme Court Administrative Order 1996-4, we are bound to defer to Cooper. Accordingly, we modify our initial opinion in this case to reverse the circuit court for the reasons set forth in Cooper. But for Administrative Order 1996- 4, we would affirm the order of the court granting summary disposition in favor of defendants. We would briefly address what we perceive to be a flaw in the reasoning of the Cooper opinion.

In Fiser v. Ann Arbor, 417 Mich. 461, 469-472; 339 NW2d 413 (1983), our Supreme Court ruled that, under certain circumstances, a police officer involved in a high speed chase may be held liable where his actions contribute to the injury of an innocent bystander. Subsequently, in Jackson v. Oliver, 204 Mich.App 122, 126; 514 NW2d 195 (1994), this Court held that while "police officers owe a duty to innocent bystanders .... [w]e do not believe that the Fiser decision applies in a case where injuries were suffered by a fleeing wrongdoer." The Jackson Court concluded that "[p]olice officers in pursuit of a suspect do not owe the suspect a duty to refrain from chasing the suspect at speeds dangerous to the suspect." Jackson, supra, p 127. Note that both Jackson and Fiser address the issue strictly in terms of duty.

The present case and Cooper involve injuries suffered by individuals who do not fit neatly into the Fiser-Jackson paradigm--passengers in fleeing automobiles. While Fiser provides that police officers owe a duty to "innocent bystanders," it would be difficult to categorize one traveling in a fleeing automobile as a "bystander," whether innocent or not. [FN1] Similarly, while Jackson sets forth that no duty is owed a fleeing wrongdoer, the wrongdoer in Jackson was the driver of the automobile, not a passenger.

We believe that Cooper is flawed in that it establishes a presumption, apparently irrebuttable, that a passenger is an innocent bystander, and is, therefore, owed the duty set forth in Fiser regardless of the actions of that passenger. Cooper, supra, slip op p 3 (emphasis supplied), provides that "[t]o the extent that passengers within a fleeing vehicle are at fault for bringing about or continuing the police

pursuit, such factors should be considered by the factfinder when considering causation and apportioning fault." Thus, Cooper ignores the central principle of both Fiser and Jackson that one's status as an innocent bystander or wrongdoer implicates the element of duty. This questionable principle has already been followed, albeit in an unpublished opinion, where this Court quoted the very sentence quoted above in reversing the circuit court's grant of summary disposition on the ground that no duty existed. Cantrell v. Detroit, unpublished memorandum opinion of the Court of Appeals (Docket no. 179873, issued October 25, 1996).

In the present case, the decedent made obscene gestures to the police and encouraged the driver to flee, facts which we omitted from our original opinion because we believed them to be immaterial. Under Cooper, they are indeed immaterial. Regardless of the acts of the passenger, Cooper states that the police officer still owe that passenger a duty.

In summary, we believe that Cooper was wrongly decided because, in defiance of both Fiser and Jackson, it holds that the misconduct of a passenger in a fleeing vehicle has no bearing on whether the police owe that passenger a duty of care. Nevertheless, pursuant to Administrative Order 1996-4, we are bound to follow Cooper. Therefore, we reverse the order of the circuit court granting summary disposition in favor of defendants, concluding that a duty was owed the present decedent despite the fact that he made obscene gestures to the police and encouraged the flight that led to his death.

Reversed.

FN1. The term "bystander" is defined in the Random House Webster's College Dictionary (1992) as follows: "a person present but not involved; onlooker." Obviously, a passenger is involved when the automobile in which he is riding attempts to elude police apprehension, whether or not that passenger instigated the flight. Similarly, such a passenger may not reasonably be classified as a mere "onlooker."

Appendix 5

PEOPLE v POOLE

Docket Nos. 169867, 169987. Submitted March 16, 1996, at Lansing. Decided September 17, 1996, at 9:00 A.M.

Terry L. Poole was convicted following separate jury trials in the Saginaw Circuit Court, William A. Crane, J., of delivery of 50 grams or more, but less than 225 grams, of cocaine and of possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine. The defendant was sentenced to consecutive prison terms of thirteen to twenty years and life imprisonment without eligibility for parole for the respective convictions. The defendant appealed each conviction, and the appeals were consolidated.

The Court of Appeals *held*:

1. The trial court did not err in denying the defendant's motion to suppress as evidence the items seized at the defendant's place of residence pursuant to a search warrant. In support of the motion, the defendant argued that substantial evidence did not exist for the magistrate to conclude that probable cause existed to search the residence. An affidavit used to secure a search warrant must provide sufficient facts from which a magistrate can find that the information supplied was based on personal knowledge and that either the person supplying the information was credible or the information was reliable. Hearsay statements in an affidavit may be used to establish probable cause where the requirements of personal knowledge and credibility or reliability are met. The averment in the affidavit in this case that an informant had been told that the defendant had just moved to the address that became the subject of the warrant by the person with whom the defendant had previously lived satisfied the personal knowledge and credibility requirements. The reliability of that information was supported by the fact that the affiant found that the address supplied by the informant also had been listed in the defendant's jail records as the address at which a relative could be contacted. Under the circumstances, there was a substantial basis for the magistrate's finding of probable cause to search the subject address.

2. The trial court did not err in imposing a sentence of life imprisonment without eligibility for parole for the conviction of possession with intent to deliver. MCL 333.7413(1); MSA

14.15(7413)(1) provides that an individual "who was convicted previously" of certain designated controlled substance offenses and is "thereafter convicted of a second or subsequent violation" of those same designated offenses is to be imprisoned for life and is not eligible for parole. Both of the offenses of which the defendant was convicted are among the offenses listed in § 7413(1). Therefore, because the defendant was convicted of delivery of 50 or more grams, but less than 225 grams, of cocaine, he came within the scope of the sentence enhancement provision of § 7413(1) and was properly sentenced to life imprisonment without parole for the conviction of possession with intent to deliver an amount of cocaine in the same range. Because § 7413(1), unlike some other sentence enhancement statutes that speak in terms of committing an offense or violation after having been convicted of a prior offense or violation, provides for sentence enhancement where the second or subsequent conviction occurs after the first conviction, the enhanced sentence for his conviction of possession with intent to deliver was appropriate in this case in spite of the fact that the possession offense was committed before defendant was convicted of the delivery offense.

3. The enhanced sentence of life imprisonment without eligibility for parole imposed with respect to the conviction of possession with intent to deliver does not constitute cruel or unusual punishment within the meaning of Const 1963, art 1, § 16. The Legislature could properly determine that a second or subsequent conviction of the delivery of or possession with intent to deliver fifty or more grams of cocaine is sufficient to warrant a sentence of life imprisonment without eligibility for parole without violating the constitutional prohibition against cruel or unusual punishment.

4. The failure of defendant's trial counsel to seek consolidation of the trials of the two charges has not been shown to amount to ineffective assistance of counsel. Not only has the defendant failed to demonstrate on appeal that a motion to consolidate would have been granted if it had been made by counsel, but also there appear to be sound reasons why counsel, as a matter of trial strategy, may have felt that separate trials were preferable.

5. Any claim that the defendant is entitled to be resentenced with respect to the delivery conviction is rendered moot by the affirming of the life sentence without eligibility for parole for the possession with intent to deliver conviction.

Affirmed.

HOLBROOK, JR., P.J., concurring in part and dissenting in part, stated that the defendant's convictions should be affirmed but that the life sentence should be set aside and the matter should be

remanded for resentencing because the language of MCL 333.7413(1); MSA 14.15(7413)(1) is susceptible to more than one interpretation concerning the required sequence of offenses and convictions and, thus, the common-law rule that sentence enhancement requires that the conviction of the prior offense precede the commission of the subsequent offense should apply.

1. SEARCHES AND SEIZURES — SEARCH WARRANTS — AFFIDAVITS — PROBABLE CAUSE.

An affidavit in support of an application for a search warrant must provide sufficient facts from which a magistrate can find that the information in the affidavit is based on personal knowledge and that either the unnamed informant supplying the information was credible or that the information was reliable; hearsay statements in an affidavit may be used to establish probable cause where the requirements of personal knowledge and credibility are met.

2. CONTROLLED SUBSTANCES — SECOND OR SUBSEQUENT CONVICTIONS — SENTENCE ENHANCEMENT.

Sentence enhancement for a second or subsequent conviction of delivery of or possession with intent to deliver at least 50 grams but less than 650 grams of a schedule 1 or 2 drug or cocaine or of conspiracy to do the same may be based on an offense for which the conviction occurred after the conviction of the prior offense even though commission of the second or subsequent offense preceded the conviction of the prior offense (MCL 333.7413[1]; MSA 14.15[7413][1]).

3. CONSTITUTIONAL LAW — CONTROLLED SUBSTANCES — LIFE SENTENCES — CRUEL OR UNUSUAL PUNISHMENT.

The life sentence without eligibility for parole for a second or subsequent conviction of delivery of or possession with intent to deliver at least 50 grams, but less than 650 grams, of a schedule 1 or 2 drug or cocaine or of conspiracy to do the same does not violate the constitutional prohibition against cruel or unusual punishment (Const 1963, art 1, § 16; MCL 333.7413[1]; MSA 14.15[7413][1]).

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Catherine Langevin Semel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Richard B. Ginsberg*), for the defendant on appeal.

Before: HOLBROOK, JR., P.J., and TAYLOR and W. J. NYKAMP,* JJ.

TAYLOR, J. Defendant was convicted following separate jury trials of delivery of 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).[1] He was sentenced to serve consecutive prison terms of thirteen to twenty years and nonparolable life imprisonment, respectively. He appeals as of right, and we affirm.

I

Defendant first argues that the lower court erred in denying his motion to declare void the search warrant for 602 Holden Street and to suppress the fruits of that search because substantial evidence did not exist for the magistrate to conclude that probable cause existed to search the residence. In reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner. This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995); *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

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

[1] We note that the judgment of sentence in No. 93-7218-FH lists an incorrect statutory citation for the conviction of the offense of possession with intent to deliver cocaine.

Defendant specifically argues that the search warrant affidavit did not establish probable cause to believe that a nexus existed between him and 602 Holden Street. We disagree.

A search warrant affidavit must provide sufficient facts from which a magistrate could find that the information supplied was based on personal knowledge and that *either* the unnamed person was credible *or* the information was reliable. MCL 780.653; MSA 28.1259(3). Here, the affiant averred that informant Norman Wilson had been told by Kevin Jackson that defendant had moved to the Holden Street address. Such multiple hearsay statements may be used to establish probable cause where the ordinary requirements of personal knowledge and reliability or credibility are met. *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991); *People v Brooks*, 101 Mich App 416, 419; 300 NW2d 582 (1980). Jackson's statement that defendant had moved to the Holden Street address was made with personal knowledge and could be viewed as credible given that defendant had just moved out of Jackson's home. Moreover, defendant's connection with the Holden Street address was independently verified by the affiant, who checked defendant's jail records and found that they listed Holden Street as the address where a relative could be contacted. The affiant further averred that a person named "Whinnie" had stated he was at "Terry's place" on Holden Street. Although this information did not confirm defendant's current residence, it did bolster the information provided by Kevin Jackson that defendant was then residing at the Holden Street address. *Harris*, *supra*. Finally, "Whinnie's" credibility as an informant was shown by the state-

ments he made against his penal interest. See *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). Accordingly, under the totality of the circumstances, we conclude that a substantial basis existed for the district judge's finding of probable cause to search 602 Holden Street. Defendant's motion to suppress was properly denied.

II

On September 9, 1992, defendant delivered cocaine to a police officer. On September 17, 1992, the police found cocaine in defendant's jacket while executing a search warrant. Defendant subsequently was convicted by separate juries at separate trials of delivery of more than 50 grams but less than 225 grams of cocaine on August 27, 1993, and possession with intent to deliver more than 50 grams but less than 225 grams of cocaine on September 3, 1993. Defendant was sentenced to serve consecutive prison terms of thirteen to twenty years and life without parole, respectively.

Defendant argues that the trial court erred in sentencing him as a second offender under MCL 333.7413(1); MSA 14.15(7413)(1) because the offense resulting in his second conviction occurred before he was convicted for the first offense. We disagree.

MCL 333.7413; MSA 14.15(7413) prescribes the penalties for repeat controlled substance offenders. The first three subsections of § 7413 describe different groups of offenses and provide different enhanced penalties for each group. Section 7413(1) requires nonparolable life sentences for individuals who commit a second or subsequent offense involving more than fifty grams of a schedule 1 or 2 narcotic drug or

cocaine, or conspiring to commit such offenses. Section 7413(3) subjects individuals who are second or subsequent offenders under MCL 333.7410(2) and (3); MSA 14.15(7410)(2) and (3) (delivery or possession with intent to deliver schedule 1 or 2 narcotics or cocaine to a minor within 1,000 feet of a school property) to mandatory enhanced prison terms (although the court may depart from the mandatory minimum sentence upon a finding of substantial and compelling reasons). Section 7413(2) provides discretionary enhanced sentences for individuals who are convicted of any other second or subsequent offenses under the controlled substances act (delivery offenses involving less than fifty grams, possession offenses involving twenty-five to fifty grams, and conspiracies to commit these offenses).

MCL 333.7413; MSA 14.15(7413) provides, in pertinent part:

> (1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> (a) A violation of section 7401(2)(a)(ii) or (iii).
>
> (b) A violation of section 7403(2)(a)(ii) or (iii).
>
> (c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(ii) or (iii) or section 7403(2)(a)(ii) or (iii).

More plainly stated, these sections prohibit the manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver, at least 50 grams but less than 225 grams, or at least 225 grams but less than 650 grams of a schedule 1 or 2 narcotic or cocaine; or possession of at least 50 grams but less

than 225 grams, or at least 225 grams but less than 650 grams, of a schedule 1 or 2 narcotic drug or cocaine; or conspiracy to commit one of the foregoing offenses. See Managing a Trial Under the Controlled Substances Act (Michigan Judicial Institute, 1995), pp 332-333.

As applicable to defendant, MCL 333.7413(1); MSA 14.15(7413)(1) provides that an individual who was convicted previously of delivery of more than 50 grams but less than 225 grams of cocaine and is thereafter convicted of possession with intent to deliver more than 50 but less than 225 grams of cocaine shall be imprisoned for life without eligibility for parole. Thus, the trial court imposed a nonparolable life sentence for defendant's conviction of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine because defendant had previously been convicted of delivering more than 50 but less than 225 grams of cocaine.

The issue is whether the trial court properly construed MCL 333.7413(1); MSA 14.15(7413)(1) as requiring that defendant receive a nonparolable sentence for his second conviction. The goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). If a statute is clear, the courts must enforce its directive. *People v Morris*, 450 Mich 316, 325; 537 NW2d 842 (1995). It is only where a statute is unclear and susceptible to more than one interpretation that judicial construction is allowed. *Id.* The Legislature is presumed to have intended the meaning it plainly expressed. *People v Cannon*, 206 Mich App 653, 655; 522 NW2d 716 (1994). Although penal in nature, § 7413(1) is part of

the Public Health Code, which is to be "liberally construed for the protection of the health, safety, and welfare of the people." MCL 333.1111(2); MSA 14.15(1111)(2). Thus, it is a court's duty to construe § 7413(1) in a manner that most effectively protects the health, safety, and welfare of the public and effects the object sought to be advanced by the statute. *Morris*, *supra* at 327.

Section 7413(1) is not ambiguous, and it clearly requires a nonparolable life sentence where a defendant was "convicted previously" of an enumerated offense and thereafter is "convicted" of an enumerated offense. At the time defendant was convicted of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, he had been "convicted previously" of an enumerated offense. Thus, defendant's situation fits within the terms of § 7413(1), and the trial court properly sentenced him to a nonparolable term in prison.

Defendant argues that § 7413(1) should not have been applied to him because he committed his second offense before he had been convicted of the first offense. This argument is simply not supported by the unambiguous statutory language used by the Legislature, which we must enforce. For defendant's argument to prevail, we would have to rewrite § 7413(1). This statute, as written, provides for a nonparolable life sentence for a defendant "convicted previously" who "is thereafter convicted." Defendant, however, would require this Court to change "is thereafter convicted" to read "[who] thereafter commits" an offense. This we cannot do.

The trial court's construction of the statute is consistent with *People v Roseburgh*, 215 Mich App 237,

239; 545 NW2d 14 (1996), which found that sentence enhancement under § 7413(2) only requires convictions to follow one another with no temporal requirement regarding the sequence of the crimes. Although *Roseburgh* is not controlling because it dealt with a different subsection of the statute, it is persuasive and a similar result is appropriate in this case.

We are aware that other repeat offender statutes have been construed by our courts to require that a prior conviction precede the commission of the second offense. However, the statutory language under examination in those cases was sufficiently different to render those cases inapplicable. *Roseburgh*, *supra* at 239, n 1. In *People v Pruess*, 436 Mich 714; 461 NW2d 703 (1990), the Court held that a defendant could not be punished as a fourth-offense habitual offender unless the fourth offense was preceded by three felony convictions. Yet, an examination of the language in the habitual offender statutes makes this result appropriate and lends support to our interpretation of § 7413(1). The habitual offender statutes, MCL 769.10-769.12; MSA 28.1082-28.1084, provide that a person who "commits" a subsequent felony after being convicted of one, two, or three prior felonies, may be punished as a repeat felony offender. The important distinction is the fact that the Legislature used the word "commits" and not "convicted" in describing what must occur after a person has a prior felony conviction.

Similarly, *People v Erwin*, 212 Mich App 55, 60; 536 NW2d 818 (1995), stated that a drunk-driving conviction may not be used for enhancement purposes unless the date of conviction precedes the date of the second offense. This statement was entirely appropri-

ate because the repeat offender provisions of the drunken-driving statute, MCL 257.625(7)(b) and (d); MSA 9.2325(7)(b) and (d), provide that if "the violation occurs within seven years of a prior conviction" or if "the violation occurs within ten years of two or more prior convictions," a defendant may be treated as a repeat offender. Once again, the Legislature did not use the word "conviction" but used the word "violation" in describing what must occur after a first conviction. The wording used in these three repeat offender statutes shows clearly that the Legislature has demonstrated that it knows how to use language requiring that a defendant must commit an offense after a conviction before the defendant may be considered a repeat offender when it so chooses, i.e., it uses words like "commit" and "violation" to describe what must occur after the first conviction. *Morris*, *supra* at 329-330 (if the Legislature means to limit the reach of a statute, it has demonstrated the ability to do so); *People v Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991) (the Legislature has demonstrated when it intends to do so, that it is capable of excluding a particular category of felonies from the sentence enhancement of the habitual offender act). We must respect this legislative distinction. The dissent, however, fails to do so.

The case that is most supportive of the defendant's position, and facially problematic to our approach, is *People v Stewart*, 441 Mich 89, 95; 490 NW2d 327 (1992), which limited *People v Sawyer*, 410 Mich 531; 302 NW2d 534 (1981). Yet, properly understood, *Stewart* and *Sawyer* stand in harmony with our analysis. *Sawyer* was a case in which the Court construed the repeat offender portion of the felony-firearm statute

that requires a lengthier sentence "upon a second" or "third" conviction. *Sawyer* held that a defendant should not be sentenced as a second felony-firearm offender unless the second offense is committed after the first conviction. In reasoning to this conclusion, the Court stated that a number of purposes are served when the Legislature increases punishment for repeat offenders, including providing more severe punishment for people who decline to change their ways following an opportunity to reform. The clinching rationale for the Court's holding was the rule of lenity, which holds that ambiguities in penal statutes must be resolved against the imposition of harsher punishments. *People v Smith*, 423 Mich 427, 446; 378 NW2d 384 (1985).[2] Thus, the construction that held that the second offense must occur after the first conviction was doctrinally sound.[3] This rule was limited in *Stewart*, where the Court stated that a defendant may be convicted of felony-firearm, third offense, if the third offense is preceded by two felony-firearm convictions that arose out of separate criminal incidents.

The holdings of *Sawyer* and *Stewart* are inapplicable to the case at bar because the rule of lenity is inapplicable. The felony-firearm statute is part of the

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[2] The rule of lenity applies only in the absence of a firm indication of legislative intent. *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). In fact, MCL 750.2; MSA 28.192 provides that the rule that a penal statute is to be strictly construed shall not apply to the Michigan Penal Code and all its provisions shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

[3] *Sawyer* was a four to three decision. Justice T. G. KAVANAGH stated he was sympathetic to the efforts of the majority to read sense into the statute by construing it as they did, but dissented because he felt constrained to enforce the statute as the Legislature wrote it.

Penal Code, which is subject to the rule of lenity,[4] whereas § 7413(1) is part of the Public Health Code, which must be liberally construed for the protection of the health, safety, and welfare of the public. The *Stewart* Court believed the Legislature wanted to provide an opportunity to reform oneself after having been first convicted before the additional prison time required for repeat felony-firearm offenders was applicable. Here, however, there is no good reason to make the same assumption. Indeed, the Legislature in passing drug laws has focused more on protecting the public than providing drug dealers with an opportunity for reform. The Legislature has provided for nonparolable life sentences for first-time offenders who possess,[5] deliver, or possess with an intent to deliver more than 650 grams of a schedule 1 or 2 narcotic or cocaine.

For all the foregoing reasons, the trial court properly interpreted § 7413(1) as requiring that defendant be sentenced to a nonparolable life term. We recognize that many would consider this penalty to be harsh. Nevertheless, judicial misgivings regarding the wisdom of a legislative sentencing policy do not provide, absent a violation of the constitution, a legal foundation for overriding legislative intent. *Morris*, *supra* at 335. The wisdom of this policy is a political question to be resolved in the political forum. *Id.*

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[4] See, however, n 2, *ante* at 713.

[5] The Supreme Court found this penalty violated the Michigan constitutional prohibition against cruel or unusual punishment. *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992). Nevertheless, the Legislature's desire not to give any opportunity for rehabilitation was made clear by the statute.

III

Defendant next argues that a mandatory life sentence constitutes "cruel and/or unusual" punishment because he was not given a chance to reform before facing a mandatory life sentence.[6] In determining whether a sentence is cruel or unusual, we look to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Past decisions of the Michigan Supreme Court have found mandatory drug sentences in violation of Const 1963, art 1, § 16 as cruel or unusual punishment. *People v Lorentzen*, 387 Mich 167, 176; 194 NW2d 827 (1972), held that a statute mandating a minimum term of twenty years' imprisonment for the sale of any amount of marijuana was unconstitutionally excessive. In *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992), the Supreme Court held that a mandatory life sentence for possession of 650 grams or more of cocaine violated the constitutional ban against "cruel or unusual" punishments.[7] The Supreme Court, how-

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[6] Defendant does not argue that his sentence is "disproportionate" as that term was used in *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990), because *Milbourn* has no applicability to legislatively mandated sentences. *People v Bullock*, *supra* at 34, n 17.

[7] The *Bullock* Court erroneously stated that Michigan required mandatory life sentences only for first-degree murders and drug offenses involving more than 650 grams. *Bullock*, *supra* at 39-40. However, *People v Fernandez*, 427 Mich 321, 337; 398 NW2d 311 (1986), states that treason and placing explosives with an intent to destroy that causes injury to a person also carry mandatory life sentences. The *Bullock* Court also failed to note the statute we are considering in this case that also provides for life without parole for certain repeat drug offenders.

ever, refused to extend the *Bullock* holding to cases involving delivery or possession with intent to deliver more than 650 grams of cocaine, or conspiracy to do the same. *People v Fluker*, 442 Mich 891 (1993); *People v Stewart*, 442 Mich 890 (1993); *People v Lopez*, 442 Mich 889 (1993); *People v Loy-Rafuls*, 442 Mich 915 (1993). See also *People v DiVietri*, 206 Mich App 61, 63-65; 520 NW2d 643 (1994).

At the outset, we reject defendant's claim that a mandatory life sentence is cruel or unusual per se unless he was given an opportunity to reform before imposition of such a sentence. This claim is of no avail to this defendant in any case because he did have a chance to reform himself. He could have realized he had made a gross mistake and have reformed himself after committing his first offense. *People v Bettistea (After Remand)*, 181 Mich App 194, 202; 448 NW2d 781 (1989). The opportunity to reform began immediately after he committed his first offense, not after he was first arrested or convicted.

We further reject defendant's claim that his mandatory life sentence constitutes cruel or unusual punishment given the gravity of the offense and our Supreme Court's refusal to extend *Bullock* to delivery-related drug offenses. As previously stated, mandatory life sentences have been found to be constitutional for first-time offenders who (1) possess with intent to deliver more than 650 grams of cocaine, (2) deliver more than 650 grams of cocaine, or (3) conspire to deliver or to possess with the intent to deliver more than 650 grams. Here, defendant was a repeat drug offender who was convicted of delivering more than 50 but less than 225 grams of cocaine and of possession with intent to deliver the

same amount. We find, under the rationale of *Fluker*, *Stewart*, *Lopez*, and *Loy-Rafuls*, that the Legislature may impose a mandatory life sentence upon repeat cocaine dealers who deliver or possess with intent to deliver more than fifty grams of cocaine without violating the constitutional prohibition against cruel or unusual punishment.

IV

Defendant next argues that he was deprived of his right to effective assistance of counsel because his counsel's failure to request consolidation of his two cases for trial subjected him to a nonparolable life sentence. Defendant claims that if his counsel had had his two charges consolidated, and if he had been convicted of both charges, then he could not have been subject to a nonparolable life sentence because there would not have been a prior conviction.

In *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994), the Supreme Court adopted the federal test for reviewing claims of ineffective assistance of counsel under the Michigan Constitution. The *Pickens* Court stated that to find prejudice a court must conclude that there is a reasonable probability that, absent counsel's errors, the factfinder would have had a reasonable doubt respecting guilt. *Id.* at 312. The *Pickens* Court *id.*, n 12, then stated as follows:

> Furthermore,
> "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's errors may grant the defendant a windfall to which the law does

not entitle him." [*Lockhart v Fretwell*, 506 US (364), (369); 113 S Ct 838; 122 L Ed 2d 180, 189 (1993).]

Also, the lead opinion in *People v Reed*, 449 Mich 375, 401, n 21; 535 NW2d 496 (1995), states:

> The proper inquiry is not whether "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland* [*v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984)]. An analysis that focuses "solely on outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v Fretwell, supra* at 369.

Thus, in order to establish that counsel was ineffective, defendant must show that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *Pickens, supra; Reed, supra.*

We are satisfied that defendant is not entitled to any relief regarding this claim. Because defendant did not move to create an evidentiary record to support this claim, our review is limited to the existing record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Defendant has failed to demonstrate that a motion to consolidate necessarily would have been granted. Further, defendant has not overcome the strong presumption that counsel's assistance constituted sound trial strategy. *Stanaway, supra* at 687. Counsel may not have wanted to consolidate the two cases because the chances for an acquittal in either case would have been reduced if the jury heard both cases against defendant. This is especially the case here because the proofs relating

to the possession with intent to deliver charge were not as strong as the proofs relating to the delivery charge. Further, if the motion to consolidate had been granted and defendant was convicted of both charges, he still would have been subject to a very lengthy prison term once the sentences were made consecutive pursuant to MCL 333.7401(3); MSA 14.15(7401)(3) and doubled under MCL 333.7413(2); MSA 14.15(7413)(2). It can be anticipated that this would have precipitated a claim that moving for consolidation of the two cases was ineffective assistance of counsel. The limning of the dilemma with which counsel was faced bespeaks the strategic nature of the decision that was made.

Finally, defendant claims that he is entitled to resentencing with respect to his delivery conviction, for which he received thirteen to twenty years. Even if defendant is correct, he is not entitled to any relief because we are upholding his mandatory life sentence. *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995).

Affirmed.

W. J. NYKAMP, J., concurred.

HOLBROOK, JR., P.J. (*concurring in part and dissenting in part*). I agree with the majority that defendant's conviction should be affirmed. However, because the second-offender provision of MCL 333.7413(1); MSA 14.15(7413)(1) does not apply in this case, I would remand for resentencing.

In this case, defendant committed the delivery offense[1] (offense I) on September 9, 1992, and eight

[1] MCL 733.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

days later, on September 17, 1992, committed the possession with intent to deliver offense[2] (offense II). He was convicted of offense I on August 27, 1993, and convicted of offense II on September 3, 1993. At sentencing, the prosecutor argued that MCL 333.7413(1); MSA 14.15(7413)(1) required that defendant receive a nonparolable life sentence for his conviction of offense II because his conviction of offense I preceded that conviction. The trial court expressly noted its lack of sentencing discretion under subsection 7413(1) and imposed a term of nonparolable life imprisonment for defendant's conviction of offense II.

MCL 333.7413; MSA 14.15(7413) provides, in pertinent part:

> (1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> (a) A violation of section 7401(2)(a)(ii) or (iii).
>
> (b) A violation of section 7403(2)(a)(ii) or (iii).
>
> (c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(ii) or (iii) or section 7403(2)(a)(ii) or (iii).

To determine whether subsection 7413(1) requires that an offense resulting in a second conviction occur after a defendant's previous conviction, we must look first at the express terms of the statute. The statute clearly includes a temporal component, inasmuch as it includes phrases such as "convicted *previously*" and "*thereafter* convicted of a *second or subsequent* violation." These temporal phrases, however, are sus-

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[2] MCL 733.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

ceptible of more than one interpretation. Most important for our purposes is to determine how the phrase "second or subsequent" is to be applied, i.e., "second or subsequent" to what? On the one hand, the phrase could mean that the "second or subsequent violation" occur following the "previous" conviction. On the other hand, the phrase could mean that the violation for which a mandatory life term is to be imposed simply have occurred "second or subsequent" to an earlier violation.

In *People v Roseburgh*, 215 Mich App 237; 545 NW2d 14 (1996), the defendant committed offense I and then offense II and was thereafter convicted of offense II, then offense I. The *Roseburgh* panel considered whether subsections 7413(2) and (5), MCL 333.7413(2) and (5); MSA 14.15(7413)(2) and (5),[3] of the controlled substances act applied "to enhance a defendant's sentence where the crime resulting in the second conviction occurred before the crime resulting in the first conviction," and held that, "[a]lthough the convictions must follow one another, the statute includes no temporal requirement regarding the sequence of the crimes, and in the absence of any authority to do so, we decline to add such a require-

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[3] Subsections 2 and 5 provide in pertinent part:

> (2) Except as otherwise provided in subsections [7413](1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.
>
> * * *
>
> (5) For purposes of subsection (2), an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time, been convicted under this article . . . .

ment." *Id.* at 238-239. The *Roseburgh* panel's interpretation of subsections 7413(2) and (5) is neither binding on this panel nor is it persuasive. Indeed, the panel's reasoning is faulty because it nullifies a key phrase in both subsections, i.e., "second or subsequent offense." In *Roseburgh*, the panel upheld a term of life imprisonment where the offense (offense I) for which a life sentence was imposed occurred *before* any second or subsequent offense (offense II). Such an interpretation of the phrase "second or subsequent offense" begs the question: "second or subsequent" to what?

The factual situation in this case presents a different possible interpretation of the phrase "second or subsequent violation." Here, defendant committed offense I, then offense II, and was thereafter convicted of offense I, then offense II. Unlike the sequence of events in *Roseburgh*, the offense (offense II) for which defendant received a life sentence did occur "second or subsequent" to an earlier offense (offense I), but not "second or subsequent" to the previous conviction. To the extent that the language of subsection 7413(1) is susceptible of more than one interpretation, judicial construction in accordance with established rules of statutory construction is necessary to resolve the ambiguity.[4] *People v Morris*, 450 Mich 316, 325; 537 NW2d 842 (1995); *People v Nantelle*, 215 Mich App 77; 544 NW2d 667 (1996).

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[4] The majority's wholehearted capitulation to the legislative branch is, if nothing else, interesting. The majority exalts legislative form over substance, yet fails to address the effect of the statutory phrase "second or subsequent violation," thereby implicitly conceding the error of their position. See *Gross v General Motors Corp*, 448 Mich 147, 159; 528 NW2d 707 (1995) (as far as possible, a court must give effect to every phrase, clause, and word of a statute).

The Supreme Court in *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995), stated:

> In enacting statutes, the Legislature recognizes that courts will apply common-law rules to resolve matters that are not specifically addressed in the statutory provision. 2B Singer, Sutherland Statutory Construction (5th ed), § 50.01, p 90. "[W]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject" matter as that with which they were associated at the common law. *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994); *People v Young*, 418 Mich 1, 13; 340 NW2d 805 (1983).

Where the Legislature "has shown no disposition to depart from the common-law definition, therefore it remains." *People v Schmitt*, 275 Mich 575, 577; 267 NW 741 (1936).

Michigan appellate courts have long followed the majority common-law rule that, for purposes of penalty enhancement under repeat offender statutes, it is a prerequisite that the prior conviction precede the commission of the principal offense. *People v Stoudemire*, 429 Mich 262, 283; 414 NW2d 693 (1987) (ARCHER, J., dissenting), cited with approval in *People v Preuss*, 436 Mich 714, 732; 461 NW2d 703 (1990). See also *People v Podsiad*, 295 Mich 541, 546-547; 295 NW 257 (1940); *People v Sawyer*, 410 Mich 531, 536; 302 NW2d 534 (1981); *People v Alexander*, 422 Mich 932 (1985); *People v Johnson*, 86 Mich App 77, 79-80; 272 NW2d 200 (1978); *People v Smith*, 90 Mich App 572, 574; 282 NW2d 399 (1979), vacated on other grounds 407 Mich 906 (1979); *People v Jones*, 171 Mich App 720, 726, n 5; 431 NW2d 204 (1988); *People v Erwin*, 212 Mich App 55, 60; 536 NW2d 818 (1995).

See, generally, anno: *Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes*, 7 ALR5th 263, § 2a, pp 289-293. For example, in *People v Sawyer*, *supra*, our Supreme Court construed the meaning of the phrase "prior conviction" in the second-offender provision of the felony-firearm statute.[5] In that case, the defendant committed a robbery while armed with a firearm on two separate occasions. The prosecution initiated separate trials for these two offenses, and the defendant ultimately pleaded guilty of two counts of felony-firearm at a single plea proceeding. The trial court considered the first offense as a prior conviction and imposed a five-year term of imprisonment rather than the two-year term for offenders without a prior conviction. Our Supreme Court held that, although a literal reading of the statute would lead to the conclusion that the defendant had a second conviction and technically was subject to the repeat-offender provisions of the statute, the Legislature did not intend such a result:

> There are a number of purposes served when the Legislature provides increased punishment for repeat offenders. These include deterrence and the proper desire of society to provide more severe punishment for a person who declines to change his or her ways following an opportunity to reform. These purposes are not served by imposing a more severe punishment on the day when a defendant first pleads guilty, and we accordingly believe that the Legislature intended a five-year term of imprisonment for a second conviction should only be imposed where the second offense is subsequent to the first conviction. [410 Mich 535-536.]

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[5] See MCL 750.227b; MSA 28.424(2).

More recently, our Supreme Court placed a further gloss on *Sawyer* when it stated in *People v Stewart*, 441 Mich 89, 94-95; 490 NW2d 327 (1992):

> Our statement in *Sawyer* that "a five-year term of imprisonment for a second conviction should only be imposed where the second offense is subsequent to the first conviction," 410 Mich 536, should be understood to mean that a defendant may not be convicted as a repeat offender unless the prior conviction(s) precede the offense for which the defendant faces enhanced punishment. There is no requirement that all prior offenses be neatly separated by intervening convictions.

Given that the statutory phrase "second or subsequent violation" is susceptible of more than one interpretation, we are obligated to apply the established common-law rule. In a footnote, the panel in *Roseburgh*, *supra* at 239, n 1, refused to apply this rule by analogy beyond the habitual offender statutes because the "statutory language is sufficiently different to render those cases inapplicable to the issue presented here." While it is true that no previous Michigan case has applied this common-law rule to the second-offender provisions of the controlled substances act, the rule has been applied not only to the habitual offender statutes (*Stoudemire*, *supra*; *Preuss*, *supra*; *Johnson*, *supra*; *Jones*, *supra*), but also to the repeat-offender provisions of the felony-firearm statute (*Sawyer*, *supra*; *Stewart*, *supra*), and to the second-offender provisions of the drunk-driving statute (*Erwin*, *supra*). Certainly, the legislative intent in enacting such penalty-enhancing statutes is the same whether the conduct involved is general recidivism or recidivism of specific offenses, such as possession of a firearm during the commission of a

felony, or driving a motor vehicle while under the influence of liquor, or dealing in large amounts of illegal narcotics.

Here, defendant Poole committed two offenses one week apart and was convicted of those offenses in separate court proceedings approximately one year later. At the time defendant committed his second offense, however, he had not been convicted of his first offense. Thus, application of the common-law rule to the facts of this case furthers both the Legislature's intent in enacting the second-offender provisions of the controlled substances act and the underlying principle of the common-law rule. Accordingly, I would remand this matter to the trial court for resentencing.

Appendix 6

PLATTE LAKE IMPROVEMENT ASSOCIATION v DEPARTMENT OF NATURAL RESOURCES

Docket No. 176356. Submitted April 10, 1996, at Grand Rapids. Decided August 23, 1996, at 9:30 A.M. Leave to appeal sought.

The Platte Lake Improvement Association brought an action in the Ingham Circuit Court against the Department of Natural Resources, seeking injunctive relief against alleged violations by the defendant of the Michigan Environmental Protection Act, (MEPA) MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, now MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.* The court, Thomas L. Brown, J., granted injunctive relief and costs, including attorney fees incurred up to the judgment, to the plaintiff. The court subsequently granted a motion by the plaintiff for an award of postjudgment attorney fees. Following the decision of the Court of Appeals in *Attorney General v Piller*, 204 Mich App 228 (1994), that the MEPA does not authorize or permit an award of attorney fees, the trial court reversed its decision to award postjudgment attorney fees. The plaintiff appealed.

The Court of Appeals *held*:

Costs awardable under MCL 691.1203(3); MSA 14.528(203)(3), now MCL 324.1703(3); MSA 13A.1703(3), do not include attorney fees.

1. MCL 600.2405; MSA 27A.2405 defines "costs" to include attorney fees when such fees are authorized by statute or court rule. The MEPA, in providing that costs may be apportioned to the parties if the interests of justice require it, does not expressly provide that costs include attorney fees. Because the Legislature in other environmental legislation has specifically provided for attorney fees as part of costs, the absence of an express provision in the MEPA regarding attorney fees indicates that the Legislature did not intend that attorney fees may be awarded as costs in actions brought under the MEPA.

2. The "common law of environmental quality," as mentioned in *Ray v Mason Co Drain Comm'r*, 393 Mich 294 (1975), relates to interpreting what constitutes environmental pollution or impairment and not to the meaning to be afforded well-defined legal terms such as "costs."

3. Administrative Order No. 1996-4 binds the Court of Appeals to follow *Piller*.

4. Whether the inability of citizens who initiate environmental cases to recover attorney fees has a chilling effect on such litigation is best addressed by the Legislature, not by the Court of Appeals.

Affirmed.

COSTS — ENVIRONMENTAL PROTECTION ACT — ATTORNEY FEES.

The Michigan Environmental Protection Act does not authorize or permit an award of attorney fees as part of the costs that may be awarded in actions brought under the act (MCL 691.1203[3]; MSA 14.528[203][3], now MCL 324.1703[3]; MSA 13A.1703[3]).

Boyden, Waddell, Timmons & Dilley (by *Frederick D. Dilley*), for the plaintiff.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, and *James L. Stropkai*, Assistant Attorney General, for the defendant.

Before: GRIBBS, P.J., and HOEKSTRA and C. H. STARK,* JJ.

HOEKSTRA, J. Plaintiff appeals as of right an order of the Ingham Circuit Court denying attorney fees under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.*[1] We affirm.

In this appeal, plaintiff overtly challenges this Court's decision in *Attorney General v Piller (After Remand)*, 204 Mich App 228; 514 NW2d 210 (1994). Plaintiff recognizes that the *Piller* opinion, upon

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

[1] At the time plaintiff's suit was filed, the MEPA was codified at MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.* During the time this appeal was pending, those sections were repealed and the MEPA was moved to MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.* The provision at issue in this appeal was not altered substantively in any way. For the remainder of this opinion, the MEPA will be referred to under its former codification.

which the trial court relied, is controlling; however, plaintiff requests that this panel express disagreement with the holding in *Piller* pursuant to Administrative Order No. 1996-4.

Plaintiff, a nonprofit corporation formed by property owners on Platte Lake and Platte River, filed suit against defendant in 1986, claiming that phosphorous emissions from defendant's salmon hatchery was causing environmental pollution in the lake and river. Following a bench trial in 1988, the trial court determined that defendant was violating the MEPA and awarded plaintiff injunctive relief. Plaintiff was also awarded costs, including attorney fees, pursuant to MCL 691.1203(3); MSA 14.528(203)(3) for expenses incurred through the date of the 1988 judgment. In August 1993, plaintiff filed a supplemental motion for apportionment of costs, including attorney fees, incurred after entry of the 1988 judgment. That motion was granted in an opinion and order dated March 9, 1994. However, on March 21, 1994, this Court announced its decision in *Piller*, prompting defendant to request reconsideration of the award of postjudgment attorney fees. Using *Piller* as authority, the trial court reluctantly reversed the original award of postjudgment attorney fees, and this appeal ensued.

Since the enactment of MCL 691.1203(3); MSA 14.528(203)(3), this Court has repeatedly addressed the question whether attorney fees are assessable costs under the MEPA. The first case to mention the issue, *Taxpayer & Citizens in the Public Interest v Dep't of State Hwys*, 70 Mich App 385; 245 NW2d 761 (1976), has been cited by subsequent cases for the proposition that an award of attorney fees was

authorized by this subsection. See *Superior Public Rights, Inc v Dep't of Natural Resources*, 80 Mich App 72; 263 NW2d 290 (1977), *Three Lakes Ass'n v Kessler*, 101 Mich App 170; 300 NW2d 485 (1980), and *Dafter Twp v Reid*, 131 Mich App 283; 345 NW2d 689 (1983). A panel of this Court adopted the opposite position in *Oscoda Chapter of PBB Action Committee, Inc v Dep't of Natural Resources*, 115 Mich App 356; 320 NW2d 376 (1982). The *Piller* decision agreed with the reasoning in the *PBB* case and held that an award of costs pursuant to MCL 691.1203(3); MSA 14.528(203)(3) could not include attorney fees. We are now asked to revisit the issue on the basis of the arguments raised in this appeal.

For us, the issue presents a question of statutory interpretation. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Golf Concepts v Rochester Hills*, 217 Mich App 21; ___ NW2d ___ (1996). The Legislature is presumed to intend the meaning plainly expressed in a statute, and judicial construction is not allowed where the plain and ordinary meaning of the language is clear. *Id.*

Here, MCL 691.1203(3); MSA 14.528(203)(3) states that "[c]osts may be apportioned to the parties if the interests of justice require." The word "costs," when used in a legal context, is a word that has a distinct meaning that is different than the meaning of the word in everyday parlance. MCL 600.2401; MSA 27A.2401 provides that the taxation of costs related to a legal proceeding is regulated by statute or court rule. MCL 600.2405; MSA 27A.2405 then defines which items may be taxed and awarded as costs as follows:

> The following items may be taxed and awarded as costs unless otherwise directed:
>
> * * *
>
> (6) Any attorney fees authorized by statute or by court rule.

Thus, by statutory definition, costs do not include attorney fees except when specifically authorized by statute or court rule. In addition, our Supreme Court has held that attorney fees ordinarily are not recoverable at common law and can be awarded only where a statute specifically so provides. *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986).

The issue then is reduced to deciding whether the Legislature intended to create a statutory exception to the above definition of costs by the enactment of MCL 691.1203(3); MSA 14.528(203)(3). A panel of this Court in *Oscoda, supra*, concluded that it did not. The panel concluded that "[w]hile the statute permits apportionment of costs, it does not purport to alter the ordinary definition of 'costs' or to allow taxation of costs for items which may not be taxed as costs in ordinary civil actions." *Id.* at 362. We have no basis upon which to challenge the accuracy of the *Oscoda* panel's conclusion.

When the MEPA is examined in the context of other environmental legislation, it is apparent that the Legislature understands the significance of the word "costs" because in other environmental legislation the Legislature has specifically provided for the payment of attorney fees. For example, § 10 of the Water Resources Commission act, MCL 323.10; MSA 3.529(1), provides for a discretionary award of reasonable attorney fees and costs to the prevailing

party. Similarly, § 48 of the Hazardous Waste Management Act, MCL 299.548; MSA 13.30(48), allows a trial court to award costs of litigation, including reasonable attorney fees, to a party if appropriate.

In these instances, the Legislature has expressly provided for the recovery of attorney fees. The MEPA, conspicuously devoid of any similar provisions, cannot be read to authorize them. Thus, we are constrained to agree with *Piller* that costs under the MEPA do not include attorney fees.

Plaintiff claims that previous MEPA cases, such as *Taxpayers*, *supra*, and the cases that rely upon *Taxpayers*, have established a rule of common-law that an award of costs under the MEPA includes attorney fees. Accordingly, plaintiff asks us to disregard the statutory nature of costs and find that the inclusion of attorney fees as costs in these early cases has created a common-law precedent that we should follow. While our Supreme Court in *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975), recognized that the Legislature "left to the courts the important task of giving substance to the standard by developing a common law of environmental quality," this common law of environmental quality refers not to the meaning to be afforded well-defined legal terms such as "costs," but rather to interpreting what constitutes environmental pollution or impairment. Thus, we find that the concept of a common law of environmental quality, as stated in *Ray*, does not encompass misinterpretations of terms of art such as "costs" and does not support plaintiff's position.

Plaintiff also alleges that the *Piller* decision contravenes the doctrine of stare decisis. However, before *Piller*, this Court had issued opinions deciding the

issue both ways. The *Piller* panel found that the holding in *Taxpayer*, as it relates to attorney fees, was essentially dicta and concluded that the reasoning of the *PBB* case was more persuasive. Furthermore, before Administrative Order No. 1990-6, prior opinions of this Court were not binding on subsequent panels addressing the same issue. Consequently, for purposes of stare decisis, the *Piller* case, as the first case addressing the issue since 1990, represents the precedent-setting opinion and the one we are bound to follow.

Lastly, plaintiff argues that, as a matter of public policy, this Court should disagree with the *Piller* opinion because to hold that citizens who initiate environmental cases cannot recover attorney fees will have a chilling effect on such litigation. Although we are completely sympathetic to plaintiff's concern in this regard, we believe that this is a policy matter to be resolved by the Legislature, and not by this Court. As the statutory sections at issue are now written, we have no choice but to conclude that the Legislature did not intend for attorney fees to be recoverable under the MEPA.

Affirmed.

POLICE OFFICER LIABILITY IN HIGH-SPEED PURSUITS: A STUDY REPORT TO THE MICHIGAN LAW REVISION COMMISSION[1]

I. Summary.

In the summer of 1996 the Michigan Law Revision Commission issued a special report on gross negligence in Michigan. A section of that special report addressed the question of police officer liability for claims arising out of high-speed pursuits. Although the literature on accident rates in high speed pursuits is sparse and the research on the subject not especially noteworthy for its comprehensiveness, research from the 1980s indicates that nationwide property damage occurs in about one of every five pursuits, personal injury in one out of seven, and death in approximately one out of every thirty-five pursuits.[2] One respondent to this Report, the Michigan Municipal Risk Management Authority (MMRMA) noted that its members have been sued 79 times for claims brought by innocent third parties arising out of high-speed pursuits. In the ten most serious accidents, 11 persons died and five were injured, with payments by MMRMA of nearly $15 million in settlement of claims and satisfaction of judgments, with an additional $1 million in fees and court costs.

In response to the complex problem of high speed pursuit by police, some states have enacted legislation requiring police departments to issue written guidelines for its officers regarding exceeding speed limits when in pursuit of actual or suspected violators,[3] but still hold officers liable for ordinary negligence. Other states have extended absolute immunity to police officers involved in high speed pursuit, or have extended qualified immunity provided the officers' conduct is not grossly negligent.[4]

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1 This study report was prepared by Professor Kevin Kennedy. Professor Kennedy wishes to acknowledge the valuable research assistance provided by Russell Meyers, Class of '98, Detroit College of Law at Michigan State University.

2 Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit,* 70 MARQUETTE L. REV. 237, 239 n.4 (1987). For a discussion of the literature on the subject, see Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements,* 80 J. CRIM. L. & CRIMINOLOGY 521 (1989). *See also* Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander Is Injured,* 30 VALPO. U. L. REV. 161 (1995).

3 *See, e.g.*, WIS. STAT. § 346.03(6).

4 *See* Phillip M. Pickus, *Police Officer Pursuing Suspect Owes Duty of Care to Third*

This special report was distributed to interested persons in the Michigan legal community, including members of the Michigan State Bar Association and law professors at the five Michigan law schools. The most active respondent has been the Michigan Municipal Risk Management Authority (MMRMA), created by the Legislature and authorized to provide risk management and financing services to local units of government in Michigan. The MMRMA represents approximately 30 percent of the 475 police agencies in the State. The MMRMA's response to the Commission's special report, and a proposed amendment to the Government Tort Liability Act, is attached as Appendix A.

The MMRMA endorses a proposal that the GTLA, M.C.L. § 691.1407, be amended to provide tort immunity to police officers and their employers from claims arising out high-speed pursuits, coupled with a provision for compensation to innocent third persons for personal injury or property damage according to a fixed schedule.

II. Introduction.

The subject of government tort claims and liability is of special interest to the Michigan Law Revision Commission, especially as it relates to the issue of liability for police officers and their employers for injuries resulting from high-speed pursuits. This study report examines the issue of police officer liability in high-speed pursuit cases under the gross negligence standard contained in the Government Tort Liability Act (GTLA).[5] The report includes a 50-state survey on government employee immunity and the standards other states use for imposing liability on government employees, be it ordinary negligence, gross negligence, or willful misconduct. With varying qualifications, three states -- Nebraska, Pennsylvania, and California -- have extended absolute immunity to police officers for claims arising out of high-speed pursuits.

Of special note is the case law development of police officer liability under the GTLA's gross negligence standard.[6] Prior to the 1986

Parties Injured by the Fleeing Suspect, 21 BALT. L. REV. 363, 370 n.43 (1992).

5 M.C.L. §691.1407, M.S.A. §3.996(107).

6 The Michigan Court of Appeals has issued a number of opinions dealing with gross negligence under the GTLA outside the context of police officer liability. See, e.g., Green v. Benton Harbor School Dist., No. 141667 (Mich. Ct. App. Mar. 31, 1993)(defendants' conduct in approaching

amendments to the GTLA -- where the standard of recovery against individual government employees was ordinary negligence[7] -- the Michigan Supreme Court showed great solicitude for the dilemma that police officers often confront in situations calling for quick and decisive action:

> Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful activity, and the apprehension of wrongdoers. The determination of what type of action to take . . . is entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner . . . .[8]

The Legislature responded sympathetically to these concerns when it adopted the 1986 GTLA amendments. It must be remembered that cases addressing police officer immunity and liability under the pre-1986 version of the GTLA[9] -- which made ordinary negligence the standard of liability for individual government employees, and still does for government employers in cases involving automobile negligence -- would today undergo a more rigorous screening under the statutory gross negligence standard. One of those pre-1986 cases, *Frohman v. City of Detroit*,[10] is

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student who jumped school yard fence and was raped on private property did not constitute gross negligence as a matter of law); Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dep't, 198 Mich. App. 103, 497 N.W.2d 551 (1993)(the mens rea for wanton and wilful misconduct is greater than the reckless substantial lack of concern for gross negligence); Reese v. Wayne County, 193 Mich. App. 215, 483 N.W.2d 671 (1992)(where county had no duty to remove natural accumulation of snow, county employees likewise had no such duty); Tallman v. Markstrom, 180 Mich. App. 141, 446 N.W.2d 618 (1989)(allegation that teacher was grossly negligent in permitting student to use a table saw without safety devices sufficient to withstand motion for summary disposition).

7 The standard of liability for units of government in cases involving automobiles remains ordinary negligence. *See* Friser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (1983).

8 Zavala v. Zinser, 420 Mich. 567, 659-60, 363 N.W.2d 641 (1984).

9 *See, e.g.*, Friser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (1983); Frohman v. City of Detroit, 181 Mich. App. 400, 450 N.W.2d 59 (1989). Before the 1986 amendments, a police officer could be personally liable for ordinary negligence in driving cases. In most cases it will be difficult for plaintiffs to meet the statutory gross negligence standard in order to establish individual liability, although the police officer's employer may nevertheless be held liable for ordinary negligence under the motor vehicle exception to governmental immunity, M.C.L. § 691.1405, M.S.A. § 3.996(105).

10 181 Mich. App. 400, 450 N.W.2d 59 (1989).

particularly noteworthy for its candor. In the aftermath of a high-speed chase, the pursued vehicle entered an intersection striking the plaintiff's car. Although the police officer was not personally liable because he acted in the course of his employment and was performing a discretionary act, the Court of Appeals was nevertheless constrained to find the City of Detroit vicariously liable for the officer's negligence under the motor vehicle exception to governmental immunity. In so holding, the Court of Appeals issued the following invitation:

> We invite the Supreme Court or Legislature to establish a bright line test which provides that a decision to engage in pursuit, as a matter of law, cannot be the basis of a claim of negligence. Only when the officer's driving itself is a direct cause of an injury would the question of negligence be submitted as a fact question to the jury. The determination should not turn on how the officer was conducting the pursuit, but rather on what effect the manner in which the officer drove his vehicle had on the cause of the accident.[11]

It appears that the court's invitation has been declined by the Supreme Court. In 1994, in *Dedes v. Asch*, that Court held that the use of the definite article "the" before "proximate cause" in M.C.L. § 691.1407(2)(c), M.S.A. § 3.996(107)(2)(c), could not limit a plaintiff's recovery in a case in which a government employee is grossly negligent and the plaintiff or some third party is also a cause of the accident.[12]

III. Michigan Case Law Developments Under the 1986 GTLA Amendments.

Five Court of Appeals' decisions have addressed the liability of police officers under the 1986 GTLA amendments. Two of three recent Court of Appeals' decisions involving the individual liability of police

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11 Frohman, 181 Mich. App. at 414-15, 450 N.W.2d 59.

12 *See* Brown v. Shavers, 210 Mich. App. 272, 532 N.W.2d 856 (1995), where the court rejected the defendant-officer's argument that since it was the suspect who shot the bystander, and not the officer, that the officer could not be "the" proximate cause of the victim's death. *See also* Michelle L. Hirschauer, *Casenote: Dedes v. Asch*, 72 U. DET. MERCY L. REV. 685 (1995).

As the 50-state survey below shows, a few states have addressed the joint tortfeasor problem in the immunity context by making the government defendant liable only for its pro rata share of damages. *See, e.g.*, IDAHO CODE § 6-903(a). In 1995, the Michigan Legislature abolished joint and several liability in most tort cases, and substituted a several liability legal regime. *See* M.C.L. § 600.6304(4).

officers have turned on the issue of whether the police officer breached a duty owed to the plaintiff. The third turned on the issue of whether the police officer acted in a grossly negligent manner as a matter of law.

In the first of the two duty cases, *Jackson v. Oliver*,[13] the issue was whether the representative of a driver of a vehicle who is killed while fleeing police who are in hot pursuit has a claim for wrongful death. The court in *Jackson v. Oliver* held that police officers in pursuit of a suspect did not owe the suspect a duty to refrain from chasing the suspect at speeds dangerous to the suspect.

In the second breach of duty case, *White v. Humbert*,[14] the Court of Appeals concluded that a police officer who is at the scene of a reported crime, is informed of the danger to a specific victim, and is in a position to render possible assistance owes a specific duty to the victim so that the public duty doctrine[15] does not apply. The court in that case was careful to stress that "this does not make the police the guarantor of the safety of every crime victim. . . . [T]he officer is immune unless his conduct rises to the level of gross negligence."[16]

In a case dealing specifically with the issue of gross negligence, *Brown v. Shavers*,[17] a robbery victim was caught in the cross-fire between an off-duty police officer and the suspect. The court concluded that the officer's decision to draw his weapon and confront the robber was discretionary and entitled to immunity, and that once the officer was fired upon he was entitled to defend himself. The court concluded that "it is

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13 204 Mich. App. 122, 514 N.W.2d 195 (1994).

14 206 Mich. App. 459, 522 N.W.2d 681 (1994).

15 The public duty doctrine provides that law enforcement personnel owe a duty to the general public to provide protection, and not to any specific individual, unless a special relationship exists between the official and the individual such that the performance by the official would affect the individual in a manner different in kind from the way performance would affect the public. Harrison v. Director, Dep't of Corrections, 194 Mich. App. 446, 456-57, 487 N.W.2d 799 (1992). For a discussion of the public duty doctrine, see Mark L. Van Valkenburgh, *Note, Massachusetts General Laws Chapter 258, § 10: Slouching Toward Sovereign Immunity,* 29 NEW ENGLAND L. REV. 1079 (1995); Karen Mahon Tullier, *Note, Governmental Liability for Negligent Failure to Detain Drunk Drivers,* 77 CORNELL L. REV. 873 (1992).

16 White, 206 Mich. App. at 465.

17 210 Mich. App. 272, 532 N.W.2d 856 (1995). The court in Brown also concluded that the plaintiffs had not made out a case for an exception to the public duty doctrine. 210 Mich. App. at 275, 532 N.W.2d 856.

clear that plaintiff has set forth nothing that can be characterized as gross negligence."[18]

The fourth and fifth cases were both decided on September 10, 1986, involved the identical issue, but reached opposite conclusions on the question of whether police officers engaged in a high-speed pursuit owe a duty of care to passengers in the fleeing vehicle. In *Cooper v. Wade*,[19] the Court of Appeals declined to extend the holding of *Jackson v. Oliver, supra*, to passengers in a pursued vehicle, and concluded that a duty of care is owed to such passengers. The Court added that "a limitation of liability must come, if at all, from the Legislature or from the Supreme Court's narrowing of Fiser [v. Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (1983), holding the a government employer can be held liable for the negligent operation of a motor vehicle by one of its employees]."[20] In the other case, *In the Matter of the Estate of Henderson*,[21] the Court of Appeals concluded that police officers owe no duty of care to a passenger who is voluntarily in a fleeing vehicle because that person is not an innocent bystander and, thus, does not come within the rule announced in *Fiser*. The Court explained that unlike an innocent third party, a passenger has voluntarily placed himself in the hands of the driver. He can exercise control in encouraging the driver to stop and obey the police. In making their split second decision in regard to a chase, the police should only have to consider the safety of the innocent public, not what may be going on inside the car they are pursuing or who may be in the car.[22] However, given the conflict with the *Cooper* opinion, the court in *Henderson* granted rehearing and deferred to the *Cooper* decision pursuant to Supreme Court Administrative Order 1996-4. The court noted that but for Administrative Order 1996-4, it would have adhered to its earlier decision, describing the reasoning in *Cooper* as "flawed."

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18 Brown, 210 Mich. App. at 277, 532 N.W.2d 856.

19 218 Mich. App. 649 (1996).

20 *Id.*, 218 Mich. App. at 657.

21 1996 WL 518017 (Mich. Ct. App. 1996), *rehearing granted and overruled*, 1996 WL 682922 (1996). Supreme Court Administrative Order 1996-4 provides that a prior Court of Appeals' decision is controlling authority unless reversed by the Supreme Court or a special panel of the Court of Appeals.

22 *Id.* at 3, *rehearing granted and overruled*, 1996 WL 682922 (1996).

The next Part of this study report contains the results of a 50-state survey dealing with government employee immunity from suit, and the standard of care (e.g., ordinary negligence, gross negligence) government employees must exercise in order to enjoy immunity from suit.

IV. Other States' Government Tort Claims Statutes.

A. State Tort Immunity Statutes.

The following tables summarize the government employee and employer immunity law of the other 49 states and the District of Columbia.

STATE	IMMUNITY ABROGATED	LIABILITY OF POLICE OFFICERS	RESPONDEAT SUPERIOR LIABILITY OF CITIES AND COUNTIES	DAMAGE CAPS
ALABAMA	ALA. CODE § 6-5-338	absolute immunity for discretionary acts; negligence for other acts: § 11-47-190	liability for negligence of employees: § 11-47-190	$100,000/ person $300,000/ occurrence: § 11-47-190
ALASKA	AK. STAT. § 09.65.070	absolute immunity for discretionary acts; negligence for other acts	absolute immunity for discretionary acts; negligence for other acts	
ARIZONA	AR. REV. STAT. §§ 12-820.02, 26-314	gross negligence	gross negligence, wilful misconduct, bad faith: § 26-314	
ARKANSAS	ARK. CODE ANN. § 21-9-301	negligence, but only to insurance limits; otherwise, intentional or malicious conduct: § 19-10-305	no respondeat superior liability: § 21-9-301	$25,000/ person $50,000/ occurrence (limits of mandatory liability insurance): § 21-9-301
CALIFORNIA	CAL. GOVT CODE § 820	negligence, but no liability for emergency or high-speed pursuit: CAL. VEH. CODE §§ 17004, 17004.7	same as private person, but respondeat superior liability limited to same extent as employee liability: CAL. GOVT CODE §§ 815, 820.2	
COLORADO	COLO. REV. STAT. § 24-10-106	wilful, intentional, malicious conduct: § 24-10-118(2)(a)	no liability unless employee acted wilfully, intentionally, or maliciously: § 24-10-106(1), (3)	$150,000/ person $600,000/ occurrence: § 24-10-114, -118
CONNECTICUT	CONN. GEN. STAT. § 52-557n	no personal liability	negligence	
DELAWARE	DEL. CODE ANN. tit.10, § 4001	gross, willful, or wanton negligence, or bad faith conduct; no liability in emergency vehicle cases: § 4106	liable to same extent as employee	
DISTRICT OF COLUMBIA	D.C. CODE § 1-1212	negligence; gross negligence for emergency vehicles: §§ 1-1212, 4-176	liable to same extent as employee	
FLORIDA	FLA. STAT. ANN. § 768.28	personal liability for conduct that is in bad faith, malicious, or in wanton & wilful disregard of safety: § 768.28(9)(a)	negligence	$100,000/ person $200,00/ occurrence: § 768.28(5)

GEORGIA	GA. CONST. art. I, § 2, para. XI	negligence: GA. CONST. art. I, § 2, para. XI	not liable for torts committed by police officers: GA. CODE ANN. § 36-33-3	
HAWAII	HAW. REV. STAT. § 662-2	negligence	liable to same extent as employee	
IDAHO	IDAHO CODE § 6-901	negligence	negligence: § 6-903	among joint tortfeasors, liability limited to pro rata share of total damages: § 6-903(a)
ILLINOIS	ILL. STAT. ANN. ch. 745, § 5/1	wilful and wanton conduct: § 10/2-202	liable to same extent as employee: § 10/2-109	
INDIANA	IND. CONST. art. 4, § 24	negligence: IND. CODE ANN. § 34-4-16.5-3	liable to same extent as employee	$300,000/ person $5 million/ occurrence: § 34-4-16.5-4
IOWA	IOWA CODE ANN. § 670.2	negligence	liable to same extent as employee: § 670.2	
KANSAS	KAN. STAT. ANN. § 75-6101	negligence: § 75-6104	liable to same extent as employee: § 75-6103	$500,000/ occurrence: § 75-6105 no recovery of punitive damages: § 75-6105(c)
KENTUCKY	KY. REV. STAT. ANN. § 44.072	negligence	liable to same extent as employee	$100,000/ person $250,000/ occurrence: § 44.070(5)
LOUISIANA	LA. CONST. art. 2, § 10	negligence in discretionary functions malicious, willful, reckless misconduct in other contexts: LA. CIV. CODE ANN. § 9:2798.1	liable to same extent as employee	
MAINE	ME. REV. STAT. tit. 14, § 8104-A	absolute immunity for discretionary acts: ME. REV. STAT. tit. 14, § 8111 negligence in use of force: ME. REV. STAT. tit. 17-A, § 107	negligence: ME. REV. STAT. tit. 14, § 8104-A	$300,00/ occurrence: ME. REV. STAT. tit.14, § 8105
MARYLAND	MD. ANN. CODE, tit. 12, § 12-104	malice or gross negligence: MD. ANN. CODE tit. 5, § 5-399.2(b); gross negligence in operation of emergency vehicle: § 19-103(b)	liable to same extent as employee: MD. ANN. CODE tit. 5, §§ 5-399.2(a), 5-403(b)	$200,000/ person $500,000/ occurrence: § 5-403(a)
MASSACHUSETTS	MASS. GEN. LAWS ch. 258, § 2	no personal liability: § 2	liable for negligence of employees: § 2	
MINNESOTA	MINN. STAT. ANN. § 3.736	negligence: § 466.04, subd. 1a	negligence: §§ 3.736, 466.02	$200,000/ person $600,000/ occurrence: § 3.726, subd. 4
MISSISSIPPI	MISS. CODE ANN. § 11-46-5	no personal liability: § 11-46-7(2)	liable if police officer shows reckless disregard of safety of others: § 11-46-9(c)	$50,000, increased to $500,000 after 2001: § 11-46-15
MISSOURI	MO. STAT. ANN. § 537.600	negligence: § 537.600	negligence: § 537.600, subd. 1(1)	$100,000/ person $1 million/ occurrence: § 537.610

MONTANA	MONT. CONST. art. 2, § 18	negligence: MONT. CODE ANN. § 27-1-701	negligence: MONT. CODE ANN. § 2-9-102	
NEBRASKA	NEB. REV. STAT. § 13-910	no personal liability for high-speed pursuits: § 13-911	negligence: § 13-908	$1 million/ person $5 million/ occurrence: §§ 13-922, 13-926
NEVADA	NEV. REV. STAT. § 41.031	negligence: § 41.032	liable to same extent as employee	
NEW HAMPSHIRE	N.H. REV. STAT. § 541-B:19	no personal liability if employer is liable under respondeat superior: § 541-B:9-a	negligence	$250,000/ person $2 million/ occurrence: § 541-B:14
NEW JERSEY		negligence, including operation of emergency vehicles: N.J. STAT. ANN. §§ 59:3-1, 39:4-91	liable to same extent as employee (§ 59:2-2), unless employee's conduct constitutes malice or willful misconduct (§ 59:2-10)	
NEW MEXICO	N.M. STAT. ANN. § 41-4-4	negligence	liable to same extent as employee	
NEW YORK	N.Y. LAWS ANN. § 8	gross negligence in transporting person to hospital: § 9.59(a) negligence in other motor vehicle settings: § 9.59(b)	negligence of police officers: N.Y. LAWS ANN. § 50-j negligence in operation of vehicles: N.Y. LAWS ANN. § 50-a	
NORTH CAROLINA	N.C. GEN. STAT. § 160A-485	negligence: § 143-291	negligence, but only to extent of liability insurance purchased by city: § 160A-485	lesser of insurance policy limits or $150,000: § 143-291(a)
NORTH DAKOTA	N.D. CODE § 32-12.1-03	gross negligence, reckless conduct, willful or wanton misconduct: *Binstock v. Fort Yates Sch. Dist.*, 463 N.W.2d 837 (N.D. 1990)	negligence: N.D. CODE § 32-12.1-03	$250,00/person $500,000/ occurrence: § 32-12.1-03, subd. 2
OHIO	OHIO REV. CODE ANN. § 2744.02	acts committed with malicious purpose, in bad faith, or in wanton or reckless manner: § 2744.03(a)(6)(a)	negligence in operation of motor vehicle, unless police officer was responding to emergency call and operation did not constitute willful or wanton misconduct: § 2744.02(B)(1)(a)	noneconomic damages cap of $250,000: § 2744.05 (C)(1)
OKLAHOMA	OKLA. STAT. tit. 51, § 153	willful and wanton negligence: *Holman v. Wheeler*, 677 P.2d 645 (1983)	negligence: § 153	$100,000/ person $1 million/ occurrence: § 154
OREGON	OR. REV. STAT. § 30.265	no personal liability: § 30.265(1)	negligence: § 30.265(1)	$100,000/ person $500,000/ occurrence: § 30.270
PENNSYLVANIA	42 PA. CONS. STAT. ANN. § 8522	willful misconduct generally: § 8550 absolute immunity from claims brought by persons fleeing police in high-speed pursuit: § 8542(a),(b)(1) recklessness in other high-speed pursuit settings: 75 PA. CONS. STAT. ANN. § 3105	negligence, but absolute immunity from claims brought by persons fleeing police in high-speed pursuit: § 8542(a), (b)(1)	city liability limited to $500,000/ occurrence: § 8553(b) state liability limited to $250,000/ person $1 million/ occurrence: § 8528(b)
RHODE ISLAND	R.I. GEN. LAWS § 9-31-1	recklessness in operation of emergency vehicle: § 31-12-9	negligence: § 9-31-1	$100,000/ occurrence: § 9-31-2
SOUTH CAROLINA	S.C. CODE ANN. § 15-78-20	no personal liability, unless conduct constituted intent to harm or actual malice: § 15-78-70(b)	negligence: § 15-78-40	$250,000/ person $500,000/ occurrence: § 15-78-120

SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 21-32A-1	no personal liability unless government employer purchases liability insurance: § 21-32A-2	negligence	liability to insurance policy limits: § 21-32A-1
TENNESSEE	TENN. CODE ANN. § 29-20-202, -205	negligence	negligence	lesser of liability insurance limits, or $50,000/ person $300,000/ occurrence: § 29-20-403
TEXAS	TEX. CIV. PRAC. & REM. CODE ANN. § 101.201	no personal liability: § 101.026	negligence: § 101.0215	$250,000/ person $500,000/ occurrence: § 101.023(c)
UTAH	UTAH CODE ANN. § 63-30-4	no personal liability except for fraud or malice: § 63-30-4	negligence: § 63-30-10	$250,000/ person $500,000/ occurrence: § 63-30-34
VERMONT	VT. STAT. ANN. tit. 29, § 1403 (municipalities); tit. 12, § 5601 (state)	gross negligence or willful misconduct: tit. 12, § 5602	negligence	state, $250,00/ person $1 million/ occurrence: tit. 12, § 5601(b) municipalities, not in excess of liability insurance limits: tit. 29, § 1404
VIRGINIA	VA. CODE ANN. § 8.01-195.3 (waived as to state only)	negligence	same as liability of employee	$100,000: § 8.01-195.3
WASHINGTON	WASH. REV. CODE ANN. § 4.96.010	negligence: § 4.96.041	negligence	
WEST VIRGINIA	W. VA. CODE § 29-12A-4	negligence	negligence: § 29-12A-4(c)(2)	noneconomic damages capped at $500,000: § 29-12A-7
WISCONSIN	*Holytz v. Milwaukee*, 17 Wis. 2d 26 (1961)	negligence	negligence	$50,000: WIS. STAT. ANN. § 893.80(3)
WYOMING	WYO. STAT. § 1-39-102	negligence: *State v. Dieringer*, 708 P.2d 1 (1985)	negligence: § 1-39-105, -112	$250,000/ person $500,000/ occurrence: § 1-39-118

As the foregoing tables show, with regard to the individual liability of police officers, states fall into three broad categories. The first group holds police officers personally liable for their negligent acts, but extends immunity for acts that fall within certain enumerated discretionary functions. States in this category are Alabama, Alaska, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. A second group of states holds police officers personally liable only if their conduct was grossly negligent, malicious, fraudulent, or wanton and wilful. States in this group are Arizona, Arkansas, Colorado, Delaware, Florida, Illinois,[23] Louisiana, Maryland, North Dakota, Ohio, Oklahoma,

[23] ILL. ANN. STAT. § 10/1-210 defines "willful and wanton conduct" as follows:

Pennsylvania, South Carolina, Utah, and Vermont.[24] A third group of states relieves police officers from all personal liability, and instead holds the government employer liable under respondeat superior. States in this group are Colorado, Connecticut, Massachusetts, Mississippi, Nebraska, New Hampshire, Oregon, South Carolina, South Dakota, Texas, and Utah. Interestingly, 35 states impose damage caps on the recovery of either compensatory damages or damages for noneconomic injuries in the government tort liability context. All states with either type of damage cap also prohibit an award of punitive damages.

B. Police Officer Liability for High-Speed Pursuits.

Turning to the question of liability for high-speed pursuits, three states have addressed this issue through specific legislation.

1. *Nebraska's Legislative Response.*

Nebraska relieves a police officer from personal liability for claims arising out of high-speed pursuits brought by innocent third parties, but the government employer remains liable for the payment of damages.[25] Section 13-911, Nebraska Revised Statutes, provides:

> In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer. . . .
>
> For purposes of this section, vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of

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> "Willful and wanton conduct" as used in this [Governmental Employees Tort] Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

24 The District of Columbia defines "gross negligence" as "wilful intent to injure" or "a reckless or wanton disregard of the rights of another . . . ." D.C. CODE § 4-162.

25 NEB. REV. STAT. § 13-911. Nebraska also requires each law enforcement agency within the state to adopt a five-point policy regarding high-speed pursuits. NEB. REV. STAT. § 29-211.

another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

Nebraska also requires law enforcement agencies within the state to adopt a motor vehicle pursuit policy. Section 29-211, Nebraska Revised Statutes, provides:

> Each law enforcement agency within the State of Nebraska shall adopt and implement a written policy regarding the pursuit of motor vehicles. Such policy shall contain at least the following elements:
> (1) Standards which describe when a pursuit may be initiated, taking into consideration the nature and severity of the offense involved;
> (2) Standards which describe when a pursuit is to be discontinued, giving special attention to (a) the degree of danger presented to the general public and the pursuing officer and (b) the probability of later apprehension of the subject based upon his or her identification;
> (3) Procedures governing the operation of pursuits including, but not limited to, the number and types of vehicles which may be used, the method of operation of such vehicles, and the exercise of supervision during pursuits;
> (4) Procedures governing pursuits which include other law enforcement agencies or which extend into the jurisdiction of other law enforcement agencies; and
> (5) A system of continued planning and training of personnel regarding the proper handling of pursuits.

2. *Pennsylvania's Legislative Response.*

Pennsylvania extends absolute immunity to both a police officer and his or her employer for claims brought by a person fleeing the police in high-speed pursuit.[26] Section 8542, title 42, Pennsylvania Consolidated Statutes Annotated, provides:

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[26] 42 PA. CONS. STAT. ANN. § 8542(a); 75 PA. CONS. STAT. ANN. § 8545; Hawks v. Livermore, 629 A.2d 270 (Pa. 1993); Dennis v. City of Philadelphia, 620 A.2d 625 (Pa. 1993).

> **(b) Acts which may impose liability**.--The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> (1) *Vehicle liability*.--The operation of any motor vehicle in the possession or control of the local agency, provided that the local agency shall not be liable to any plaintiff that claims liability under this subsection if the plaintiff was, during the course of the alleged negligence, in flight or fleeing apprehension or resisting arrest by a police officer or knowingly aided a group, one or more of whose members were in flight or fleeing apprehension or resisting arrest by a police officer. . . .
>
> * * * *
>
> **(d) Evidence**.--Whenever any plaintiff claims liability under subsection (b)(1), evidence is admissible to demonstrate that the plaintiff, at any time during the course of the alleged negligence, was engaged or participating in willful misconduct, including, but not limited to, the illegal possession of controlled substances, firearms or ammunition.

As to other persons injured in such a pursuit, the standard is one of recklessness.[27]

The Michigan Court of Appeals' decision in *Jackson v. Oliver, supra*, essentially reaches the same result as section 8542(b)(1) by holding that a police officer owes no duty of care to a fleeing suspect.

3. *California's Legislative Response.*

California has taken the boldest step. California provides that a police officer is not liable for personal injuries or death to any person when in the immediate pursuit of an actual or suspected law violator.[28] Section 17004 of the California Vehicle Code provides:

> A public employee is not liable for civil damages on account of personal injury to or death of any person or

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27 Roadman v. Bellone, 379 Pa. 483, 108 A.2d 754 (1954).

28 CAL. VEH. CODE § 17004.

damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

California extends this immunity to public agencies employing police officers in cases in which the pursued vehicle causes injury to a third person if the public employer adopts a written policy on the safe conduct of vehicular pursuits. Section 17004.7(b)-(c) of the California Vehicle Code provides:

> (b) A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle.
>
> (c) If the public entity has adopted a policy for the safe conduct of vehicular pursuits by peace officers, it shall meet all of the following minimum standards:
>
> > (1) It provides that, if available, there be supervisory control of the pursuit.
> >
> > (2) It provides procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit.
> >
> > (3) It provides procedures for coordinating operations with other jurisdictions.
> >
> > (4) It provides guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or

should be terminated.[29]

The California statute further provides that "[a] determination of whether a policy adopted pursuant to subdivision (c) complies with that subdivision is a question of law for the court."[30]

V. Suggested Reforms.

There are any number of legislative responses to the problem of police-officer liability for high-speed pursuits, including, of course, maintaining the status quo. An alternative approach predicated on legislative reform would be to add special provisions to the GTLA for high-speed pursuits.

The following draft language prepared by Commissioner George Ward would amend the GTLA by adding a new subsection to M.C.L. § 691.1407 that would provide:

> (4)(i) A government agency, its law enforcement officers, employees, agents, or volunteers shall be immune from civil liability to an innocent third party for personal injury or property damage caused by the vehicle pursued in an official vehicular pursuit if the requirements of subsection (ii) have been met. Notwithstanding such immunity, an innocent third party, or his or her estate, shall receive compensation for personal injury or property damage caused by the pursued vehicle, according to the following schedule:
>
> > (a) Death, hemiplegia, paraplegia, or quadriplegia resulting in a total permanent functional loss, $350,000.
> >
> > (b) Permanent loss of vision of both eyes, $325,000.

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29 CAL. VEH. CODE § 17004.7(c)(1)-(4).

30 Id., § 17004.7(d).

(c) Injury to the brain which permanently impairs cognitive functions, rendering the person incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal daily living, $300,000.

(d) Loss of limb or functional use of a limb, $200,000.

(e) Permanent loss of vision in one eye, $150,000.

(f) Permanent loss of use of important body functions, $75,000.

(g) Property damage, in amount equal to the lesser of (i) the cost of repair of such property or (ii) the fair market value of such property immediately preceding the accident.

The schedule of compensation shall in no way limit the right to receipt of benefits payable to an injured person for his or her care, recovery, and rehabilitation under the provisions of Chapter 31, Motor Vehicle Personal and Property Protection.

Notwithstanding the immunity from tort liability provided under this subsection, a law enforcement officer, employee, agent, or volunteer remains subject to discipline by his or her employer or agency for any failure to observe the employer's pursuit policy.

(ii) Tort liability shall be displaced by the compensation schedule as provided above only in cases where the government agency has adopted a Safe Vehicular Pursuit Policy and the pursuit in

question was conducted consistently with the adopted policy. A Safe Vehicular Pursuit Policy shall, at a minimum, include all of the following:

> (a) If available, there shall be supervisory control of the pursuit.
>
> (b) Procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit shall be stated.
>
> (c) Procedures for coordinating operations with other jurisdictions shall be stated.
>
> (d) Guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated shall be stated.

A determination of whether the policy of a governmental agency complies with subsection (ii) or whether a particular vehicular pursuit was conducted consistently with an adopted policy are questions of law for the court to decide.

A similar proposal has been made by the MMRMA in its submission to the Commission. See Appendix A.

The Commission expressed concerns with this proposal, including the following:

1. Who is an "innocent" person for purposes of this proposal? Does "innocent" mean "non-negligent;" does it mean less than 50 percent comparatively negligent; or does it have some other meaning?

2. In the event of a high-speed pursuit initiated in one jurisdiction and continuing through and assisted by police officers from one or more additional jurisdictions, how is liability to be apportioned? Should a Commission be created to award compensation to victims and to apportion damages among municipalities?

3. Although medical and health benefits available under the no-fault law would be unaffected by this proposal, do the damage caps adequately compensate for actual economic losses suffered by a victim and his or her family? Should the damage caps be limited to non-economic injuries, i.e., damages for pain and suffering?

4. Is it advisable to state actual dollar amounts for recoveries? If actual dollar amounts are stated, should they be indexed in order to account for the impact of inflation?

5. Does this proposal amount to an unfunded mandate from the Legislature to municipalities?

The Commission will continue to study this issue during 1997.

Appendix A

RISK Michigan Municipal MANAGEMENT AUTHORITY

June 10, 1996

Professor Kevin C. Kennedy
Detroit College of Law at MSU
130 E. Elizabeth Street
Detroit, MI 48210

Re: Amending Government Tort Liability

Dear Professor Kennedy:

I would like to personally convey my appreciation to the Michigan Law Revision Commission for its invitation to address the group at its September 23, 1996, meeting. It is my belief that the Commission's intention to review some of the problems that have occurred as a result of the treatment of emergency vehicle operations under the governmental immunity statute is an endeavor that will be beneficial to us all. Perhaps a little background and statistical information would be helpful.

The Michigan Municipal Risk Management Authority (MMRMA) is statutorily created and is authorized to provide risk management and risk financing services to Michigan local governments acting as intergovernmental pools. These pools are not insurance companies and do not operate as insurance companies. Losses paid by the pools and the cost associated with administrating them are paid by the taxpayers of Michigan. The MMRMA, together with the Michigan Municipal League and the Michigan Township Participating Plan provide insurance protection to virtually all of Michigan local governments with the exception of the cities of Detroit and Warren and a few of the larger counties.

There are approximately 475 police agencies in Michigan employing about 18,600 police officers and sheriff deputies. The MMRMA represents approximately 30% of these police agencies.

Police pursuits have been and continue to be a very difficult and challenging issue for our programs. While everyone would agree that our police should protect the public and uphold the law, which by definition includes the apprehension of lawbreakers, there is disagreement about the method and means utilized by the police in fulfilling that duty. Police chases that result in property damage or injury are only a small percentage of the total number of police pursuits. Most pursuits end with the fleer being captured by the police with injuries to no one. But, it is those few cases where innocent parties are injured or die that are the areas of greatest concern to all of us.

In the last eight years, MMRMA Members have been sued a total of 79 times for chases that have resulted in accidents involving innocent third parties, usually when they are struck by the fleer's vehicle. In the ten most serious lawsuits, involving 11 deaths and 5 injuries, we have paid judgments and settlements totaling $14,542,574.00 and almost another million dollars in costs and attorney fees defending those cases. It must be emphasized that although these losses are paid directly by the MMRMA on behalf of its Members, the necessary funds ultimately are recovered from Michigan taxpayers.

14001 Merriman • Livonia, MI 48154 • (313) 513-0300 • FAX (313) 513-0318

RISK Michigan Municipal
MANAGEMENT
AUTHORITY

We encourage and support the Commission's efforts to bring sense, reason and order to this area. Our police agencies are conflicted with pressures on the one hand to make our streets safe by apprehending criminals and on the other being penalized by jury verdicts that are almost punitive in nature. We must not forget that it is the fleer who is the underlying cause of the pain, suffering and even death that results from this small percentage of chases. It's not the police officer's car that strikes the innocent person, it's the fleer's vehicle that had the accident and caused the damages.

I believe that the initial proposal to be studied by the Commission is a grant of immunity to protect the governmental unit and it's employees, along with a schedule of fair compensation to be paid to victims and a simplified administrative mechanism to award it. It would seem that the best interests of all would be served by such a scheme. Victims would be quickly awarded adequate damages, unreduced by attorney fees, costs or the passage of time and the taxpayers of the state would not be financing the litigation lottery that has existed in the past.

Very truly yours,

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY

Rufus L. Nye
Executive Director

RLN/teb/gbm

cc: Mr. George Ward
Mr. Christopher Johnson
Mr. Timothy E. Belanger

teb96/kennedy.

RISK Michigan Municipal MANAGEMENT AUTHORITY

August 21, 1996

Mr. Kevin C. Kennedy
Professor of Law
Detroit College of Law
at Michigan State University
130 East Elizabeth Street
Detroit, MI 48201

Re: Amending Government Tort Liabilities

Dear Mr. Kennedy:

Enclosed please find a proposal paper that Christopher Johnson and myself have prepared for you to submit to the Michigan Law Review Commission for discussion at its September 23, 1996 meeting. Please feel free to review this prior to the meeting and call me with any comments you might have.

As I indicated to you previously, myself, Chris Johnson and the Executive Director of the MMRMA, Rufus Nye, will be attending the Commission's meeting on September 23. However, as you will recall, you advised that you would get back to us sometime closer to the meeting regarding the location and time of day. If you have that information now would you please advise me so that I can pass it on to Messrs. Johnson and Nye.

Very truly yours,

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY

Timothy E. Belanger
Claims Attorney

TEB/gbm
Enclosure

cc: Rufus L. Nye
Christopher J. Johnson

PROPOSED CHANGES TO THE GOVERNMENTAL IMMUNITY STATUTE: VICTIM COMPENSATION AND POLICE PURSUIT IMMUNITY

Police pursuits have been and continue to be a very difficult and challenging issue. Everyone would agree that our police should protect the public and uphold the law, which by definition includes the apprehension of lawbreakers. One of the methods of fulfilling that duty includes the use of controlled vehicular pursuit. Most pursuits end with the fleer being captured by the police with injuries to no one. Unfortunately, a small percentage of police pursuits do result in property damage and sometimes injury. It is those few cases where innocent persons are injured or die that are the area of greatest concern.

The Michigan Municipal Risk Management Authority (MMRMA) was created pursuant to MCL 124.5 et seq. This statute permits Michigan governmental entities to jointly share risk management and risk financing. These group self-insurance pools are not insurance companies and do not operate as insurance companies. Losses paid by these pools and the costs associated with administering them are borne by the taxpayers of Michigan.

About 98% of Michigan's counties, cities, villages and townships belong to either the MMRMA or the other major inter-governmental pools; the Michigan Municipal League Property & Casualty Pool (MML) and the Michigan Township Participating Plan (MTPP). Counties such as Genesee, Macomb, Oakland, Saginaw, and Wayne, along with cities such as Ann Arbor, Detroit, and Warren, while not members of an inter-governmental pool, have individual self insurance programs funded by taxpayer dollars.

There are approximately 18,600 police officers and deputy sheriffs in Michigan employed by approximately 475 police agencies. The MMRMA represents approximately 30% of these police agencies. In the last 8 years, MMRMA members have been sued a total of 79 times for pursuits that have resulted in accidents involving innocent persons, usually when they are struck by the lawbreaker's vehicle. In the 10 most serious lawsuits, involving 11 deaths and 5 injuries, MMRMA members paid judgments and settlements totalling $14,542,574.00 and almost another million dollars in costs and attorney fees to defend these cases.

As will be noted in the Study Report recently submitted to the Law Review Commission, various states have taken different approaches in dealing with the pursuit dilemma. The majority have statutorily implemented liability damage caps protecting governmental entities and/or their employees. (See Study Report pgs. 51-61). One state, California, has directly addressed the issue. Its approach is to provide immunity to the governmental entity and its employees, when certain objective standards are met (see Study Report pg. 58). No compensation is available to any victim under the California statute.

It is our belief that the California system could be improved upon by inclusion of an innocent victim compensation plan. Such a plan should be designed with a schedule of compensation to be paid to innocent victims with a simplified administrative mechanism. Victims would quickly receive damages, unreduced by attorney fees, costs or the passage of time.

We believe that the attached proposed amendment to MCL 691.1407 accomplishes the goal of balancing the need to apprehend dangerous criminals with a quick and fair system to compensate the innocent victim. It is hoped that this proposal will act as a foundation for discussion and consideration.

Our police agencies are conflicted with pressure on the one hand to make our streets safe by apprehending criminals and on the other by being penalized by jury verdicts that are often punitive in nature. We encourage and support the Commission's efforts to bring sense, reason and order to this issue.

(4) If a government agency adopts general guidelines to be observed by its police agency in situations where a driver of a motor vehicle ignores a lawful stop order and a pursuit of the fleeing vehicle results, the governmental agency and its officer, employee, member or volunteer shall be immune from tort liability for personal injury or property damage sustained as a result of the pursuit. However, if a police pursuit results in bodily injury or property damage to an innocent victim, the innocent victim or the estate of an innocent victim shall receive compensation according to the following schedule:

(a) Death, hemiplegia, paraplegia, or quadriplegia resulting in a total permanent functional loss: $350,000.

(b) Permanent loss of vision in both eyes: $325,000.

(c) Injury to the brain which permanently impairs cognitive functioning, rendering the person incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal daily living: $300,000.

(d) Loss of limb or functional use of a limb: $200,000.

(e) Permanent loss of vision in one eye: $150,000.

(f) Permanent loss of use of important body function: $75,000.

Notwithstanding immunity from tort liability, an employee of a police agency remains subject to departmental discipline for any negligence committed in the implementation of the department's pursuit policy.

691.1407. Governmental immunity from tort liability

Sec. 7. (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(3) Subsection (2) shall not be construed as altering the law of intentional torts as it existed prior to the effective date of subsection (2).

(5) (4) This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:

(a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.

(b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital operated by the department of corrections.

(6) (5) Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Amended by P.A.1986, No. 175, § 1, Imd. Eff. July 7.

THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT: A STUDY REPORT TO THE MICHIGAN LAW REVISION COMMISSION

In 1996, the Michigan Law Revision Commission undertook a comprehensive review of the Michigan Administrative Procedures Act (MAPA). As part of that review, the Commission retained the services of Professor Steven Croley of the University of Michigan Law School to review the current version of the MAPA and to submit a report to the Commission on suggested reforms. Professor Croley's report follows as a study report.

Professor Croley's report was distributed as a Special Report in late 1996 to state agencies, legislators, and other interested persons within the Michigan legal community, soliciting their comments. Once comments have been received and considered, the Commission intends to make recommendations for legislative action in 1997.

Revised Preliminary Report to

THE MICHIGAN LAW REVISION COMMISSION

on

THE PROPOSED ADMINISTRATIVE PROCEDURES ACT OF 1997

Steven P. Croley
University of Michigan Law School

October 10, 1996

Contents of Report

THE PROPOSED ADMINISTRATIVE PROCEDURE ACT OF 1997

I. Overview of This Report

The Michigan Law Review Commission ("Commission") has initiated serious reform of the State's administrative procedure through revision of the Michigan Administrative Procedures Act ("current APA" or "old APA"). The following discussion provides an overview of the proposed new act ("proposed APA" or "new APA"), designed to replace in its entirety the current APA. Section A explains the principles that motivate a new approach to administrative procedure in Michigan. Section B identifies certain specific areas of administrative process on which the Commission has focussed. Section C explains the basic approach taken in the design of the new APA. Finally, Section D summarizes the most significant revisions embodied in the new APA. Later below, Parts III and IV provide more detailed commentary on the proposed APA, introduced in Part II.

A. *Guiding Principles*

There is little doubt that real reform of administrative procedure in Michigan is overdue. The old APA dates to 1969. What is more, the model state administrative procedure act on which the old APA is based (which itself dates to 1961) no longer exists; in 1981, the Uniform Law Commissioners adopted a revised Model State Administrative Procedure Act. Although the current APA has seen some legislative and judicial changes since its passage, far too few of the many important developments in administrative law—on both the state and federal level—during the intervening two and two-thirds decades are reflected in Michigan law.

Three main principles underlie the Commission's present effort to bring Michigan's administrative law up to date: (1) administrative efficiency, (2) accountability, and (3) accessibility. With respect to the first, three related problems currently stand in the way of

efficient agency decisionmaking. For one, the old APA is unnecessarily long: Over the years, the old APA has become excessively lengthy and filled with needless clutter. Second, the old APA subjects agency decisionmaking to too many hurdles. Some of these hurdles are designed to ensure that agencies' decisions conform with legislative will, but more streamlined means of oversight are possible. Finally, the old APA and its case law leave open several important questions about how agencies are to proceed in certain decisionmaking contexts. Ironically, in other words, the old APA is not only too long, but it leaves several gaps. As a result, agencies' decisionmaking processes are unnecessarily tortuous in some cases, and mysterious in others.

To remedy such problems, the new APA clarifies, simplifies, restructures, and thereby enhances the effectiveness and workability of the decisionmaking procedures agencies employ. On the one hand, the new APA eliminates overly burdensome, counterproductive, or otherwise non-essential provisions of the old APA. No less importantly, the new APA clarifies and supplements provisions of the old APA that are unclear or absent. If one slogan were to capture the basic, streamlining approach taken in the new APA to simplify and organize administrative decisionmaking, that slogan might be "lean but not mean."

Nor are accountability and accessibility goals compromised in the name of simplicity. To the contrary, clarification, reorganization, and change will enhance the ability of legislators, judges, executive-branch officials, and even the general public to keep abreast of agencies' decisionmaking activities. In turn, the enhanced ability to monitor agencies will allow for greater participation in those activities, for only those who are able to understand and follow what agencies do can possibly influence agency decisions. The new APA advances accessibility, then, by making administrative decisionmaking much more user-friendly—not only for regulatory insiders but also for parties such as small businesses and ordinary citizens affected by agency activity.

B. *Focus of Report*

The scope of this Report is comprehensive: It undertakes a broad examination of the current APA, and it proposes changes relevant to many aspects of administrative decisionmaking. Simultaneously, however, it address three specific questions of particular concern to the Commission. First, exactly how can agency decisionmaking be made more user-friendly, for regulated parties and the general public alike? Are there aspects of the current Act reform of which would enable interested parties to navigate their way through Michigan's administrative regime without the aid of a veteran lawyer? Second, how might administrative decisionmaking be modernized through the new electronic communications? Can agencies make better use of e-mail and the Internet? Third, to return to the accountability theme mentioned above, what are the best institutional structures for ensuring that new, streamlined modes of agency decisionmaking reflect legislative will? In particular, is the Joint Committee on Administrative Rules a desirable form of legislative oversight, given its controversial and uncertain constitutional status? Each of these questions is addressed in the body of this Report, but a few comments concerning the new communications are in order at the outset.

While a new administrative procedure act may not be the ideal place to write new requirements pertaining to electronic communication into law—the legislature should enact appropriate legislation in a separate, focussed measure—the administrative procedure act drafted and explained in this Report does at several points incorporate references to electronic communication. For example, the new material pertaining to the *Michigan Register* refers to its availability on line. For another example, the sections in Chapter 3 concerning agency rulemaking provide for electronic notice of public hearings in the formal rulemaking context and for electronic receipt of comments during the notice-and-comment stage of informal rulemaking.

Increased use of electronic communication—even beyond the few references to it in the pages that follow—and of the Internet specifically would bring several distinct benefits. First, electronic communication would provide those affected by agencies' decisions with a very inexpensive way to learn about what agencies have done—about what administrative regulations say. Second, electronic communication would allow interested parties to keep informed about what agencies are doing—about prospective rather than past agency decisions. Third, electronic communication holds the promise of allowing parties an inexpensive way actually to participate in agency decisionmaking, rulemaking in particular.

Today, lack of information constitutes a major hurdle to public involvement in administrative decisionmaking. The Internet offers considerable promise in reducing the costs of acquiring information about agency decisionmaking. While Internet technology might not yet be affordable to the extent that a computer exists in the home of every citizen, costs of necessary hardware and software are falling, while Internet access through schools and libraries is increasingly becoming available, even in remote and rural townships. Use of the Internet as a central repository for agency information would allow everyone from individual citizens, to regulated parties, to large trade associations to stay abreast of agency activities that may affect them.

Government agencies nationwide, including agencies in Michigan, have already begun to provide information through the Internet, following the federal government's lead. Examples of especially well designed Internet sites include the homepages for the Environmental Protection Agency, the Internal Revenue Services, and the National Highway Transportation Safety Administration. To improve upon the current state of affairs in Michigan, all agencies in Michigan could be required to have an Internet homepage on the World Wide Web (WWW). While many agencies have already created homepages, new homepages could easily become more functional than their current incarnations. Specifically, each agency homepage might contain general agency information, including calendars of

events, proposed rulemakings and hearings, contact information, lists of agency departments with e-mail addresses, and access to agency regulations and relevant statutes.

With respect to the latter, Internet technology could substantially reduce the costs of discovering information about agency rules and orders. Indeed, agency homepages could provide instant access to the law. This advantage is especially desirable where interested parties would otherwise have to hire a lawyer and/or travel to an agency office simply to become informed about agency regulations. Here again, the federal government provides a model. Recently, the President created a U.S. Business Advisor Task Force, co-chaired by the Deputy Secretary of Commerce and the Administrator of the Small Business Administration, which he charged to facilitate business entities' access to information about government regulations affecting them, including, for example, trade, labor, workplace, and environmental regulations. The U.S. Business Advisory Task Force has since announced that it will develop a "U.S. Business Advisor," a one-stop World Wide Web site accessible through the Internet. The main idea behind the U.S. Business Advisor is to provide comprehensive information relating to business regulation and assistance at one location, readily available to all businesses large and small, and organized in a user-friendly way. Michigan could, and should, do the same.

Finally, and no less importantly, increased use of the Internet could also facilitate two-way communication between agencies and the public, given the distinct advantages that electronic communication enjoys over other media. Telephone communication, for example, can be costly, and increasingly leads to frustrating encounters with voice mail and automated phone systems. Similarly, communication through the mail comes with inevitable uncertainties about exactly who to send mail to, and about when or whether it will be answered. And when interested parties have to travel to Lansing or to agencies' other physical locations in order to participate in administrative decisionmaking, the costs are often prohibitive.

Two-way electronic communication goes one step beyond simply creating e-mail addresses, allowing private parties to download proposals to their home computers and then to provide feedback to agencies. The notice-and-comment stage of agency rulemaking is one obvious context in which agencies should exploit the advantages of electronic communication. Doing so would require commitments of agency staff, hardware, and software. Agencies would also have to provide guidelines setting forth rules and norms of communication. These requirements are summarized more fully in Appendix B. While such commitments should not be trivialized, neither are they so costly or significant that they should deter policymakers from moving more completely into the information age.

C. *Methodology of Report*

The proposed APA reflects changes inspired by five major sources: (1) the current APA, (2) the Commission's 1990 Proposed Administrative Procedures Act, (3) the Model State Administrative Procedure Act, (4) the federal Administrative Procedure Act and its case law, and (5) various regulatory reform proposals recently adopted or under current discussion at the national level.

Although substantially different from the old APA, the new APA is not invented out of whole cloth. Rather, it adopts and seeks to improve upon most of the basic framework of the old APA and to vindicate the main values underlying the old Act. It thus resembles the old APA even while it introduces several substantial innovations. The new APA also takes the Commission's 1990 proposal as another point of departure. Six years ago, the Commission issued a report containing a proposed substitute for the old APA. While the new APA contained in this Report provides more comprehensive reform than contemplated in 1990, the 1990 proposed act contained several good ideas which are incorporated into the new Act. The new APA also draws from the latest state Model Act, which as noted post-dates the old APA. In addition, the new APA also takes cues from federal administrative law, looking not only to

the federal Administrative Procedure Act and its amendments and appendices, but also to judicial developments of recent years, including Supreme Court interpretations of the federal Act. Finally, the new Act also reflects regulatory reform initiatives at the national level, where certain reforms of agency decisionmaking processes are embraced by leaders of both political parties: Reform of agencies' decisionmaking processes is now on the national agenda, and this Report incorporates the best ideas on regulatory reform currently in circulation, from the "Contract With America" to the Vice President's "National Performance Review."

D. *Summary of Major Revisions*

The new APA contains five chapters and thirty-one sections, organized by subject matter. By comparison, the current Act contains eight chapters and some seventy-seven sections, the organization of which is rather haphazard. But the new APA does not only look on its face much different from the old. Under it, agencies' decisionmaking procedures would unfold differently in several significant respects. At the same time, agencies would be subject to a somewhat different combination of external constraints, as the following discussion explains.

To begin with, all of the new APA's general and miscellaneous material, including its definitions, its provisions describing the interpretation and construction of the Act and the legal effect of rules, it provisions regarding the maintenance of all final agency adjudicative decisions, and its exemptions are pulled together in Chapter 1, *Definitions; General Provisions*, which consolidates provisions currently scattered throughout chapters 1, 2, 3, 7, and 8 of the old APA. Chapter 1's definitions capture a broader range of agency activity as compared with the old APA, including "agency action," which is defined as "any agency rule, order, or other decision, affirmative or negative." The broad definition ensures that more of what agencies do is subject to oversight by the other branches of government. Thus, for example, the definition of agency action connects later in the new Act to Chapter 5, *Judicial*

Review, under which any final agency action may be subject to judicial scrutiny under an "arbitrary or capricious" standard.

The new Act also distinguishes among different species of rules, to which different particular rulemaking procedures apply, as set forth in Chapter 3, *Rulemaking*. For example, the concept of "guidelines" has been replaced by the concept of "interpretive rules." In addition to "interpretive rules," the new Act introduces "procedural" and "housekeeping rules," which it distinguishes from "substantive rules," for which more rigorous decisionmaking processes are required. This definitional framework provides better insight into the precise nature of agency activity, and in turn offers easy reference for the application of different decisionmaking procedures—depending on the species of rule in question—as well as to the appropriate standard of judicial review for each. Most importantly, the new act delineates clear criteria for distinguishing between substantive and non-substantive rules. Substantive rules include all rules that impose or determine rights and obligations and that have a binding effect, leaving the agency unable to exercise discretion in the enforcement of a given statutory provision.

Similarly, the definition of "formal adjudication," archaically referred to in the old APA as "contested cases," is now defined as the agency decisionmaking process triggered whenever the legislature requires that agency orders follow a hearing and be based on a record. As in the case with agency rulemaking, the new Act also distinguishes different types of agency adjudication—"formal" and "informal"—for which different procedures are specified, again allowing for better understanding of the nature of agency action in question and for clear delineation of the appropriate standard of judicial review for each type.

Just as Chapter 1 neatly houses all of the new APA's definitions and general provisions, Chapter 2 of the new APA, *Legislative Service Bureau, Michigan Register and Michigan Administrative Code*, contains nearly all references to the *Michigan Register* and the *Michigan Administrative Code*. It specifies the Legislative Service Bureau ("Bureau")'s role in

publishing and distributing the *Michigan Register*, which under the new Act shall contain, among other items, the text of all proposed substantive rules. Chapter 2 also outlines the Bureau's role in publishing and distributing the *Michigan Administrative Code*, which under the new Act shall be recompiled periodically, codified in a manner corresponding to the organization and activities of agencies, and made available at cost. In short, the *Michigan Register* will serve as a source of information about agencies' ongoing activities, while the *Michigan Administrative Code* will serve as an important source of law to which parties may turn for easy reference. To ensure that the *Administrative Code* is an easy reference indeed, Chapter 2 now requires its compilation at least every seven years.

Turning to the actual agency decisionmaking processes, the new APA restructures agency rulemaking. In Chapter 3, *Rulemaking*, the new APA replaces the current framework and creates different types of agency rulemaking procedures, corresponding to the different species of rules. Housekeeping, interpretive, and procedural rules would be subject to less strict and more informal procedures. Substantive rules, on the other hand, would be subject to heightened, notice-and-comment requirements, under which an agency developing a rule would provide notice of its intent to develop a rule along with the text of its proposed rule, solicit commentary on its proposed rule, and explain when issuing its final rule why, in light of any feedback the agency received, the final rule took the form it did. The new APA makes allowances for agencies to forego public hearings during the development of substantive rules, however, and instead to solicit public feedback electronically or in writing where a statute authorizing agency rulemaking does not require a public hearing. Finally, agencies would be required to make a full record of the development of all substantive rules available for public inspection and for possible judicial scrutiny.

Chapter 3 also formally introduces the concept of "negotiated rulemaking," borrowed from federal practice, used successfully in the labor and environmental contexts, for example, and experimented with in recent years by the Michigan Department of Natural Resources. See

generally ACUS NEGOTIATED RULEMAKING SOURCEBOOK (1991). In a negotiated rulemaking, parties interested in the development of a proposed substantive rule convene for the purposes of discussing that rule's content. This way, interested parties have an opportunity to shape a proposed rule, while the agency developing the rule has a structured opportunity to benefit from the information, expertise, and perspectives that outside parties might have. To ensure the some parties do not try to use a negotiated rulemaking as an opportunity to exercise illicit influence on an agency, all negotiations are announced in advance in the *Michigan Register* and minutes of the meetings become part of the rulemaking record. Moreover, negotiated rulemaking does not displace the ordinary, notice-and-comment rulemaking process. Rather, it precedes that process: The ordinary rulemaking procedures commence upon completion of a negotiated rulemaking. Where a negotiation was successful, that process will likely proceed more quickly and smoothly.

The new chapter on rulemaking also clarifies and supplements the informational requirements that agencies must meet when developing a new substantive rule, including Small Business Impact Statements. It also requires agencies to engage in cost-benefit analysis before issuing any substantive rule. Agency cost-benefit analyses will incorporate small business impact statements whenever a rule will have a substantial impact on small businesses. The cost-benefit requirement applies, however, even to rules that do not have substantial impacts on small business. The new cost-benefit requirement will thereby help to ensure that all agency rules, whatever their intended consequences, can withstand rational scrutiny.

Finally, the new chapter on rulemaking replaces the controversial and constitutionally questionable Joint Committee on Administrative Rules (JCAR) with several alternative mechanisms of legislative oversight. These mechanisms include concurrent resolutions of disapproval, joint resolutions of rejection (the introduction of which stays the effective date of a rule for sixty days), and institutionalized legislative "corrections days," all of which are designed to give the legislature various checks and vetoes on agencies' rulemaking activities. In addition, agencies are required under the proposed Act to keep legislators abreast of their

rulemaking activities, as well as provide legislators with periodic retrospective reviews of the consequences of rules already adopted. Combined, these alternative methods of legislative oversight will ensure that agency decisions conform to legislative will, while avoiding the problems currently presented by the JCAR.

With respect to adjudication, the other main mode of agency decisionmaking, the new APA clarifies, simplifies, and restructures the processes according to which agencies issue orders. Chapter 4, *Adjudication*, first distinguishes between the two species of agency adjudication, formal and informal. Formal adjudication corresponds to the "contested case" procedures in the current APA, and is triggered whenever the legislature authorizes an agency to issue orders based on a record and following a hearing. Informal adjudication, in contrast, constitutes a residual category of agency decisions—specifically, decisions other than rules that do not follow a formal hearing. Agencies engage in informal adjudication, then, whenever the legislature authorizes agencies to make decisions other than rules but does not require those decisions to follow a formal hearing. What the old Act calls a "declaratory ruling" would be one example of informal adjudication, as would a licensing compliance determination.

As for licensing generally, the new APA incorporates the old APA's licensing chapter, as well as its chapter on awards of costs and fees following certain contested cases, into Chapter 4. Thus, the new chapter on adjudication contains all of the new APA's provisions pertaining to adjudication. This consolidation avoids confusion and certain redundancies in the old Act. Any agency decisions pertaining to licensing which the legislature requires to follow a formal hearing trigger formal adjudication; all other licensing decisions trigger informal adjudication. The new Act furthermore requires comparative hearings for all licensing hearings wherever the legislature has provided competitive criteria according to which licenses are to be awarded.

Besides distinguishing, definitionally and procedurally, between formal and informal adjudication, the new adjudication chapter introduces several significant changes to the formal

adjudication process. First, Chapter 4 identifies the circumstances under which third parties may intervene in an adjudication, an issue generating much confusion under the current Act. Under the new Act, a party may intervene as a matter of right when that party demonstrates that an adjudication will affect its direct legal interests. Otherwise, a party may intervene at the discretion of the hearing officer when the interests of justice so require and when intervention would not impair the orderly and prompt conduct of the adjudication. Intervention in circumstances other than these two is foreclosed.

Second, the new chapter on adjudication also contains new provisions concerning the presiding officer's—that is, the administrative law judge's—role in a formal adjudication. Under the new Act, the presiding officer in an adjudication can be any person identified by statute or designated by an agency, except a person directly answerable to other personnel in that agency with investigative or prosecutorial powers in connection with that adjudication. In addition, the new Act specifies the manner in which a presiding officer may be disqualified.

Third, Chapter 4 also settles longstanding confusion surrounding the so-called "legal residuum rule." It makes clear that an agency's decision may rest on evidence that would not be admissible in a court of law, were a court rather than an agency to consider such evidence. Rather than requiring agency decisions to be supported by legally admissible evidence, the new Act allows agencies to consider, and to rest their decisions on, evidence that ordinary persons would consider probative. Chapter 4 furthermore makes clear that the moving party in an adjudicatio· carries the burden of proof, and that the burden of persuasion is the "preponderance of the evidence" standard.

The culmination of a formal adjudication is a decision—a formal order—by the presiding administrative law judge. Under the new Act, that decision becomes the "final" decision in the case—final, that is, subject both to possible appeal within the agency, such as to an agency's appellate review board for example, and to possible judicial review as well. The new APA thus does away with so-called "proposals for decisions" by hearing examiners to

other persons or bodies within an agency. It thus avoids an unnecessary and cumbersome step in the formal adjudication process—a step, moreover, that compromises the integrity of the original proceedings—while fully retaining intra-agency review of administrative law judge's decisions.

Of course, agencies do not make decisions in a political or legal vacuum. Both the legislative and the executive branch have various formal and informal oversight mechanisms that constrain agency discretion. And "final" agency decisions are subject to judicial review. Respecting that latter, the new APA's Chapter 5, *Judicial Review*, contemplates changes to the structure of judicial review of agency decisions. First, the new Act's provisions on timing, standing, and exhaustion clearly establish who may challenge an agency decision and under what legal circumstances. These provisions will avoid confusion about when courts will exercise their power of judicial review.

Second, once it is clear who may bring a judicial challenge and when, Chapter 5 also clarifies the standards of review applicable to each species of agency decision, whether in the rulemaking or the adjudication mode. Under Chapter 5's section setting forth the scope of judicial review, any agency decision whatsoever may be set aside if contrary to statutory authority, unlawful under the Constitution, in violation of legal procedure, or arbitrary or capricious. And respecting that first issue, the new Act further delineates the particular questions reviewing courts will consider when interpreting statutes in the context of a challenge that an agency has acted contrary to statutory authority. In addition to these standards of review, all formal agency orders and all declaratory orders are also subject to a "substantial evidence" test, according to which a court shall set aside an agency decision not supported by substantial evidence in the record, considering the decisionmaking record as a whole.

Third, now that judicial review is simplified through clear standards of review neatly corresponding to each type of agency decision and available only to parties who satisfy the new Act's requirements for seeking judicial review, the new APA provides for judicial review

of agency decisions in the Michigan Court of Appeals rather than in the trial court (Circuit Court), subject to legislative exclusions of specific categories of cases, for which trial-court review may be maintained. Appellate-court review is well suited for the judicial task of reviewing final agency decisions, given that the essential question for the reviewing court is whether the evidence in the decisionmaking record, as it stands, supports what the agency has done: A judicial challenge to an agency decision is not the proper opportunity for introducing new evidence. In addition, appellate-court review avoids the problems of forum shopping, delay, lack of uniformity, and lack of expertise associated with trial-court review in a judicial system like Michigan's. In 1990, the Commission seriously considered recommending appellate rather than trial-court review of agency decisions, but ultimately believed that the possibility of a significantly increased workload for the appeals court counseled against such a change. Because the proposed APA drastically simplifies the entire process of judicial review, and moreover because it subjects agency decisionmaking to several internal and external checks—such as the requirement that agencies include certain specific information in their decisionmaking records (an internal check) and various layers of legislative oversight (external checks)—judicial review under the new Act will not impose substantial burdens on the appellate-court system.

These various changes contemplated in the new APA are discussed, and justified, in more detail in Part III later below. Table 1 highlights the most significant among them:

Table 1:

Most Important Changes to Administrative Decisionmaking Structure

Rulemaking Processes:	new typology of rules; applicable procedures for each type specified; formal and informal rulemaking processes distinguished; negotiated rulemaking introduced; cost-benefit analysis required for substantive rules
Adjudication Processes:	intervention clarified; burdens of proof and persuasion specified; "legal residuum" rule expressly rejected; administrative law judge's decision made final pending appeal to agency or court; licensing and declaratory orders integrated into adjudication provisions
Judicial Review of Agency Decisions:	standing requirements specified; scope of judicial review specified for each type of agency decision; standards of review for statutory interpretation delineated; greater review by Court of Appeals

As always, those with vested interests in maintaining the status quo may not welcome change to the current administrative-process regime. It is worth emphasizing, however, that while the new APA promises significant change, it does so while preserving core political values—such as separation of powers—by ensuring that all branches have some control over agency decisionmaking. The power of no branch of government is enhanced at the expense of another, and the importance of ensuring that agency decisions reflect legislative will remains central. Part II presents the draft language of the proposed Act.

II. Draft Language of The Administrative Procedure Act of 1997

AN ACT to provide for the processing, promulgation, and compilation of agency rules and other decisions; to provide for procedures for agency rulemaking and agency adjudications, including licensing; to provide for legislative oversight of agency decisionmaking; to provide for judicial review of agency action; to provide for the printing, publishing, and distribution of the Michigan Register and Michigan Administrative Code; to repeal certain acts or parts of acts; and for other purposes.

This act shall be known by and may be cited as the "Administrative Procedure Act of 1997".

CHAPTER ONE. DEFINITIONS; GENERAL PROVISIONS.

Section 101. Definitions.

For the purposes of this Act:

(1). "Adjudication" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(2). "Administrative law judge" means a person designated by statute to conduct an adjudication, or a hearing examiner, presiding officer, or hearing officer designated and authorized by an agency to conduct an adjudication.

(3). "Adoptee" means a child who is to be or who is adopted.

(4). "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission , or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(5). "Agency action" means any agency rule, order, or other decision, affirmative or negative.

(6). "Costs and fees" means the normal costs incurred after a party to an adjudication—other than an adjudication that is settled, an adjudication in which a consent agreement is entered into, or any proceeding for establishing a rate or approving,

disapproving, or withdrawing approval of a form—has received notice of a hearing. Costs and fees include all of the following:

(a) the reasonable and necessary expenses of expert witnesses as determined by the administrative law judge;

(b) the reasonable costs of any study, analysis, engineering report, test, or project which is determined by the administrative law judge to have been necessary for the preparation of a party's case; and

(c) reasonable and necessary attorney or agent fees including those for purposes of appeal.

(7). "Court" means the Michigan Court of Appeals.

(8). "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(a) it originated before the person became 18 years of age;

(b) it has continued since its origination or can be expected to continue indefinitely;

(c) it constitutes a substantial burden to the impaired person's ability to perform normally in society; and

(d) it is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(9). "Emergency Rule" means a substantive rule authorized under Section 309 of this Act, promulgated following neither the ordinary formal or informal rulemaking procedures used to develop substantive rules.

(10). "Formal Rule" means a substantive rule promulgated following a public hearing required by statute or a hearing deemed in the public interest by an agency.

(11). "Housekeeping Rule" means a rule relating only to agency management, personnel, organization, operation, or other internal agency matters not directly affecting the substantive rights or obligations of parties outside of the agency.

(12). "Informal Rule" means a substantive rule promulgated following notice and comment processes.

(13). "Interpretive Rule" means a rule expressing an agency's understanding of a statutory term the meaning of which the agency was not delegated the task of specifying, or the meaning of an undefined term of a substantive rule.

(14). "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(15). "Licensing" includes agency adjudication involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.

(16). "Negotiated Rulemaking" means the process of convening a group of parties interested in the development of a proposed agency rule for the purpose of drafting the text of the proposed rule prior to the commencement of ordinary rulemaking processes.

(17). "Order" means any agency decision other than a rule, including declaratory orders and decisions relating to the issuance, amendment, conditioning, suspension, revocation, of a license.

(18). "Party" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization of any kind.

(19). "Party to an adjudication" means a person or agency named, admitted, or property seeking and entitled or permitted to be admitted, as a party to an agency's formal adjudicative hearing and related proceedings. For the purposes of the costs and fees provisions of Section 406 of Chapter 4, however, "party to an adjudication" does not include any of the following:

(a) an individual whose net worth was more than $700,000.00 at the time the contested case was initiated;

(b) the sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded $3,500,000.00 at the time the contested case was initiated and which is not either exempt from taxation pursuant to section 501(c)(3) of the internal revenue code or a cooperative association as defined in section 15(a) of the agricultural marketing act, 12 USC 1141j(a); or

(c) the sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees, as determined by the total number of employees multiplied by their working hours divided by 40, at the time the contested case was initiated.

As used in this Subsection "net worth" means the amount remaining after the deduction of liabilities from assets as determined according to generally accepted accounting principles.

(20). "Prevailing party" means the party prevailing on the entire record in an action involving only one issue or count stating only one cause of action or defense, or the party prevailing as to each remedy, issue. or count an action involving several remedies, or issues or counts which state different causes of actions or defenses.

(21). "Procedural Rule" means a rule specifying the procedures that an agency and other parties shall follow wherever agency decisionmaking processes are not prescribed by this Act or other statutes.

(22). "Rule" means an agency, statement, standard, policy, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof, but does not include any of the following:

(a) an order;

(b) a decision of the state administrative board;

(c) a formal opinion of the attorney general;

(d) a decision establishing or fixing rates or tariffs;

(e) a decision pertaining to game and fish and promulgated under part 411 (protection and preservation of fish, game, and birds) of the Natural Resources and Environmental Protection Act, Act No. 451 of the Public Acts of 1994, being sections 324.41101 to 324.41105 of the Michigan Compiled Laws, part 487 (sport fishing) of Act No. 451 of the Public Acts of 1994, being sections 324.48701 to 324.48740 of the Michigan Compiled Laws,

and part 401 (wildlife conservation) of Act No. 451 of the Public Acts of 1994, being sections 324.40101 to 324.40119 of the Michigan Compiled Laws;

(f) a rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals;

(g) an intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public;

(h) a form with instructions, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory;

(i) unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates which was promulgated before December 4, 1986, shall be considered a rule and shall remain in effect until rescinded but shall not be amended. As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections;

(j) all of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:

(i) the designation, deletion, or revision of covered medical equipment and covered clinical services;

(ii) certificate of need review standards;

(iii) data reporting requirements and criteria for determining health facility viability;

(iv) standards used by the department of public health in designating a regional certificate of need review agency; and

(v) the modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws;

(k) a policy developed by the family independence agency under section 6(3) of the social welfare act, Act No. 280 of the Public Acts of 1939, being section 400.6 of the Michigan Compiled Laws, setting income and asset limits, types of income and assets to be considered for eligibility, and payment standards for administration of assistance programs under that act; or

(l) a policy developed by the family independence agency under section 6(4) of Act No. 280 of the Public Acts of 1939, being section 400.6 of the Michigan Compiled Laws, to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.

(23). "Rulemaking" means the processing of establishing a rule, including the action required or authorized by this act and culminating with the rule's promulgation. Rulemaking consists of notice and comment procedures, for proposed informal substantive rules, as well as public hearings, for proposed formal substantive rules as required by statute or as deemed in

the public interest by the relevant agency. Rulemaking consists also in agency consideration of responses generated by notice and comment or public hearings, agency provision of information required in conjunction with a proposed rule, such as but not limited to a small business impact statement, and promulgation of final rules together with their accompanying concise general statement explaining why a final rule took the form it did.

(24). "Substantive Rule" means a formal or informal rule other than a housekeeping rule, a procedural rule, or an interpretive rule. A substantive rule is binding upon relevant parties, its observance is mandatory, and a violation of a substantive rule is itself sufficient to establish a violation of a statute or regulation.

Section 102. Effects on Other Laws.

(1). Act No. 306 of the Public Acts of 1969, as amended, is hereby repealed.

(2). A reference in any other law to Act No. 306 of the Public Acts of 1969, as amended, is deemed to be a reference to this act.

(3). This Act shall not be construed to repeal additional requirements to Act No. 306 of the Public Acts of 1969, as amended, unless those additional requirements are incompatible with the provisions of this Act.

(4). This act is effective January 1, 1997, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.

(5). When an agency has completed any or all of the processing of a rule pursuant to Act No. 306 of the Public Acts of 1969 as amended, before January 1, 1997, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act.

(6). Chapter 3 and Section 402(3) do not apply, in whole or in part, to the municipal employees retirement system and retirement board created by the municipal employees retirement act of 1984, Act No. 427 of the Public Acts of 1984, being sections 38.1501 to 38.1555 of the Michigan Compiled Laws, on and after the certification date, as that date is defined in section 2a of Act No. 427 of the Public Acts of 1984, being section 38.1502a of the Michigan Compiled Laws.

(7). Chapter 4 does not apply, in whole or in part, to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.256 of the Michigan Compiled Laws.

(8). Chapters 4 and 5 do not apply, in whole or in part, to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(9). Chapter 5 does not apply, in whole or in part, to final decisions or orders rendered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333. 18838 of the Michigan Compiled Laws.

Section 103. General Provisions on Rules and Rulemaking: Continuation of Existing Rules; Successor Agencies; Recision; Amendment; Definitions of Terms; Discrimination; Violations; Adoption by Reference; Submission to Legislative Service Bureau and Attorney General; Final Promulgation; Transmittal to Legislature.

(1). **Continuation of Existing Rules.** Rules which became effective before the effective date of this Act continue in effect until amended or rescinded.

(2). **Successor Agencies.** When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.

(3). **Amendment and Recision.** The rescission of a rule does not revive a rule which was previously rescinded. The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule. Except in the case of the amendment of rules concerning inmates, a rule may be amended or rescinded by another rule or as a result of an act of the legislature.

(4). **Meaning of Terms.** Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.

(5). **Nondiscrimination.** A rule or exception to a rule shall not discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.

(6). **Violations not Crimes.** The violation of a rule is a crime if and only if so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.

(7). **Adoption by Reference.** An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost and the rules shall state where copies of the

adopted matter are available from the agency and the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.

(8). **Submission to Legislative Service Bureau and Attorney General.** Before proposing a rule, the proposing agency shall submit its proposed rule for prompt approval as to form by the Legislative Service Bureau, and for prompt approval for legality by the Department of the Attorney General.

(9). **Promulgation of Final Rules.** To promulgate a final substantive rule, an agency shall file in the office of the secretary of state 3 copies of the rule, along with record of the rule's approval by the Legislative Service Bureau and the Attorney General as required by Subsection (8). The agency shall also transmit a copy of the rule to the office of the governor at least 10 days before it files the rule. The secretary of state shall endorse the date and hour of filing of rules on the 3 copies and shall maintain a file containing 1 copy for public inspection. The secretary of state, as often as he or she considers it advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter filed in his or her office with their attached certificates and published in a temporary supplement to the *Michigan Administrative Code*. The secretary of state shall certify under his or her hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state for public inspection, and no further record of the rules is required to be kept prior to their inclusion in the next printing of the *Michigan Administrative Code* or supplement thereto. Except in case of an emergency rule authorized under Section 308, a rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or, if a date is not so fixed, then on the date of its publication in the *Michigan Administrative Code* or a supplement thereto, subject to the introduction of a joint resolution of rejection suspending the rule's effective date for sixty days.

(10). **Transmittal to Legislature.** The secretary of state shall transmit or mail forthwith, after copies of final rules are filed in his office, copies on which the day and hour of such filing have been indorsed to the Legislative Service Bureau and to the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail one copy to each member of the legislature at his home address. The Secretary of the Senate and Clerk of the House of Representatives shall present the rules to the Senate and the House of Representatives.

Section 104. General Provisions on Orders and Formal Adjudication.

(1). Agencies shall prepare an official record of all formal adjudications carried out pursuant to Section 404, which shall include all:

(a) notices, pleadings, motions and intermediate rulings;

(b) questions and offers of proof, objections, and rulings thereon;

(c) evidence presented;

(d) matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;

(e) findings and exceptions; and

(f) any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2). Agencies shall maintain collected, bound volumes of official records prepared under Subsection (1) of this Section.

(3). Agencies shall make available official records of adjudications available to any party upon request, at cost.

(4). Agencies shall also prepare records al all final decisions rendered pursuant to Section 405 and Section 407, which shall include short summaries of the facts and issues involved and the text of the agency's written decisions.

(5). Agencies shall maintain collected, bound volumes of record of final decisions prepared under Subsection (4) of this Section.

(6). Agencies shall deliver or mail bound or loose-leaf copies of records of final decisions prepared under Subsection (5) of this Section to each county law library, bar association library, and law school library in this state.

CHAPTER TWO. LEGISLATIVE SERVICE BUREAU, MICHIGAN REGISTER, AND MICHIGAN ADMINISTRATIVE CODE.

Section 201. Legislative Service Bureau.

(1). The Legislative Service Bureau shall perform the editorial work for the *Michigan Register* and for the *Michigan Administrative Code* and its annual supplement. The classification, arrangement, numbering, and indexing of rules and other items shall be uniform and, for the *Michigan Administrative Code*, shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The Legislative Service Bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so.

(2). The cost of publishing and distributing the *Michigan Register* and the *Michigan Administrative Code* and its supplements shall be prorated by the Legislative Service Bureau on the basis of the volume of the materials published for each agency in the *Michigan Register* and the *Michigan Administrative Code* and its supplements. The cost of publishing and distribution shall be paid out of appropriations to the agencies.

(3). When so requested by an agency, the Legislative Service Bureau shall prepare reproduction proofs or negatives of the rules, or a portion of the rules, of the agency. The requesting agency shall reimburse the Legislative Service Bureau for preparing the reproduction proofs or negatives, and the cost of the preparation shall be paid out of appropriations to the agency.

(4). The Legislative Service Bureau shall print or order printed a sufficient number of copies of the *Michigan Register* and the *Michigan Administrative Code* and its annual supplement to meet the following requirements of this Subsection. The Department of Management and Budget shall deliver or mail copies of the same as follows:

(a) to the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary;

(b) to the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk;

(c) to each member of the legislature, 1 copy at the member's home address;

(d) to the Legislative Service Bureau, 1 copy for each attorney on the bureau's staff;

(e) to the department of the attorney general, 1 copy for each division;

(f) to each other state department, 3 copies;

(g) to each county law library, bar association library, and law school library in this state, 1 copy;

(h) to other libraries throughout this state, 1 copy, upon request;

(i) additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).

The copies of the *Michigan Register*, the *Michigan Administrative Code* and its supplements are for official use only by the agencies and persons identified above, and they shall deliver them to their successors, except that members of the legislature may retain copies sent to their home address. The Department of Management and Budget shall send to the home address of each new member of the legislature the current volume of the *Michigan Register* and a complete copy and latest supplement of the *Michigan Administrative Code*. The Department of Management and Budget shall deliver to the state library the *Michigan Register* and the *Michigan Administrative Code* and its supplements when requested by the state library sufficient for the library's use and for exchanges. The Department of Management and Budget shall hold additional copies for sale at a fee reasonably calculated to cover publication and distribution costs, as determined by the Legislative Service Bureau.

Section 202. Michigan Register.

(1). The Legislative Service Bureau shall publish the *Michigan Register* each month. The *Michigan Register* shall contain all of the following:

(a) on a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers;

(b) on a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year;

(c) all executive orders and executive reorganization orders;

(d) all attorney general opinions; and

(e) all of the items finally approved by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws.

(2). In addition, the Legislative Service Bureau shall publish in the *Michigan Register* all of the following:

(a) notice and text of all proposed substantive rules, together with a proposing agency's explanation of the proposed rule and any additional information that may be required of the agency under Sections 303, 304, and 307 of this Act, including Small Business Economic Impact Statements, and Cost-Benefit Analyses;

(b) all notices of public hearings on proposed substantive rules where such hearings are required by statute or deemed by agencies to be in the public interest, as required by Section 304 of this Act;

(c) the text of all final substantive rules together with agencies' concise, general explanation of the final rule as required by Sections 303 and 304 of this Act;

(d) the text of all agency procedural and interpretive rules as authorized by Sections 306 and 307 of this Act; and

(e) the text of all emergency rules filed with the secretary of state.

The Legislative Service Bureau shall promptly approve a proposed or final rule for inclusion in the *Michigan Register* if the Legislative Service Bureau considers the rule to be proper as to all matters of form, classification, arrangement, and numbering.

(3). In addition to all of the above, the Legislative Service Bureau shall also publish in the *Michigan Register* any other official information it considers necessary or appropriate.

(4). If publication of any items listed in this Section would be unreasonably expensive or lengthy, the Legislative Service Bureau may publish instead a brief synopsis of such an item together with information on how to obtain a complete copy of the item from the agency at no cost.

(5). The Legislative Service Bureau shall also publish, no less often than annually, a cumulative index for the *Michigan Register* organized by subject matter.

(6). The *Michigan Register* shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs. As soon as practicable, the *Michigan Register* should be accessible on-line, such as from the State of Michigan's Internet homepage.

Section 203. Michigan Administrative Code.

(1). The Legislative Service Bureau shall compile and publish the *Michigan Administrative Code*, containing in codified form the final text of agency rules, as often as practicable, and at least every seven years. The *Michigan Administrative Code* may be arranged and printed to make convenient the publication in separate volumes or pamphlets, or loose-leaf pages those parts of the code relating to different agencies. Agencies may order the such separate volumes, pamphlets, or pages the cost of which shall be paid out of appropriations to the agencies.

(2). The Legislative Service Bureau shall publish an annual supplement to the *Michigan Administrative Code*. The annual supplement shall contain all final promulgated rules published in the *Michigan Register* during the current year, except emergency rules, a cumulative numerical listing of amendments and additions to, and rescissions of rules since the last complete compilation of the *Michigan Administrative Code*, and a cumulative alphabetical index. The annual supplement shall be published at the earliest practicable date.

(3). If publication of any rule in the *Michigan Administrative Code* and/or its annual supplement would be unreasonably expensive or lengthy, the Legislative Service Bureau may publish instead a brief synopsis of the rule together a notice stating the general subject and substance of the omitted rule and information on how to obtain a complete copy it from the relevant agency at no cost.

(4). The *Michigan Administrative Code* and its annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

CHAPTER THREE. RULEMAKING.

Section 301. Request for Rulemaking.

Any party may request an agency to make a rule. Within 90 days after filing of a request, the agency shall either initiate a rulemaking or issue to the requesting party a concise written statement of its principal reasons for denying the request.

Section 302. Informal Rulemaking: Notice; Comment; Explanation of Final Rule.

(1). **Notice.** Where an agency is authorized by statute to make substantive rules without holding a public hearing, the agency shall publish in the *Michigan Register* public notice of:

(a) its intent to adopt a rule;

(b) the legal authority under which it intends to adopt the rule;

(c) the main substantive issues requiring and otherwise implicated in the rule;

(d) the text of the proposed rule;

(e) any information required to accompany a proposed rule under Section 308; and

(f) the address of the agency office to which comments on the proposed rule may be sent.

(2). **Comment.** After providing the notice required in Subsection (1), the agency shall provide potentially interested parties with a reasonable opportunity to supply the agency with written comments, arguments, or data relating to the proposed rule. As soon as practicable, agencies should provide for electronic submission of written views on proposed rules. Such

written feedback shall become part of the rulemaking record. Where the agency deems necessary, it may amend the text of its proposed rule in response to any written comments, arguments, or data it receives, and provide public notice anew of the amended text of its proposed rule.

(3). **Explanation of Final Rule.** After consideration of the feedback received under Subsection (2), if any, the agency shall publish in the *Michigan Register* the text of the final rule adopted by the agency, together with a concise, general statements explaining the final form of the rule.

Section 303. Formal Rulemaking.

(1). Where an agency is required by statute to promulgated substantive rules following a public hearing, the agency shall give notice of a public hearing and offer interested parties an opportunity to present data, views, questions, and arguments.

(2). Such notice shall be given within the time and manner prescribed by any applicable statute, if any. If the time and manner of notice is not prescribed by any applicable statute, the agency shall publish the notice not fewer than 10 days and not more than 60 days before the date of the public hearing either in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be in the Upper Peninsula, or electronically through publicly accessible Internet media.

(3). Additional methods that may be employed by the agency, depending upon the circumstances, include publication in trade, industry, governmental, or professional publications.

(4). In addition to the requirements of Subsection (2), the agency shall also publish the notice in the *Michigan Register* not fewer than 30 days and not more than 90 days before the public hearing.

(5). The notice described in subsections (1)-(4) shall include all of the following:

(a) s reference to the statutory authority under which the action is proposed;

(b) the time and place of the public hearing and a statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency at other times; and

(c) a statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

(6). The agency shall also transmit copies of the notice to any person who requested the agency in writing for advance notice of proposed action which may affect that person. The notice shall be by mail, in writing, to the last address specified by the person.

(7). The public hearing shall comply with any applicable statute, but is not subject to the procedural provisions required in an adjudication.

(8). The head of the promulgating agency or 1 or more persons designated by the head of the agency who have knowledge of the subject matter of the proposed rule shall be present at the public hearing and shall conduct and participate in the discussion of the proposed rule.

(9). Except in the case of an emergency rule promulgated under Section 309 or a rule promulgated under subsection (10) of this Section, a substantive rule authorized only following a public hearing is not valid unless processed in substantial compliance with this Section. A proceeding to contest a rule on the ground of noncompliance with the this Section must be commenced within 2 years after the effective date of the rule in question.

(10). This Section does not apply to an amendment or rescission of a rule that is obsolete or superseded, or that is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose. Nor does this Section apply to any rule promulgated under the Michigan Occupational Safety and Health Act, Act No. 154 of the Public Acts of 1974, being sections 408.1001 to 408.1094 of the Michigan Compiled Laws, that is identical—with the exception of style, format, or other technical differences needed to conform to this or other State laws—to an existing federal standard that has been adopted or promulgated under the Occupational Safety and Health act of 1970, Public Law 91-596, 84 Stat. 1590. However, the notice-and-comment requirements of Section 302 shall apply to such a rule instead of this Section.

Section 304. Negotiated Rulemaking.

Where an agency deems it to be in the public interest, the agency may convene representatives of interested parties for the purpose of developing the text of a proposed, substantive rule. Meetings of convened groups shall be announced in advance in the *Michigan Register* and shall be open to the public. One or more representative from the agency developing the rule shall attend and chair each meeting, and minutes of all meetings shall be maintained by the agency and shall become part of the agency's rulemaking record. When the convened parties come to an agreement concerning the text of a proposed rule, or when the agency determines that additional meetings would no longer be productive, the agency shall commence ordinary rulemaking under Section 302 or 303.

Section 305. Housekeeping Rules.

(1). An agency may develop rules, not affecting the rights of other parties, that describe its organization and state the general course and method of its internal operations.

(2). Section 302's notice-and-comment requirements, and Section 303's public hearing requirements, do not apply to the creation of such housekeeping rules.

(3). An agency must maintain a written record of such rules, but such Section 202's requirement that substantive rules be published in the *Michigan Register* and Section 203's requirement that rules be codified in the *Michigan Administrative Code* do not apply to such rules.

Section 306. Procedural Rules.

(1). An agency shall develop rules, affecting only the procedural rights of other parties, that detail the procedures according to which it will make decisions and according to which interested parties may participate in the development of agency decisions. An agency shall also promulgate rules prescribing its procedures and the methods by which the public may obtain information, submit requests, or otherwise communicate with the agency. Such procedural rules may include forms with instructions.

(2). Section 302's notice-and-comment requirements, and Section 303's public hearing requirements, do not apply to the creation of procedural rules.

(3). Except where inconsistent with this Act or other applicable statutes, an agency's procedural rules may prescribe the procedures used in the agency's rulemaking and adjudication processes.

(4). Procedural rules become effective upon promulgation in the *Michigan Register*. An agency's procedural rules shall also be compiled in the *Michigan Administrative Code*.

Section 307. Interpretive Rules.

(1). An agency may develop rules that explain the agency's interpretation of any statutory term a clear understanding of which is necessary for the agency to perform its statutory duties, but the exact meaning of which the legislature did not intend for the agency to determine authoritatively.

(2). Section 302's notice-and-comment requirements, and Section 303's public hearing requirements, do not apply to the creation of such interpretive rules.

(3). Interpretive rules need not be published in the *Michigan Register*, except in response to a specific request for issuance and publication of an interpretive rule by any party. Interpretive rules need not be codified in the *Michigan Administrative Code*.

(4). Interpretive rules are not binding on the agency or on any other party.

Section 308. Information Requirements for Substantive Rulemaking: Small Business Economic Impact Statement; Cost-Benefit Analysis.

(1). **Small Business Economic Impact Statements.** When an agency proposes a substantive rule that will have a primary and direct effect on small businesses within the State, the agency shall prepare and publish in the *Michigan Register* along with the text of its proposed rule a Small Business Economic Impact Statement. A Small Business Economic Impact Statement shall contain all of the following with respect to the proposed rule:

(a) the nature of any reports and the estimated cost of their preparation by small businesses that would be required to comply with the proposed rules;

(b) an analysis of the costs of compliance for all small businesses affected by the proposed rules, including costs of equipment, supplies, labor, and increased administrative costs;

(c) the nature and estimated cost of any legal, consulting, and accounting services that small businesses would incur in complying with the proposed rules;

(d) a statement regarding whether the proposed rules will have a disproportionate impact on small businesses because of the size of those businesses;

(e) the ability of small businesses to absorb the costs estimated under subdivisions (a) to (c) without suffering economic harm and without adversely affecting competition in the marketplace;

(f) the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses;

(g) the impact on the public interest of exempting or setting lesser standards of compliance for small businesses;

(h) a statement regarding the manner in which the agency reduced the economic impact of the rule on small businesses or a statement regarding the reasons such a reduction was not feasible; and

(i) a statement regarding whether and how the agency has involved small businesses in the development of the rule.

For the purpose of this subsection, "small business" means a business concern incorporated or doing business in this state, including the affiliates of the business concern, which is independently owned and operated and which employs fewer than 250 full-time employees or which has gross annual sales of less than $ 6,000,000.00.

In order to obtain cost information for purposes of this section, an agency may survey a representative sample of affected small businesses or trade associations or may adopt any other means considered appropriate by the agency.

The agency shall transmit a copy of the small business economic impact statement to the director of commerce. The director of commerce shall review the statement, and within 30 days after receipt, shall notify the agency of any additional information relevant to the proposed rule's impact on small business not contained in the agencies Small Business Economic Impact Statement.

(2). When an agency proposes a substantive rule which will apply to a small business, and the small business economic impact statement discloses that the rule will have a disproportionate impact on small businesses because of the size of those businesses, the agency proposing to adopt the rule shall reduce the economic impact of the rule on small businesses by doing one or more of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

(a) establish differing compliance or reporting requirements or timetables for small businesses under the rule;

(b) consolidate or simplify the compliance and reporting requirements for small businesses under the rule;

(c) establish performance rather than design standards, when appropriate; or

(d) exempt small businesses from any or all of the requirements of the rule.

If appropriate in reducing the disproportionate economic impact on small business of a rule as provided in subsection (1), an agency may use the following classifications of small business:

(a) 0-9 full-time employees;

(b) 10-49 full-time employees; or

(c) 50-249 full-time employees.

For purposes of this section, an agency may include a small business with a greater number of full-time employees in a classification that applies to a business with fewer full-time employees. This section shall not apply, however, to a rule which is required by federal law and which an agency promulgates without imposing standards more stringent than those required by the federal law.

(3). **Cost-Benefit Analysis.** A Cost-Benefit Analysis shall accompany all proposed, substantive agency rules which an agency determines will have a major impact on the economy of the State or on a sector of the economy. The Cost-Benefit Analysis shall include:

(a) the revenues, expenditures, and paper work requirements of the agency proposing the rule;

(b) the revenues and expenditures of any other state or local government agency affected by the proposed rule;

(c) the total estimated costs generated by the proposed rule, including compliance costs;

(d) the total estimated benefits generated by the proposed rule, including environmental and other benefits that are difficulty to quantify;

(e) the identity of the taxpayers, consumers, industry or trade groups, small business, or other applicable groups affected by the proposed rule and an explanation of what the distributive impacts of the rule are likely to be;

(f) an explanation of why the rule is necessary and of what alternatives to the proposed rule the proposing agency has considered, if any, including but not limited to economic incentives such as user fees or marketable permits to achieve the desired results; and

(f) an explanation of how the proposed rule will maximize net benefits.

Section 309. Emergency Rules.

(1). If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the procedures required by Section 302 or Section 303 of this Act, and if the agency states in the rule its reasons for that finding, and if the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures set forth in Sections 302 and 303 and instead file in the office of the Secretary of State three copies of the emergency rule, to one of which copies shall be attached a certificate from the Governor concurring in the agency's finding of emergency. Such an emergency rule is effective on filing and remains in effect until a date fixed in the rule or 60 days after the date of its filing, whichever is earlier. The emergency rule may be extended once for not more than 30 days by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. An

emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the *Michigan Register*.

(2). If, thereafter, an agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by Sections 303 and 304 of this Act.

(3). The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.

Section 310. Agency Review of Existing Rules.

(1). Every two years, each agency shall prepare a plan for the review of the agency's existing rules. The plan shall be transmitted to the chair and ranking minority member of legislative committees with relevant oversight jurisdiction over the agency, to the Director of the Department of Management and Budget, and to the Office of Regulatory Reform. Each agency shall conduct a review pursuant to its submitted plan.

(2). In conducting the review required by this section, each agency shall prepare a Small Business Economic Impact Statement, if the review discloses a previously unforeseen impact on small businesses. The agency shall also review its rules to ensure that the marginal benefits of its rules continue to exceed their marginal costs.

(3). The agency shall prepare a recommendation based on its review as to whether its rules should be continued without change, amended, or rescinded. The agency shall forward such recommendation to the chair and ranking minority member of each legislative committee with oversight jurisdiction over the agency, to the Director of the Department of Management and Budget, and to the Office of Regulatory Reform.

Section 311. Legislative Oversight of Agency Rulemaking: Concurrent Resolution of Disapproval; Joint Resolution of Rejection; Legislative Correction's Day.

(1). **Concurrent Resolution of Disapproval.** If any legislative standing committee with relevant jurisdiction over the subject matter of a final rule or any member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent, or is inexpedient, the committee or member may introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not necessarily constitute legislative approval of the rule.

(2). **Joint Resolution of Rejection.** If any legislative standing committee with relevant jurisdiction over the subject matter of a final rule or any member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent, or

is inexpedient, the committee or member may at a regular session, or special session if included in a governor's message, introduce a joint resolution amending or rescinding the rule for presentation to the Governor for his or her signature. The introduction of such joint resolution stays the effective date of the whole or part of the final rule for 60 days.

(3). **Legislative Corrections Day.** At least twice each legislative year, the leadership of the Senate and of the House shall designate a "legislative corrections day" for the purpose of focused and expedited consideration of legislative resolutions to repeal, amend, or otherwise modify existing agency rules which the legislature considers to be contrary to legislative intent or to sound public policy. Such resolutions shall, pursuant to each chamber's scheduling rules, be given priority status in each chamber's legislative calendars.

CHAPTER FOUR. ADJUDICATION.

Section 401. Applicability.

This Chapter shall apply to all agency decisions other than rules.

Section 402. Informal Orders: Procedure; Declaratory Orders; Licensing Decisions.

(1). **Procedure.** Where an agency is authorized by statute to make decisions that are not rules, including but not limited to declaratory orders and licensing decisions, and where such statutory authority does not require such decisions to follow a formal hearing on a record, the agency may adopt procedural rules appropriately suited for the type of decision authorized.

(2). **Declaratory Orders.** On request of any party, an agency may issue a declaratory order addressing the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration, and agency resolution. A declaratory order is binding on the agency and the person requesting it. An agency may not retroactively change a declaratory order, but nothing in this subsection prevents an agency from prospectively changing such an order.

(3). **Licensing Decisions.** Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license not required by statute to follow a formal hearing on a record, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. Except as otherwise provided in the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, or the regulated occupations support enforcement act, the licensee shall be given an opportunity to show or achieve compliance with all lawful requirements for retention of the license. Within a reasonable time, the agency must inform the licensee of the results of the agency's

compliance determination. If as a result of the agency's compliance determination the agency finds it necessary to proceed with suspension or revocation, the agency must so proceed within a reasonable time of its compliance determination.

If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in an order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings licensee's opportunity to show compliance. Such opportunity shall be promptly commenced and determined.

An agency may forego a compliance determination if:

(a) the agency deems circumstances to constitute an emergency situation;

(b) the licensee's conduct threatens the public health, safety, or welfare or presents a threat to the health, safety, or welfare of persons who receive a benefit from the licensing requirement, such as benefits of services, housing, treatment, care, or support;

(c) the licensee's conduct justifies revocation regardless of future compliance; or

(d) the licensee's conduct constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license.

Where the number of licenses exceeds the number of license applicants, the licensing agency shall hold a comparative hearing designed to select from among applicants those most qualified according to statutory criteria. Where the relevant statute does not provide comparative criteria, the agency shall promulgate rules governing the allocation of available licenses on a random, first-come, or otherwise neutral basis.

When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This provision does not affect valid agency action then in effect summarily suspending such license under this subsection.

Section 403. Formal Orders.

(1). Where an agency is authorized by statute to make decisions that are not rules, and where such statutory authority requires that such decisions follow a formal hearing on a record, the agency must employ the formal adjudication process of Section 404.

(2). When licensing is required by statute to be preceded by a hearing on a record, the agency must employ the formal adjudication process of Section 404.

(3). When licensing suspension, revocation, or cancellation is required by statute to be preceded by a hearing on a record, the agency must employ the formal adjudication process of Section 404.

(4). An agency may adopt procedural rules not inconsistent with Section 404 specifying the details of its formal adjudication process, including but not limited to rules providing for discovery and depositions.

Section 404. The Formal Adjudication Process: Notice; Scheduling; Answer; Failure to Appear; Hearings; Ex Parte Communications; Subpoena; Administrative Law Judges; Evidence.

(1). **Notice.** The parties to an adjudication shall be given an opportunity for a hearing without undue delay. They shall also be given a reasonable notice of such hearing, which shall include:

(a) a statement of the date, hour, place, and nature of the hearing;

(b) a statement of the legal authority under which the agency is holding the hearing;

(c) a reference to the particular sections of the statutes and rules involved; and

(d) a plain statement of the issues to be addressed at the hearing. If the agency or other party is unable to explain the issues in detail at the time the notice is given, the initial notice may summarize the main issues involved. Thereafter, on request the agency or other party shall furnish a more detailed statement on the issues.

(2). **Notice to Legislators.** A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. A member of the legislature shall not be privileged from service of notice or other process pursuant to this Chapter, however, if such service of notice or process is executed by certified mail, return receipt requested.

(3). **Answer.** A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(4). **Scheduling.** When the presiding officer knows that a party to an adjudication is a member of the legislature of this state, and the legislature is in session, or when the presiding administrative law judge knows that such party serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the adjudication shall be continued by the administrative law judge to a non-meeting day. When the administrative law judge knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the taking of the legislator's testimony as a witness shall be postponed to the earliest practicable non-meeting day.

(6). **Failure to Appear.** If a party fails to appear at a hearing after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(7). **Hearings.** At a hearing, the parties to an adjudication shall be given an opportunity to present oral arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact. To the extent that the interests of the parties will not be substantially prejudiced thereby, however, an agency may provide for submission of all or part of the evidence in written form. The parties shall also be given an opportunity to cross-examine witnesses, including authors of any document prepared by, on behalf of, or for use of the agency and offered in evidence, and to submit rebuttal evidence. An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. Depositions may be used in lieu of other evidence when taken in compliance with the general court rules. An agency that relies on a witness in an adjudication, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts in dispute, except records related solely to the internal procedures of the agency or exempt from disclosure by law, an agency shall make such records promptly available to a party. Hearings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

(8). **Ex Parte Communications.** Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a formal adjudication shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This subsection does not apply, however, to an agency employee or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in an adjudication before the Financial Institutions Bureau, the Insurance Bureau or the Public Service Commission insofar as the case involves rate-making or financial practices or conditions.

(9). **Subpoena.** The administrative law judge shall issue subpoenas requiring the attendance and testimony of material witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence sought does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason the subpoena is invalid or unnecessary. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition in the circuit court for Ingham County, or for the county in which the agency hearing is held, for a court order requiring compliance.

(10). **Administrative Law Judges.** One or more persons designated by statute or one or more hearing officers designated and authorized by the agency to oversee formal adjudications shall preside impartially over hearings. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias, conflict of interest, or other grounds for disqualification of an administrative law judge, the agency shall determine the matter as a part of the record in the case. When an administrative law judges designated to conduct an adjudication is disqualified or it is impracticable for him or her to continue the hearing, another may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom. An administrative law judge may do all of the following:

(a) administer oaths and affirmations;

(b) sign and issue subpoenas in the name of the agency;

(c) provide for the taking of testimony by deposition;

(d) regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(e) direct the parties to appear and confer to consider simplification of the issues by consent of the parties;

(f) act upon an application for an award of costs and fees under Section 406; and

(g) prepare a decision for an adjudication under Section 405.

(11). **Evidence.** The rules of evidence as applied in a nonjury civil case in circuit court shall be generally followed in adjudication as far as practicable. An agency may admit and give probative effect, however, to any evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded, and effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Evidence, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Factual information not made part of the record shall not be considered in the determination of the case, except that the administrative law judge may take official notice of judicially cognizable facts and of technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available. The parties to an adjudication may, by a stipulation in writing filed with the agency, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(12). **Witness Alleged Victim of Abuse.** In an adjudication where a witness testifies as an alleged victim of sexual, physical, or psychological abuse—that is, of an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress—such witness shall be

permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. Such a witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person. All persons not necessary to the proceeding shall be excluded during the witness's testimony. This section is in addition to other protections or procedures afforded to a witness by law or court rule.

Section 405. Final Decisions.

(1). Except as otherwise provided by law, disposition of a formal adjudication may be made by stipulation, agreed settlement, consent order, waiver or other method agreed upon by the parties, or by decision of the agency.

(2). A final written decision or order of an agency in an adjudication shall be made, within a reasonable period, upon consideration of the record as a whole and as supported by and in accordance with the competent, material, and substantial evidence. The final decision shall include findings of fact and conclusions of law separated into sections captioned "findings of fact" and "conclusions of law," respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed under Section 404(11). Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party to the adjudication submitted proposed findings of fact that would control the decision or order, the decision shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority and reasoned opinion.

(3). A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

(4). In the absence of the filing of exceptions, rehearing, or appeal by the agency within the time allowed by statute or provided by rule, the decision shall become the final decision of the agency.

Section 406. Awards of Costs and Fees: Availability; Criteria; Payment; Exceptions; Report to Legislature.

(1). **Availability.** The administrative law judge who conducts an adjudication shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in

connection with that contested case, if the administrative law judge finds that the position of the agency to the proceeding was frivolous. The administrative law judge may reduce the amount of the costs and fees to be awarded, however, or deny an award, to the extent that the party seeking the award engaged in conduct which unduly and unreasonably protracted the case. The final action taken by the administrative law judge under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings. The amount of costs and fees awarded under this section shall include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this act, based upon the prevailing market rate for the kind and quality of the services furnished, subject to the following:

(a) the expenses paid for an expert witness shall be reasonable and necessary as determined by the administrative law judge; and

(b) an attorney or agent fee shall not be awarded at a rate of more than $100.00 per hour unless the administrative law judge determines that special circumstances existed justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances.

The costs and fees awarded under this section shall only be awarded to the extent and amount that the agency caused the prevailing party to incur those costs and fees. This section does not apply to any agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an agency acting ex rel. on the information and at the instigation of a party who has a private interest in the matter or to an agency required by law to commence a case upon the action or request of another party. Nor does this section does not apply to an agency that has such a minor role as a party in the adjudication in comparison to other nonprevailing parties so as to make its liability for costs and fees under this section unreasonable, unjust, or unfair.

An application for costs and fees and the awarding thereof under this chapter shall not delay the entry of a final order in a contested case.

If a prevailing party recovers costs and fees under this chapter in a contested case, the prevailing party is not entitled to recover those same costs for that contested case under any other law.

(2). **Criteria.** To find that an agency's position was frivolous, the administrative law judge shall determine that at least one of the following conditions has been met:

(a) the agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party;

(b) the agency had no reasonable basis to believe that the facts underlying its legal position were in fact true; or

(c) The agency's legal position was devoid of arguable legal merit.

If the parties do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:

(a) that a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case;

(b) that the position of the agency was frivolous;

(c) that the party is a prevailing party;

(d) the amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed; and

(d) that the party is eligible to receive an award under this section.

Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.

(3). **Payment.** If costs and fees are awarded under this chapter to a prevailing party, the agency or agencies over which the party prevailed shall pay those costs and fees.

(4). **Exceptions.** This section does not apply to any of the following:

(a) any proceeding regarding the granting or renewing of an operator's or chauffeur's license by the secretary of state;

(b) proceedings conducted by the Michigan Employment Relations Commission;

(c) worker's disability compensation proceedings under Act No. 317 of the Public Acts of 1969;

(d) unemployment compensation hearings under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.73 of the Michigan Compiled Laws; and

(e) Department of Social Services public assistance hearings under section 9 of the social welfare act, Act No. 280 of the Public Acts of 1939, being section 400.9 of the Michigan Compiled Laws.

(5). **Report to Legislature.** The Director of the Department of Management and Budget shall report annually to the legislature regarding the amount of costs and fees paid by the state under this section during the preceding fiscal year. The report shall describe the number, nature, and amount of the awards, the claims involved, and any other relevant information which would aid the legislature in evaluating the scope and impact of the awards. Each agency shall provide the Director of the Department of Management and Budget with information as is necessary for the director to comply with the requirements of this section.

Section 407. Agency Appeals and Rehearings.

(1). **Rehearings.** Where for justifiable reasons the record of testimony made at a hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of another party to an adjudication shall order a rehearing. A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the

record for possible agency reconsideration and judicial review. An original decision or order may be amended or vacated after the rehearing.

(2). **Agency Appeals.** An agency shall hear appeals of final decisions as required or authorized by statute or agency rule. On appeal from or review of such decision, the agency's decisionmaker or decisionmaking body shall have all the powers which the agency had during the original hearing, except that the scope of agency appeals shall be limited to conclusions of law and matters of policy.

CHAPTER FIVE. JUDICIAL REVIEW OF AGENCY ACTION.

Section 501. Availability of Judicial Review: Agency Action; Jurisdiction.

(1). **Agency Action.** Any party aggrieved or adversely affected by final agency action may seek judicial review of that agency action in the courts, in accordance with the general court rules, and subject to the requirements of this Chapter.

(2). **Jurisdiction.** Judicial review of agency action shall follow any statutory review proceeding in any court as designated by the legislature to be applicable to a specific agency or a specified type of agency decision. In the absence of such designated courts and proceedings, the Court of Appeals shall have jurisdiction to conduct judicial review of agency action. Judicial review of agency action shall be by petition for review in accordance with Section 502.

Section 502. Petition for Judicial Review: Venue; Exception; Contents of Petition; Stay of Enforcement of Agency Action.

(1). **Venue.** A petition for review shall be filed in the Court of Appeals for the division where the party seeking judicial review resides, or for the division in which that party has his or her principal place of business.

(2). **Exception.** In the case of an appeal from a final determination of the Office of Youth Services within the Department of Social Services regarding an adoption subsidy, a petition for review shall be filed:

(a) for an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found; or,

(b) for an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.

(3). **Contents of Petition.** A petition for review shall contain a concise statement of:

(a) the nature of the agency action of which review is sought;

(b) the facts on which venue is based;

(c) the grounds on which relief is sought; and

(d) the declaratory, injunctive, or other relief sought.

When seeking review of a final rule or formal order, the petitioning party shall also include, as an exhibit accompanying the petition, a copy of the final agency rule or formal order of which review is sought.

(4). **Transmittal of Record.** Within 60 days after service of the petition for review, or within such further time as the court allows, the agency shall transmit to the reviewing court the original or certified copy of the entire record of all relevant proceedings and agency decisions. As the reviewing court deems appropriate, the court may permit subsequent corrections to the record. Parties to the proceedings for judicial review may stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for additional costs.

(5). **Stay of Enforcement of Agency Action.** The filing of the petition for judicial review does not stay enforcement of the agency action, but the agency may grant, or the court may order, a stay upon appropriate terms.

Section 503. Requirements: Timing, Standing, Exhaustion.

(1). **Timing.** A petition for review shall be filed in the court within 60 days of the agency action of which judicial review is sought.

(2). **Standing.** A petition for review may be brought by any party so entitled under another statute, or by any party aggrieved or adversely affected by final agency action, provided that:

(a) the agency's action or inaction has or is likely to prejudice that party's rights or interests;

(b) that party's rights or interests should have been considered by the agency; and

(c) a favorable judgment by the court would significantly redress the injury to that party's rights or interests.

(3). **Exhaustion.** Any party seeking review of agency action must first exhaust all administrative remedies available, if any, within the relevant agency; preliminary or intermediate agency action or ruling is not subject to immediate judicial review. A court may grant leave for review of preliminary or intermediate agency action, however, if review of the agency's final action would not provide an adequate remedy or if exhaustion of administrative remedies would serve no useful purpose. Exhaustion of administrative remedies does not require filing of a petition for rehearing or any other reconsideration by the agency, unless a statute or the agency's own rules specifically require an application for rehearing or reconsideration before judicial review is sought.

Section 504. Record on Review.

(1). Judicial review shall be confined to the record as presented under Section 501(4). In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court as the court deems appropriate.

(2). The reviewing court shall receive written briefs and, on request, shall hear oral arguments.

Section 505. Scope of Review.

(1). The reviewing court shall interpret all applicable constitutional and statutory provisions, determine the meaning or application of all of the relevant terms of an agency action, and decide all relevant questions of law.

(2). Except when a statute explicitly provides for a different scope of review in place of, and not merely in addition to, the following, the reviewing court shall hold unlawful and set aside any agency action that is:

(a) in violation of the Constitution;

(b) in excess of the agency's statutory authority or jurisdiction or otherwise in violation of law;

(c) without observance of procedure required by the agency's statute, other applicable statutes, or the agency's own procedural rules; or

(d) arbitrary, capricious, an abuse of discretion, or wholly without evidentiary or factual support.

(3). Where the validity of agency action under Subsection (2)(b) depends upon the meaning of a statutory term, the reviewing court shall:

(a) for statutory terms whose meanings the legislature has unambiguously supplied, enforce the meaning the legislature clearly intended;

(b) for statutory terms whose meanings were neither unambiguously supplied by the legislature nor legislatively delegated to the agency, employ the traditional tools of statutory interpretation when interpreting the terms of statutes that the agency is not specifically charged to administer and that do not fall within the agency's expertise;

(c) for statutory terms whose meanings were neither unambiguously supplied by the legislature nor legislatively delegated to the agency, defer to the agency's interpretation of terms of statutes that the agency is specifically charged to administer or that fall within the agency's expertise, so long as the agency's interpretation is not unreasonable, even if not the interpretation the court would have adopted; and,

(d) for statutory terms whose full meanings the legislature intended the agency to supply, defer to the agency's interpretation, so long as the agency's interpretation is not arbitrary, capricious, or an abuse of discretion.

(4). In addition to Subsections (2) and (3), the reviewing court shall also hold unlawful and set aside any formal agency order and any declaratory order that is not supported by competent, material, and substantial evidence, viewing the adjudicatory record as a whole.

Section 506. Forms of Relief.

(1). The reviewing court shall, as the court deems appropriate, affirm, reverse, or modify the agency's action.

(2). The reviewing court shall also compel agency action unlawfully withheld or delayed.

(3). In addition or in the alternative to the above, the reviewing court may also remand the matter to the agency for further proceedings. If it is shown to the satisfaction of the court that an inadequate record was made by the agency or that additional evidence is material, and that there were good reasons for failing to record or present such evidence to the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its position because of the additional evidence, and shall file with the court the additional evidence and any modified action that the agency may have taken.

(4). The court reviewing the final action of an administrative law judge regarding the award of costs and fees under Section 406 may modify that action if the award is arbitrary, capricious, an abuse of discretion, or wholly without factual support. An award of costs and fees made by a court under this Subsection shall only be made pursuant to section 2421d of Act No. 236 of the Public Acts of 1961, being section 600.2421d of the Michigan Compiled Laws.

III. Chapter-by Chapter Commentary on Proposed Revisions

A. *Chapter 1: "Definitions; General Provisions"*

As summarized earlier above in Part I, the new Chapter 1 reflects an effort to house all of the new Act's definitions, general provisions, and other miscellaneous material in one location. The differences between it and various definitional and general provisions in the old APA are primarily organizational. The first section of Chapter 1, "Definitions," now contains all of the new Act's definitions, whereas the old Act contained several definitions in later chapters, defining terms relevant to those chapters. The first section also contains a few substantive definitional changes, including new definitions of "agency action" and of the different types of agency rules. Its definitions otherwise mirror the current Act's.

Chapter 1 also provides for a smooth transition between the current Act and the proposed Act. It explains that the proposed Act repeals the current Act, but that other, existing statutes relating to agency process are not affected by it. It furthermore provides for the continuation of existing rules and for completion of agency decisions already in progress under the old framework.

Beyond this, the new Chapter 1 contains one section each containing general provisions pertaining to agency rulemaking and agency adjudication. The rulemaking section contains a provision explaining agency promulgation of final rules, a provision requiring publication of final rules in the *Michigan Administrative Code*, and a provision covering the transmittal of rules to the legislature. The general section on agency adjudication sets forth the required contents of formal agency records, requires agencies to maintain bound volumes of their official adjudication records, and requires agencies to compile records of their final decisions in formal adjudications and to make the same available to State law libraries.

This last requirement constitutes the one substantive change in the new Chapter 1, which addresses a fairly serious problem. At present, some agencies do not maintain records of their decisions in contested cases. Some agencies do, but often each has its unique format, publication frequency, and user aids (e.g., indexes). And the level of quality across these publications varies. Some agencies have in the past ceased publication of their administrative materials only to resume later. Others have ceased publication and show no sign of resuming. The variance here across agencies is a source of considerable frustration for practitioners and librarians alike. See, e.g., David Leebron, Agency Use of Unpromulgated Policies: The Practitioner's View, Mich. Bar J. (Mar. 1995) at 280; Library of Michigan, Guide to Selected Michigan Administrative Materials (1991). What is more, lack of consistent and systematic publication of agencies' decisions undermines basic commitments to the rule of law, which require that citizens have access to the law that governs them. By requiring agencies to maintain records of their decisions in formal adjudications, Chapter 1 remedies this seemingly mundane but actually quite crucial problem.

B. *Chapter 2: Legislative Service Bureau, Michigan Register and the Michigan Administrative Code*

Chapter 2 now contains all material relevant to publication of the *Michigan Register* and the *Michigan Administrative Code*, as well as to the Legislative Service Bureau's editing and publishing roles for each. Material regarding these two publications was formerly contained in chapters 1 and 3. As with Chapter 1, Chapter 2 takes a "spring cleaning" approach to the current Act. Most of the changes in Chapter 2 are organizational rather than substantive.

A few substantive changes are found in its section on the *Michigan Register*, however, which now requires that the text of all proposed rules, together with required Small Business Impact Statements and cost-benefit analyses, be published in the *Michigan Register* at the same

time an agency provides notice that it is contemplating the adoption of a proposed rule. Similarly, Chapter 2's provisions on the *Michigan Register* require agencies, through the Legislative Service Bureau, to publish the text of all final substantive, procedural, and (upon request) interpretive rules, as well as a concise general statement accompanying all substantive rules explaining why a substantive rule took the final form it did in light of comments received by the agency during the notice-and-comment phase of informal rulemaking. These changes correspond to changes in the informal rulemaking processes of Chapter 3.

Finally, with respect to the *Michigan Administrative Code*, Chapter 2 contains provisions directing the Legislative Service Bureau to compile and publish the *Michigan Administrative Code* as often as practicable, at least every seven years, and to publish annually a supplement containing all final rules published in the *Michigan Register* during the current year (other than emergency rules), as well as all amendments and rescissions of rules occurring since the last complete compilation of the *Michigan Administrative Code*. The current difficulty of finding Michigan's most current administrative materials would be ameliorated by more frequent compilation of the *Administrative Code*, along with systematic agency compilation of decisions rendered in formal adjudications, as now required by the new Chapter 1. Chapter 2 furthermore states that the *Michigan Administrative Code*, like the *Michigan Register*, shall be available for public subscription at cost.

C. *Chapter 3: "Rulemaking"*

1. *Problems with the Current Approach*

The old APA's chapter on rulemaking is cluttered with extraneous detail, much of which concerns the Legislative Service Bureau and references activities that can be handled internally by the legislative branch. The new Chapter 3 prunes this extraneous material and

combines features of chapters 2 and 3 of the old APA, which under the old act covered "guidelines" and "rulemaking," respectively. As noted above, certain provisions of the old chapter 3 concerning the procedural effect of rules and their construction have now been moved to Chapter 1. Likewise, most provisions dealing with publication of rules in the *Michigan Register* and the *Michigan Administrative Code* have been moved to Chapter 2. Finally, the provisions in the current chapter 3 allowing for "declaratory rulings" by agencies have been moved to the new Chapter 4, since (as explained in the commentary to Chapter 4) such a ruling is the functional equivalent of one type of adjudication.

The current system of agency rulemaking is also needlessly cumbersome. For one thing, public hearings every time an agency wants to adopt a new rule creates administrative burdens in excess of any gains. Simpler rulemaking procedures which preserve openness and accountability values should be used.

Legislative approval through the Joint Committee on Administrative Rules for all rules also creates unnecessary rulemaking hurdles. JCAR oversight requires agencies to obtain prior approval from the Committee before final rules can take effect. (The Committee has up to three months to act.) In the absence of such approval, such rules cannot take effect without either approval of the full legislature (within two more months) or resubmission of a modified rule to the JCAR anew. The process of submission and resubmission of rules to the JCAR can add many months to the rulemaking process.

Time and procedural complexity aside, in all candor the JCAR review process likely subjects agencies on occasion to illicit political pressures during the rulemaking process, a danger fueling recurrent controversy about the JCAR. Indeed, Michigan's JCAR resembles no institution found in the Model Act or in the Federal APA. Its veto powers exceed those recently adopted by the 104th Congress, and while some other states have analogous institutions, Michigan's JCAR is probably the most potent committee of its type. It is not

entirely clear, in other words, that *JCAR* review, apart from the oversight involvement of the legislature as a whole, always ensures that agencies actually carry out broad legislative will.

What is more, the JCAR's constitutional status is open to real question, under the bicameral and presentment provisions as well as under the separation of powers doctrine of the State's Constitution. Although this issue has not yet been addressed by the Michigan Supreme Court, one Michigan court has recently held that the JCAR does indeed violate the Constitution. See Blank v. Dept. of Corrections (No. 95-72477-AW, Sept. 7, 1995). Moreover, the JCAR's powers were created in an amendment to the current APA passed over the governor's veto. Previously, Michigan's Attorney General had expressed the view that a legislative committee with the JCAR's powers would be unconstitutional. See Biennial Report of the Attorney General of the State of Michigan (Dec. 31, 1968) at 65. Shortly thereafter, the Supreme Court declined (4-3) to rule, under the Advisory Opinions Clause, on the constitutionality of the JCAR, see Request for Advisory Opinion on Constitutionality of 1977 PA 108, 402 Mich. 83 (1977), preferring instead a concrete case. Many other state supreme courts have, however, struck down analogous enactments in their home states that created legislative institutions with veto powers like the JCAR's. See, e.g., State v. Broom, 439 So. 2d 357 (La. 1983); Opinion of the Justices, 431 A.2d 783 (N.H. 1981). Moreover, the U.S. Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983), in which the Court held unconstitutional a legislative veto provision giving the Congress a "trump" power over a federal agency, casts further doubts on the constitutionality of the JCAR. Finally, it deserves mention that the seeming non-reviewability of the JCAR's actions raises independent constitutional concerns about its status, and provides further possible support for the decision in Blank.

While agency rulemaking should undoubtedly conform to legislative will, legislative oversight mechanisms that are less procedurally cumbersome, less politically controversial, and less constitutionally questionable could and should be developed. Were the JCAR provisions of the current to be struck down as unconstitutional by the Michigan Supreme

Court, the legislature would be left with no effective alternative means of oversight. In the meantime, the Governor has issued a series of executive orders which have the combined effect of replacing JCAR oversight with gubernatorial oversight through the new Office of Regulatory Reform. See Exec. Order Nos. 1995-2, 1995-6, 1996-2. For two reasons, then, the legislature is well advised to provide for alternative mechanisms of legislative oversight, through constitutionally secure means.

The constraints on rulemaking agencies currently face—not only but perhaps especially the JCAR—also create undesirable incentives for agencies to circumvent existing rulemaking procedures by employing decisionmaking techniques excluded from the definition of "rule" under the current APA and to make decisions that, in essence, are tantamount to rules. For example, some agencies have promulgated "guidelines," "manuals," "bulletins," "newsletters," and "letters" to put in place policies that are essentially rules. See Michigan Courts Deal with "Rules" and "Non-rules", ADMIN. & REG. LAW NEWS (Fall 1995) 14 (discussing issue and supplying example cases). Under the current APA, these informal modes of agency communication are not subject to legislative review, do not require notice and comment, and do not require public hearings. As a result, agency decisions effectuated through guidelines, manuals, and other similar materials escape examination by the legislature and deny affected parties the benefits of fair and open decisionmaking procedures, as originally contemplated by the legislature. Moreover, unconstrained by the procedural apparatus that binds rulemaking, policies established through these informal means are subject to the caprice of those who administer them: They are easily changed to fit current circumstances and political pressures. Also, such materials may not be taken as seriously as rules properly passed and officially published, even though agencies may apply them with the same force as formal rules. Finally, and perhaps most critically, informal materials are not regularly published and their substance and impact cannot be adequately anticipated with any degree of certainty or predictability by parties that must prepare to comply with an agency's policies.

Furthermore, the complicated task of creating standards to differentiate between rules and decisions that are not rules—such as "guidelines," "directives," and "memorandum"—has fallen to the courts. The courts have, quite sensibly, often considered the use of informal materials such as guidelines and manuals to replace rules as contrary to due process and fairness norms as well as to the spirit of the current Act. In a number of decisions, courts have invalidated agency action based on the use of guidelines and the like in lieu of rules. See, e.g., Spear v. Mich. Rehabilitation Services, 202 Mich. App. 1 (1993); Palozolo v. Dept. of Soc. Services, 189 Mich. App. 530 (1991); Am. Federation of State, County and Municipal Employees v. Dept. of Mental Health, 522 N.W.2d 657, 660-61 (Mich. App. 1994). In these decisions, courts have held that whether a particular decision constitutes a rule does not depend on how an agency labels that decision, for otherwise agencies could engage in substantive rulemaking while avoiding the strictures of the procedures for rulemaking. Instead, courts have looked to the effect of the policy rather than its label. Indeed, the decisions try to apply the statutory definition of rule, rather than the label used by the agency, in analyzing whether the agency's position should be sustained.

Given the familiar costs associated with litigation, however, relying solely on the courts to safeguard against agency short-circuiting of the rulemaking process would not necessarily protect the integrity of the process or guarantee agency accountability. Nor should affected parties have to depend on judicial review to ensure that agencies follow the appropriate rulemaking procedures. Instead, a new rulemaking structure should be established that itself helps to ensure that agencies follow the requirements of the Administrative Procedure Act and other expressions of legislative will.

In sum, the difficulties inherent in the existing legislative approval process, the necessity of hearings when developing rules, and the current Act's complicated typology of agency decisions that are not rules together operate to discourage agency compliance with the current Act and encourage agencies to find innovative ways to avoid the burdens of the current

Act's rulemaking process. Such concerns about agency behavior prompted the Commission to endorse an earlier set of rulemaking proposals in 1990, and they continue today.

2. *Types of Rules*

The new Chapter 3 avoids these problems by introducing a new structure for rulemaking modeled, in part, after the federal approach. The new APA does so first by distinguishing among several different species of rules. Most importantly, Chapter 3 distinguishes between "substantive" and "non-substantive" rules. "Substantive" rules include all rules that impose or determine rights and obligations and that have a binding effect, leaving the agency unable to exercise discretion in the enforcement of a given statutory provision. They have as their primary identifying quality the aspect that they establish a standard of conduct or practice or define a set of circumstances, the violation of which constitutes wrongdoing. When substantive rules are in place under the appropriate statute, the agency need only prove that the rule has been violated in order to establish a violation of law.

For example, if an agency with substantive rulemaking power operates under a statute which specifically calls for the agency to identify and prohibit "deceptive trade practices," the agency may pass substantive rules which in effect define the term "deceptive" by identifying specific conduct, such as failing to list the octane rating on a gas pump or labelling as "regular" gasoline with an octane rating below a specified number. When that agency subsequently proceeds against an alleged violator, it need only prove a violation of the rule at an administrative hearing; it need not further show that the failure to list is deceptive or that the specific number set forth in its rule is deceptive. Challenges to the validity of the substantive rule or to the consistency of the rule with the underlying statute are made only through judicial review.

The proposed APA distinguishes between substantive and non-substantive rules by borrowing from a test set forth in federal cases such as State of Alaska v. U.S. Dept. of Transp., 868 F.2d 441, 445 (D.C. Cir. 1989). There, distinguishing criteria include: (1) investigating whether the language actually used by the agency in the course of creating the rule described the rule as being mandatory; (2) using the agency's determination of the need for exemptions in order to confirm that a particular rule will have a binding effect; (3) evaluating informal agency declarations that the rule is mandatory; (4) using the need for publication of the rule as a probative sign that the rule is substantive; and (5) determining whether violation of the rule without additional evidence would establish a violation of the statute in a subsequent enforcement proceeding—the classic test for identifying a substantive rule.

The new APA segregates substantive rules from other types of rules which do not have the same legal effect as substantive rules. Specifically, the proposal replaces the current framework by creating three species of non-substantive rules: "housekeeping rules," "procedural rules," and "interpretive rules." The proposal also establishes clear standards for distinguishing among these types of rules.

"Housekeeping rules" concern the internal management of an agency and do not substantially affect the procedural or substantive rights or duties of any segment of the public. For example, a housekeeping rule might establish a specific price to be charged for a good or service sold by the agency or govern the physical servicing, maintenance, or care of agency-owned or agency-operated facilities.

"Procedural rules," in contrast, describe procedures an agency requires regulated and other interested parties to follow, such as forms to use or reports to be kept. Like housekeeping rules, procedural rules do not affect the substantive rights or duties of any private parties. Instead, they govern such matters as communications between agencies and private parties.

Finally, "interpretive rules," which would replace so-called "guidelines" under the current system, offer the agency's understanding of the meaning of a statute's terms—where the agency was not delegated the task of giving meaning to the terms in question—or the meaning of one of its own rules. They do not, therefore, constitute primary law. In such a case, if the party acts in a manner which is contrary to an agency's interpretation of a statute, the agency must further demonstrate that the conduct violated the statute, not merely that the conduct was contrary to the agency's interpretation. Thus, if the rule in the example above were interpretive rather than substantive—that is to say, if the legislature did not delegate the task of defining "deceptive trade practice" to the agency but rather incidentally required the agency to interpret that term in order to carry out its other business—then the agency would be required to show that failing to post an octane rating or that a rating below the number was indeed "deceptive" within the meaning of the underlying statute, rather than simply proving that the octane rating had not been posted or that it was too low.

3. *Rulemaking Procedures*

The new APA requires notice and comment for all substantive rules: To adopt a substantive rule, an agency must publish notice of a rulemaking together with the text of its proposed rule in the *Michigan Register*, solicit comment on its proposed rule, and give whatever consideration is due the comments it receives. As the agency deems appropriate, it can engage it successive rounds of such notice and comment. Once the agency has provided at least one opportunity for comment on a proposed rule, it thereafter must publish along with the text of the final adopted rule a concise, general explanation of why its rule took the final form that it did. That explanation along with the final rule is to be published in the *Michigan Register*, with the final rule also to be codified in the *Michigan Administrative Code*.

Non-substantive rules—that is, housekeeping, procedural, and interpretive rules—are exempted from notice-and-comment requirements. That is not the only procedural distinction

between substantive and non-substantive rules, however. Among substantive rules, the new act distinguishes between "formal" and "informal" rulemaking. "Informal rulemaking" would allow agencies to promulgate rules following notice and comment without public hearings. In the informal rulemaking mode, in other words, promulgation of a final rule would follow an agency's solicitation of public feedback through the mail or electronically. Agencies would engage in informal rulemaking wherever an underlying statute has not required a public hearing.

Where the legislature has required a hearing on the record, agencies would then be required to hold open, public hearings, at times and places promulgated in advance, as the current Act now requires. This relatively costly and time consuming procedure of public hearings would be reserved, however, only to those issues the legislature deems important enough to require a hearing. Otherwise, by allowing agencies to engage in informal rulemaking through notice and comment, the new APA promotes agency flexibility while eliminating one of the major disincentives that currently lead agencies to promulgate rules under other guises. And yet, in both the informal and the formal rulemaking mode, agencies would be required to maintain full records of their decisionmaking process, thus allowing for full public disclosure of agencies' rulemaking rationales and for informed judicial review in the event that judicial review becomes necessary.

Besides restricting the full-fledged public hearing process to rulemaking legislatively required to include a public hearing, the proposed Act also makes one significant change to the notice requirement preceding a public hearing. Rather than requiring such notice in at least three newspapers, as the current Act does, the proposed Act allows agencies to provide notice *either* through newspapers *or* electronically through an agency homepage or similar Internet media. This flexibility encourages agency use of electronic communications, and furthermore provides its own economic test of the efficiency of the new communication: Given that agencies have a choice between alternative notice media, agencies will use electronic notice if and only if doing so is easier and cheaper than continued reliance on newspapers.

Because housekeeping rules do not have any external impact outside of the agency, housekeeping rules do not require prior notice and comment and do not need to be promulgated to take effect. Nor do procedural rules require notice and comment. They must accord with certain fundamental requirements of procedural fairness, but otherwise agencies have wide latitude on developing these types of rules as well. However, unlike housekeeping rules, procedural rules must be published in the *Michigan Register* before they become effective, and later codified in the *Administrative Gode*. (Procedural rules are effective, though, once promulgated in the *Michigan Register*; their effective date need not post date codification.) Finally, interpretive rules, which need not follow notice and comment, would also not be required to be published, but an agency would be required to issue and publish (in the *Michigan Register*) an interpretive rule in response to a specific request by any party. Furthermore, for all types of rules, agencies would be required to keep a full record of the development of a rule available for public inspection and judicial review in connection with each new rule. Naturally, courts have the power to review whether a particular agency rule constitutes a housekeeping, procedural, or interpretive rule.

Table 2 below summarizes these rulemaking processes together with their corresponding species of rules:

Table 2:

Typology of Rules and Rulemaking Processes

Type of Rule	Triggered By	Effect	Rulemaking Procedure	Publication/ Codification
Substantive:	delegation of substantive rulemaking power, including power to define or interpret statutory terms authoritatively	affect substantive rights, duties, and obligations of private parties	notice and comment ("informal" rule-making) or public hearing ("formal" rule-making)	Mich. Reg. & Mich. Admin. Code
Procedural:	delegation of power to specify some agency process	specify process, outline procedural rights	none	Mich. Reg. & Mich. Admin. Code
Interpretive:	need to interpret relevant statutory term	provide notice of agency's interpretive posture; non-binding	none	Mich. Reg. upon request
Housekeeping:	agency's internal needs	internal agency management and operation	none	none

4. *Negotiated Rulemaking*

In conjunction with promoting notice-and-comment rulemaking, the new APA introduces the concept of negotiated rulemaking, based on alternative dispute resolution principles and borrowed from federal practice. "Negotiated rulemaking" offers a productive way to engage interested parties in the rulemaking process in a manner that can significantly reduce confrontation and judicial challenges to substantive rules that stem from disagreements over the substance of the rule. By allowing all parties involved to negotiate in an informal setting to develop a rule each can live with, negotiated rulemaking helps eliminate many of the obstacles to effective rulemaking and increases significantly the prospects for effective enforcement and compliance of rules once promulgated.

Under the negotiated rulemaking provision, the agency would, if it chose, provide notice in the *Michigan Register* that it plans to develop a proposed rule and welcomes participation by interested parties in that rule's development. The agency would then create an advisory committee composed of representatives of parties who identified themselves to the agency as interested parties, as well as at least one representative from the agency itself. Members of the advisory committee would then meet to negotiate among themselves, under the supervision of the agency, over the terms of the proposed rule, with the aim of developing a proposed rule that reflected all parties' concerns. The agency would be required to keep records of all meetings and would be subject to applicable public disclosure requirements. Ultimately, the committee would submit to the agency the proposed rule, if any, agreed upon by its membership. Thereafter, the agency would commence the normal notice-and-comment procedures. In the event that the parties are unable to come to agreement on the text of a proposed rule, each party would submit comments to the agency as part of the normal rulemaking process.

Thus negotiated rulemaking takes nothing away from the notice-and-comment process; ordinary notice and comment begins when negotiations end. Where a negotiation is successful, however, notice and comment will proceed more smoothly, as interested parties will have agreed in advance on the terms of the proposed rule. Moreover, the possibility that any party can, as always, object to a proposed rule during the notice-and-comment stage will encourage agencies to ensure that the membership of negotiating committees reflects all interested parties. The ever-present possibility of judicial review after a final rule is promulgated—in cases brought by disgruntled parties—is a second source of discipline to encourage agencies to convene representative parties. While not suited for every rulemaking context, negotiated rulemaking can serve as a useful decisionmaking tool in agencies' rulemaking repertoire.

5. *Information Requirements in Rulemaking*

The new APA also requires agencies to engage in cost-benefit analysis before issuing a substantive rule. This new provision is based on the Model Act and on President Reagan's Executive Orders number 12291 and 12498, as reincarnated in President Clinton's Executive Order 12886. This cost-benefit requirement is in some ways similar to the current Act's requirement for evaluating the impact of a rule on small businesses. It also resonates in spirit with the review of proposed rules by agencies and by the Office of Regulatory Reform, as contemplated in the Governor's EO 1995-6. The required cost-benefit analysis must contain the following information: (1) a description of the classes of parties likely to be affected by the proposed rule, including those classes that will bear the costs of the rule and those that will benefit from the rule; (2) a description of the expected quantitative and qualitative impact of the proposed rule, including both economic and non-economic (i.e., aesthetic, environmental, recreational) impacts; (3) the expected costs to the agency of implementation and enforcement; (4) a brief description of alternative methods considered by the agency for achieving the purpose of the proposed rule and a determination of whether those alternatives are less costly or less intrusive methods that would obtain equal or greater benefits; (5) a comparison of the expected costs and benefits of the proposed rules to the expected costs and benefits of inaction; and (6) a description of the probable impact on and methods adopted or considered by the agency for reducing any negative impacts on small businesses. These requirements do not apply to non-substantive rules, or to agency orders.

6. *Emergency Rules*

The new provisions relating to "emergency rules" is also significantly modified. Because rules would no longer be subject to prior approval by the JCAR, as explained below, the need for emergency rules should be drastically reduced. In addition, because non-substantive rules are subject neither to legislative approval nor notice-and-comment

requirements, there is no persuasive to reason allow for an emergency rulemaking procedure for non-substantive rules. In order to ensure the protection of public health, safety, and welfare and the preservation of the public financial resources entrusted to the agency, however, agencies will still be able to enact emergency substantive rules of limited duration without public notice and comment, much as the current act allows. Such emergency rules would be limited to a maximum 90-day period of effectiveness. The 90-day period should be sufficient for agencies to meet the ordinary notice-and-comment requirements (or, as the case may be, for holding a public hearing) for adopting a final rule. Thus, even if the need for a rule promulgated under the emergency rule provision persisted, the justification for its emergency status would dissolve in the time it takes to promulgate a rule under ordinary notice-and-comment processes. Emergency rules could be extended, once, for an additional 60 days if the original 90-day period proved to be inadequate to complete the notice-and-comment process leading to a final rule. Thus emergency rulemaking processes would no longer be available to agencies as an end-around applicable rulemaking processes.

7. *Legislative Oversight of Agency Rulemaking*

Because the new rulemaking framework will allow for easier and more effective and consistent legislative oversignt (as well as for easier and more effective public accountability and judicial review, thus mitigating the necessity for legislative oversight), the new Chapter 3 replaces the JCAR as the dominant mechanism for legislative oversight. Instead, the new APA relies upon several alternative tools of formal legislative oversight. First, like the current Act, the new rulemaking chapter provides for "concurrent resolutions of disapproval" expressing legislative will that a rule should be amended or rescinded, or is otherwise undesirable. Undoubtedly formal expressions of legislative sentiment have an effect on errant agencies.

The proposed Act goes farther than the current Act, however, by also allowing any legislative standing committee with relevant jurisdiction over the subject matter of a rule, or

any members of the legislature who believes a rule in wholly or partly unauthorized, to introduce a "joint resolution of rejection" amending or rescinding the rule, a technique modeled on a review mechanism employed by the current Congress. Such a resolution will stay the effective date of the final rule in question for sixty days, pending legislative action on the resolution. In addition, the new Act also institutionalizes legislative "corrections days," also modeled on an initiative in the current Congress, during which the legislature can repeal or amend substantive rules issued by an agency. See "Corrections Day" Can Provide Relief, Legal Times, Feb. 12, 1996 at S33 (providing background and example application); Getting a Fix On Bad Laws, Nation's Business, July 1996, at 46 (same). Such resolutions would enjoy privileged status on the legislative calendar, under each house's procedural rules governing its agenda.

Fourth, the new Act, like the current Act, provides that members of the legislature receive copies of all promulgated rules, so that legislators are kept abreast of all agencies' rulemaking activities. In addition, the new rulemaking chapter also permanently requires agencies to conduct periodic reviews of existing rules, and to report the results of their reviews to the legislature on a regular basis. In these several ways, agencies remain in constant contact with the legislature not only about what they are doing and what they have done recently, but also about the actual consequences of old rules.

D. *Chapter 4: "Adjudication"*

1. *Problems with the Current Approach*

Like the old Act's provisions on rulemaking, its provisions on adjudication—now known as "contested cases"—are needlessly complicated. For one example of the organizational awkwardness of the current Act, it divides adjudication and licensing into separate chapters, notwithstanding that licensing decisions are, in form and substance, a subset of formal adjudication decisions. The same is true of the old Act's provisions concerning "declaratory judgments," another species of administrative order more appropriately housed in the chapter on adjudication. For another example, the current Act's provisions governing awards of costs and fees following a formal adjudication are found outside of both of the current Act's chapters on contested cases and licensing.

Organization aside, some of the current Act's provisions leave open important questions about how the formal adjudication process is to proceed. For instance, the current Act is largely silent on who bears the burden of proof and on exactly what the burden of persuasion is in a formal adjudication. Similarly, the current Act takes no position on the so-called "legal residuum rule," according to which a formal adjudicatory decision cannot rest solely on evidence introduced during an adjudication that would not be admissible in a court of law under the Michigan Rules of Evidence. The current Act's omission here breeds inconsistencies in the adjudicative system. For another example, the current Act is silent concerning intervention in an adjudication by parties with a direct legal interest in an administrative case. This too has led to practical difficulties. Agency decisions to grant, deny, or condition intervention are sometimes handled on an ad hoc, uncontrolled basis.

Still other aspects of the old act create an inefficient administrative adjudication system. For one, hearing examiners lack subpoena power, which renders them unable to compel the attendance of witnesses whose testimony is essential to the resolution of a case, creating many

practical problems. At the same time, hearing examiners are required to make "proposed" decisions rather than final decisions, with the latter sometimes made by powers within agencies who did not preside over a hearing. For another example, the current Act requires a formal hearing whenever required "by law," which has been interpreted at times by some Michigan courts to mean by statute or by the Constitution. See Lawrence v. Department of Corrections, 88 Mich. App. 167 (1979) (holding that the "by law" reference in the definition of a contested case or license included the due process clause of the constitution, that a hearing required by due process was a hearing required "by law"). As a result, agencies have used formal hearing processes for some decisions that may be better handled through more informal procedures.

Chapter 4, which in substance includes the bulk of chapters four and five of the current act, addresses all of these problems. First, it combines adjudication and licensing into one and the same chapter. It simultaneously integrates scattered provisions of the current act governing such matters as the award of costs and fees in an adjudication, provisions sensibly located in the chapter on adjudication. The new Chapter 4 also clarifies the circumstances under which agencies must engage in formal adjudication requiring a hearing on the record, and those under which agencies may instead opt for a more informal decisionmaking process. The procedures associated with formal and informal adjudications are also delineated. Fourth, the new chapter rearranges the retained provisions of the old Act to more closely approximate the chronological order of events in an adjudication. Accordingly, notice requirements for formal hearings are described first, intervention and evidentiary issues are covered next, and the agency's actual decisionmaking structure and process are formulated toward the end of the chapter. Fifth, the new Chapter 4 specifies all relevant burdens of proof and persuasion, and clarifies the nature of evidence that can satisfy those burdens. Finally, Chapter 4 rationalizes the respective tasks of hearing examiners and agencies in a formal adjudication with their respective functions.

2. *Types of Orders*

Perhaps most importantly, the new Act clearly distinguishes between formal and informal orders. Formal orders are the final product of the formal adjudication process. A formal adjudication takes place on a recorded transcript before a disinterested administrative law judge. Indeed, an administrative hearing on a record is the core feature of a formal adjudication, referred to in the current Act as a "contested case," which the new Act updates with the more modern term "formal adjudication."

How an agency chooses between formal or informal adjudication is simple: An agency must employ the formal adjudication process—in other words, must issue a formal order—whenever the legislature so directs. Thus, any statute that authorizes an agency to issue an order following a hearing on a record (in whatever statutory terms the legislature may use) necessarily triggers the formal adjudication process. In contrast, any statute that authorizes an agency to issue orders (i.e., decisions other than rules) but does *not* require those orders to follow a hearing on a record triggers instead informal adjudication. Of course, an agency may always elect to employ the formal adjudication process whenever it deems appropriate, although presumably agencies will seldom freely choose this most rigorous of decisionmaking techniques.

Requiring formal adjudication whenever specified by statute constitutes a departure from the current Act as interpreted by some Michigan courts. Because the current Act states that agencies must employ the formal adjudication process whenever a hearing is required "by law," and because some courts have interpreted "by law" to encompass the Constitution, agencies have at times been required to employ the formal adjudication processes whenever due process required *some* kind of hearing. In this regard, Lawrence v. Department of Corrections, 88 Mich. App. 167 (1979), followed the approach taken at the federal level in Wong Yang Sung, 339 U.S. 33 (1950), in which the Supreme Court held in a deportation case that, as a matter of statutory interpretation, the language "[hearings] required by statute" in the

federal APA included hearings required as well by the Constitution. The Court's result in Wong Yang Sung reflected its interpretation not of the Constitution, but rather of the meaning of the federal APA. But Congress subsequently made clear that the federal APA should not be interpreted to require the full-fledged formal adjudication whenever the constitutional Due Process requires some kind of hearing: In the very next year after the Court decided Wong Yang Sung, Congress passed a statute explicitly excluding deportation hearings from the federal APA's formal adjudication requirements, a change subsequently upheld as constitutional. See Marcello v. Bond, 349 U.S. 302 (1955).

The new Act achieves a similar result, essentially codifying the approach taken by the Michigan Supreme Court in Westland v. Blue Cross & Blue Shield of Michigan, 414 Mich. 247 (1982) (constitutional due process requirements reflect significance of interest at stake). Under the new Act, no argument could be made that the formal adjudication process is triggered whenever a court finds a non-statutory requirement for some kind of hearing in the Constitution. Of course, this change does not free agency decisionmaking from constitutional due-process constraints. Agencies would still have to provide a hearing sufficient to satisfy due-process requirements. But, once constitutional due process requirements are met, courts could not impose the formal adjudication requirements of the Act without legislative blessing.

For example, most decisions adversely affecting an existing license will have due process implications since they involve the deprivation of a protected property interest. Some kind of hearing will thus be required by the due process clause of the Constitution. But for constitutional purposes, however, the hearing need not follow the strictures of a formal adjudication, as long as the claimant has notice and a chance to present his case, opportunities which may well be adequately provided through informal adjudication (provided that the legislature has not indicated otherwise). In contrast, the due process clause would not apply to the determination of an initial license since no property right yet exists. Nevertheless, the legislature could still require a formal adjudication for the decision whether to grant or deny an

initial license. The formal adjudication in that case would be mandated by statute, not by the due process clause of the Constitution.

Whereas formal orders are the final result of the formal adjudication process, informal orders constitute a residual set of agency decisions. As mentioned, informal orders are, by definition, agency decisions other than rules for which the legislature has not required a hearing on a record. The decision to suspend a license might be one example of an informal order. Declaratory rulings are another important category of informal orders. Here, the new Act retains the substance of the current Act's treatment of declaratory rulings (now called "declaratory orders" under the new Act to accurately reflect the real species of agency decision), while locating those provisions in Chapter 4. Thus, the processes leading up to an informal order are, as in the current Act's treatment of declaratory rulings, left for agencies to specify. Agencies will specify the decisionmaking processes leading up to declaratory rulings, as well as all other informal orders, through the adoption of procedural rules.

3. *The Formal Adjudication Process*

The procedures leading to a formal order, on the other hand, are set forth in the new Act. The new Act rearranges provisions in the current Act to reflect the sequence of events, and fills in previously missing gaps concerning issues such as intervention.

First, the Act now specifies adequate methods for the service of notice including personal service or certified mail upon return receipt. In rare circumstances, the technical requirements of service may not be met, but the party may in fact have actual notice of all matters included in the notice provisions. Language has been added to authorize that a hearing may proceed if actual notice has been provided, unless the notified party can establish that proceeding on the basis of actual notice would result in material prejudice.

The Act permits the agency to proceed if a party who has received adequate notice fails to appear. An alternative to proceeding in the absence of a party has been added, permitting the agency to establish by procedural rule a system of default orders. The proposal sets forth two grounds for default orders. The first is where a party fails to appear for a hearing. The second is where a party fails to file an answer, if the agency has established by its procedural rules that an answer is required to be filed. The agency would be required to describe in its procedural rules the type of case covered by the default system, the procedures under which the default would be taken, the time limits for setting aside defaults, and the grounds on which defaults may be set aside. In those cases started by filing complaints or petitions, the agency may dismiss without prejudice the action when the person filing the complaint or petition fails to appear for the hearing.

The new Act also includes a new provision that requires formal hearings to be open unless the agency determines that the interest of a party in privacy outweighs the interest of the public in having an open hearing. It permits closed hearings also where an open hearing would result in the disclosure of trade secrets or proprietary information. (The current act has no provisions at all regarding whether a hearing should be open.) This proposal would permit a party to an adjudication other than the agency itself to seek a closed hearing. The presiding officer would be required to decide whether the hearing should be open in a separate, closed session. The reasons for closure would become part of the record, but would remain sealed.

The current act also does not cover third-party intervention in formal adjudications, even though the issue arises with some frequency. The new Act fills this gap too by borrowing language from the Model Act allowing intervention by third parties under two different circumstances. First, intervention is allowed as a matter of right where the party seeking intervention demonstrates that the proceeding will affect that party's direct legal interests. In this situation, the petition must be submitted at least three weeks before the scheduled date of hearing and the presiding officer must rule on the petition at least two weeks prior to the hearing, to afford all parties time for preparation and to allow time for possible

petition for judicial review of a decision concerning intervention prior to the commencement of proceedings. Even if the petition is timely and the petitioner asserts that a legal interest will be affected, the presiding officer must also determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

Second, intervention is allowed at the discretion of the administrative law judge when the interests of justice so dictate and when allowing intervention would not impair the orderly and prompt conduct of the proceedings. An untimely petition to intervene under the first method could be granted under the second, but no longer as a matter of right. Lack of timeliness of such a petition and the potential that a favorable decision would impair the proceedings would be factors the presiding officer would consider in the determination to grant or deny a petition.

In addition, the new Act provides that the administrative law judge may condition intervention in any manner, including limiting the intervenor to specific issues, restricting discovery, cross-examination, or other procedures, and requiring interveners to combine their cases. Permission to intervene may also be limited to the filing of briefs. The administrative law judge may also modify the conditions of intervention at any time, and may reverse a decision to allow intervention, should the claims asserted by the intervenor in the petition appear to be exaggerated or untrue or where the decision to allow intervention was otherwise improvidently made. In short, the new Act strikes a balance that provides intervenors with the opportunity to have reasonable input in adjudications affecting their interests, but in a manner that does not unduly burden the adjudication process.

Like in the current Act, the new Act provides that the formal adjudication process is overseen by a presiding officer or administrative law judge, who presides for the duration of an adjudication. The new Act prohibits designating as the presiding officer in a given case any agency employee directly responsible to any other person in the agency who carries out investigative or prosecutorial functions for the agency. This prohibition introduces a measure

of neutrality in the adjudication process by ensuring that adjudicative decisionmakers are not subject to the control of parties to the adjudication, namely, the agency itself. This prohibition does not apply, however, to the head of the agency, whether an individual, board, or commission, since the head of the agency is ultimately and unavoidably responsible for all agency functions and who, as such, may serve as the agency's highest appellate body. This change reflects the approach taken in the federal APA, enhancing the fairness and therefore the legitimacy of formal agency adjudications.

The new Act also provides clearer criteria concerning the disqualification of a presiding officer from a particular adjudication due to conflicts of interest. The new language is similar to the language in the Model Act and covers personal bias, prejudice, interest, or other causes which would disqualify a judge. The method to challenge the presiding officer and the procedures the agency follows upon challenge are retained from the current act.

The new Act also gives the presiding officer the power to dispose of cases by settlement or other means, and to summarily dispose of a case in which there are no contested facts (provided that an adequate record of those uncontested facts is developed). In addition, a presiding officer's powers have been extended to cover pre-hearing conferences which are authorized by the new Act. The new Act also adds a provision granting subpoena power to agencies conducting a formal adjudication. An agency instructed by the legislature to decide important questions through the adjudicative process requires, in order to perform that assigned task, the legal wherewithal to ensure that it has all of the relevant facts before it prior to making a decision. Currently, the act provides no independent subpoena authority, limiting the availability of subpoenas to those situations where the underlying statute authorizes the agency to issue subpoenas. The new Act remedies this defect while severely limiting the scope of agencies' subpoena power.

With respect to the adjudication process itself, the new Act retains the current Act's provisions regarding depositions, cross-examinations, the availability of witnesses, and

submission of evidence into the record, allowing agencies to adopt procedural rules detailing those matters. The new Act does, however, collect various current provisions relating to evidence in a single section, and furthermore makes several substantive changes to these evidentiary provisions. First, a new subsection has been added addressing the burdens of persuasion and production. The provision allows both burdens to be allocated by statute. Where applicable statutes are silent, the proponent in an adjudication shall have both burdens, as is the case under the federal APA. The new Act also makes clear that in the licensing context specifically, the applicant bears these burdens when seeking an initial license, a new or renewed license, and reinstatement of a license previously suspended or revoked. All other licensing decisions place the burdens on the licensing authority.

The new Act also establishes that the burden of proof will be the "preponderance of the evidence" standard. The current act makes no provision in this regard. A new provision allows the preponderance to include evidence under a relaxed test of admissibility applicable to agency adjudications, even though such evidence would not be admissible under the Michigan rules of evidence. This admissibility standard would allow evidence that is of the type that "reasonably prudent persons would rely on in the conduct of their affairs." The so-called "legal residuum rule"—that an administrative decision cannot rest solely on evidence that would be inadmissible under the Michigan Rules of Evidence—is thereby explicitly rejected. An agency's adjudicative decision can rest, in other words, on technically inadmissible evidence so long as that evidence meets the administrative admissibility test just mentioned. This difference of evidentiary standards reflects the obvious functional differences between courts and agencies as well as the different legal and policy environments in which they perform their respective functions.

Finally, the new Act also rearranges current provisions dealing with final formal orders and introduces one substantive change designed to simplify their issuance. Most significantly, the new Act requires that the hearing officer presiding over a formal adjudication render a final decision for that case. This provision eliminates the current authority for powers within

agencies who have not presided over a hearing to read the record and render the final decision. When a final decision rendered by the presiding officer is subject to review within the agency—as is commonly the case—the hearing officer's order constitutes the final decision pending review or in the absence of review. The old Act's "proposals for decisions" are thus eliminated. This change will lend more integrity to the formal hearing process, will eliminate one unnecessary step in the issuance of final orders, and will avoid confusion among parties to an adjudication about the status of their case prior to further action by authorities within agencies with review powers.

The new Act also requires that all final decisions following a formal hearing be made within a reasonable time. Borrowing from the Model Act, it also establishes a unified content requirement mandating that the hearing officer's decision consider the whole record relevant to the decision and that the written summary of the decision include findings of fact, conclusions of law, and statements of policy if any are applicable. The new Act allows presiding officers' decisions to rest on proposed findings of fact or law at their discretion, but requires a presiding officer to rule on each proposed finding of fact and each proposed conclusion of law.

Like the current Act, the new Act authorizes the agency to review on appeal a final order once issued by the presiding officer, upon petition by one of the parties to an adjudication, including the agency. Whereas the current Act contains no time limit for filing an appeal, the new Act provides that a party wishing to appeal a hearing examiner's order to an appellate decisionmaking body within the agency must file a notice of appeal within 30 days, unless otherwise specified by statute or unless the relevant agency has through procedural rules extended the time limit for filing a notice of appeal. After a notice of appeal is filed, the parties have 30 days to submit their arguments in writing to the agency's appellate body.

The new Act requires the agency to rule on an appeal within a reasonable time. As in the case with the original order under appeal, the agency's appellate decisionmaking body must

base its ruling on the whole record, supply conclusions of fact and law, and indicate policy reasons for its ruling whenever exercising its policy discretion. On appeal of a final order, the agency cannot make new findings of fact or accept or consider new evidence. Instead, where additional evidence is necessary or where the reviewing body determines that certain evidence was improperly excluded during the original hearing, the reviewing body may remand the case to the presiding officer for the purposes of accepting new evidence and making additional factual findings. As provided in the current act, oral argument on appeal is limited to those cases where the agency requests or permits, and may be conditioned as the agency sees fit.

These changes in the intra-agency review process assure fairness to all parties involved in the review of initial decisions. Under current practice, new evidence and, unfortunately, inadmissible evidence is submitted in the review process without adequate notice or opportunity to cross-examine or rebut. This compromises the integrity of the fact-finding process and undermines the evidentiary sections of the current Act. Under the new Act, appealing parties retain the opportunity to argue the significance of the evidence in the record and to argue that certain evidence should have been included. But the new Act prohibits appealing parties from treating the review as a second hearing rather than as an appeal.

4. *Licensing Decisions*

Procedures for revocations and suspensions of licenses as well as decisions for awarding licenses and monitoring compliance are modified and wrapped into the new Chapter 4. First, revocations and suspensions are treated as identical procedures. Subjecting suspension proceedings to the same provisions as revocation proceedings will alleviate current agency concerns over the lack of specificity regarding summary suspension proceedings.

The proposed Act furthermore requires that before an agency can begin a license revocation or suspension proceeding, the agency must go through some process of compliance

adjudication (subject to certain exceptions identified below). The compliance procedure may be conducted through informal adjudication processes, so long as a formal adjudication for compliance is not required by statute. So too with revocation/suspension proceedings, again subject to contrary instructions from the legislature.

These changes will ensure that agency license revocation, suspension, and compliance procedures address concerns implicit in cases such as Rogers v. State Board of Cosmetology, 68 Mich. App. 751 (1976) and Marrs v. Board of Medicine, 422 Mich. 688 (1985). Under Rogers, agencies are required to provide written notice of the intent to proceed to revocation with the offer of a final opportunity to show or achieve compliance, an informal opportunity to show or achieve compliance, and notice of the results of the attempt to show or achieve compliance.

In the great bulk of cases, the agency's objective is to achieve compliance with the statute and its own rules and regulations. There is usually no agency interest in terminating a license where compliance is achievable. In this light, the compliance opportunity should serve as a last chance to secure compliance. Thus the language used in the federal APA which refers to "achieving" compliance is an appropriate addition to the language of the current act allowing a licensee to demonstrate or "show" compliance. If the overriding concern of the legislative scheme is to secure a level of performance or conduct, the licensing function should be structured and administered with the idea that compliance with the regulations is the major objective.

Requiring a compliance hearing prior to the initiation of a revocation hearing accomplishes three particular goals. First, this scheme will retain the requirement that license holders receive some specific indication that the agency is considering a revocation proceeding before the actual notice of that hearing. Second, the new Act will significantly clarify the compliance process for agencies and eliminate any confusion that now surrounds compliance hearings. And third, by allowing the compliance hearing to proceed as an informal

adjudication, the provision retains the flexibility that informal process provides and the informality that Rogers intended to retain. For example, licensees often become accustomed to informal contact with agency personnel and rely on negotiation and rapport to delimit the terms of their responses to the reports and findings of agency inspectors or regulators. For another example, conducting part of compliance inquiries on a licensee's own premises may make good sense when physical conditions are part of the controversy. Use of the informal adjudication process for compliance proceedings will allow agencies to make informed decisions about whether a licensee is in compliance, and, if not, to try and obtain compliance by a licensee before resorting to revocation.

In addition, agency adoption of procedural rules regarding particular types of informal decisions will allow agencies to routinize compliance decisions while maintaining needed flexibility. At the same time, informal proceedings that focus only on compliance and lead to an agency order addressing only compliance issues will send a clear warning signal to licensees that an agency is at the final stage of assuring compliance before moving to the separate, revocation stage. Furthermore, agency issuance of informal orders informing a licensee of the agency's compliance determination will remove current ambiguity in the law concerning whether an agency is required to clearly indicate the results of compliance proceedings to licensees. And the subsequent transition from compliance orders to the revocation stage will also makes licensees aware that the focus of agency action has changed from processes aimed to achieve compliance to measures designed to protect the public.

The new Act also adds a requirement that revocation procedures occur within a reasonable time after a compliance determination. It also allows dispensing with the compliance procedures in any of the following limited circumstances: (1) the agency considers the case to be an emergency situation; (2) the conduct of the licensee threatens the public health, safety, or welfare or presents a threat to the health, safety, or welfare of persons who receive the benefits provided by the licensee, including such benefits as services, housing, treatment, care, or support; (3) the conduct of the licensee justifies revocation regardless of

future compliance, making any attempt to show compliance meaningless; or (4) the conduct of the licensee constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license, such that the licensee is unlikely to have any intention to comply. Otherwise, the licensee keeps the license pending revocation.

Finally, Chapter 4 includes a new provision regarding procedures to be used whenever an agency must distribute a limited number of licenses and the number of applicants competing for those licenses exceeds the number of licenses available—another practical problem which the current Act does not address. Specifically, the new Act requires a comparative hearing for limited license situations when both the applicable underlying statute requires a formal adjudication and that statute provides competitive criteria, such as that the license must go to the applicant best suited to serve the public interest, convenience, and necessity or that it must go the applicant with the greatest resources. In that setting the competition can be truly comparative, and the hearing process should be tailored to select the best applicant or applicants based on the relative merit of the competitors.

First, only qualified applicants, those who would be licensed in the absence of competition, are entitled to participate in the competition. Inadequate applications, both technically and substantially deficient, can be eliminated from the competitive process. Agencies must establish adequate reviewing procedures to determine the qualifications of applicants to participate in the competition. These initial reviews may be through informal adjudication unless otherwise required by statute.

The new Act's comparative hearings provision puts in statutory place the basic comparative hearing requirements mentioned by the court in Huron Valley Hospital, Inc. v. Department of Public Health, 92 Mich. App. 175 (1979), and known at the federal level as the Ashbacker doctrine, see Ashbacker v. Federal Communications Commission, 326 U.S. 327 (1945). Essentially, this doctrine requires that applicants who compete for a scarce resource, a license, must be given a fair chance to compete. Under both federal and state court decisions,

the agency must assure that the competitors for a limited number of licenses be permitted to partake in a single hearing the goal of which is to identify the best applicant or applicants for the limited number of licenses. In addition to fairness among applicants, a comparative hearing also promotes the public interest by ensuring that the licensee or licensees whose qualifications most exceed statutory requirements receive licenses.

Thus, when the mentioned conditions are met, an agency cannot grant a license until the review of all applications is complete. And an agency must hold a single hearing in which all competitors participate as parties unless the agency determines that a single hearing would be unduly cumbersome or unsuited to the specific nature of the subject matter.

In limited-license circumstances where the statute does not contemplate comparative criteria, the new Act prescribes alternative methods of selection, available to an agency in any situation where the underlying statute does not require formal adjudication. First, the agency may promulgate rules which allow the award to be given in the order of receipt of qualified applicants (first-come, first-awarded). The agency could, for example, set forth in a notice that it would grant a license to the first qualified applicant to submit an application for the available license. Second, the agency could promulgate rules that successful applicants will be chosen randomly from the pool of qualified applicants. The agency in this situation could give notice that it would accept applications until a given deadline, at which time the successful applicant or applicants would be drawn by lot among qualified applicants.

These alternatives are offered because in many settings the statutes are silent or vague as to the criteria for comparison of applications, and because in other situations there is often little to differentiate the qualified applicants. If the selection systems which are used to carry out these alternatives are open and subject to scrutiny, they are fair and likely acceptable to the competitors. Both systems are in use in various situations today and appear in statutes in several states. They would not replace comparisons required by statute.

5. *Fee Awards*

Chapter 4 also contains all provisions from the old Act concerning awards of costs and fees following a formal adjudication. In the old Act, these provisions were contained in a separate chapter. Because those provisions apply specifically to cost and fee awards in adjudications, to be awarded by the hearing examiner who presided over a formal adjudication—in the event that the presiding examiner finds the agency's position to have been frivolous—sound organization requires their inclusion in the new chapter on adjudication.

E. *Chapter 5: "Judicial Review"*

1. *Problems with the Current Approach*

The end result of any agency action may or may not constitute the last word on the issue at hand. For final agency decisions, even final decisions at the conclusion of intra-agency appeals in the formal adjudication context, might be subject to judicial scrutiny after the fact. The possibility of judicial review of agency action immediately raises several questions: Who may seek judicial review and when? What standard(s) is the reviewing court to apply when scrutinizing agency action? And which court(s) shall hear such claims?

Under the current approach, any aggrieved party who has exhausted available administrative remedies may seek judicial review of a final agency decision—a point of departure the new Chapter 5 retains. The current Act is not perfectly clear, however, about whether every type of agency decision, including informal orders, for example, is potentially subject to judicial review. The current Act also subjects all reviewable agency decisions to the same standards, not differentiating for the purposes of judicial review among the different types of agency actions. Consistent judicial scrutiny of agency action makes sense in some cases, but not, however, in others. For example, all agency action should be subject to

scrutiny for compatibility with the Constitution, which the current Act does. The current Act also subjects all agency decisions to the standard of "substantial evidence on the whole record," a standard designed for review of formal orders for which the agency has maintained a formal record. How exactly such a standard could be applied to an informal rulemaking, however, is not clear, which adds to the confusion just mentioned about whether under the current Act all agency actions are subject to judicial review in the first place.

But the much larger problem with the current approach is its answer to the third question above: Under the current APA, Michigan Circuit Courts are the default courts for entertaining judicial challenges to agency action—the court in which such challenges must be brought unless the legislature has otherwise provided. Assigning judicial review of agency action to the trial courts rather than to the appellate courts has led to several real difficulties. "Forum-shopping" is one: Because the current Act authorizes judicial challenges in the circuit court "where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham County," the current Act allows challengers to pick their bench, creating the possibility of favorable judicial treatment of local petitioners.

Forum-shopping probably is not the worst consequence of trial-court review, however. In addition, the circuit courts already carry the greatest judicial workload, and it is probably safe to say that appeals of agency decisions do not constitute trial-court judges favorite judicial task. As a result, administrative appeals seldom find their way to the top of circuit court dockets. What is more, circuit judges often lack the staff and clerking resources to handle administrative appeals in an expeditious manner. In addition, circuit judges have little opportunity to develop judicial expertise in issues relating to administrative procedure and administrative law; given the number of circuit courts and judges, chances are that the typical judge will not revisit particular administrative-law questions very often. Finally, judicial review at the trial court level can generate inconsistent judicial results in a system of fifty-five circuit courts and many more circuit court judges, a problem made worse by the fact that

appeals of circuit court review of agency decisions is now by discretion of the Court of Appeals.

It is worth emphasizing that all of these particular problems exacerbate one another. Lack of judicial resources breeds lack of judicial enthusiasm. Lack of resources, enthusiasm, and expertise breed inconsistency. Lack of expertise breeds lack of resource commitment. Lack of uniformity promotes forum-shopping. And so on.

Nevertheless, all of these difficulties associated with trial-court review of agency decisions may be justified if there were some compelling affirmative reason to place agency appeals within the purview of the circuit courts. But there is none. In fact, trial-court review of agency action misunderstands the purpose of judicial review, which is to ensure that agency actions are lawful and that agency decisions find factual support from agency's own decisionmaking records, tasks familiar to and well-suited for appellate courts. The purpose of judicial review is not, in other words, to make factual determinations much less to hear new evidence relating to the agency decision in question. Indeed, even appeals within an agency, which must take place before judicial review becomes available, do not focus on factual issues. An agency appellate board reviewing the decision by a hearing examiner in the formal adjudication context, for example, would remand for further factual findings questions for which an insufficient evidentiary record exists. So too for judicial review. Thus, the relative institutional advantages of the trial courts—deciding cases and making factual determinations—find no application in the context of judicial review of agency decisions. For this reason, judicial review of agency action at the federal level typically takes place before the federal appellate courts, and the U.S. Court of Appeals for the D.C. Circuit has become a de facto court of last resort for many agency decisions. Besides, even under the current Act, judicial review does not *end* with the trial courts; it rather begins there, and parties always may appeal always decisions of the circuit courts. In the absence of any compelling reason to initiate judicial review in the trial courts, judicial review would more sensibly avoid that step and begin at the judicial tier with the right set of comparative institutional advantages.

This relates to one more subtle, but no less serious, problem associated with trial-court review of agency decisions. Judicial review at the trial-court rather than the appellate-court level can undermine the integrity and thus the legitimacy of both agencies and courts. This is true because trial-court review fuels perceptions that agencies are not "real" legal decisionmakers, that agency decisions can be retried before the Circuit Court, and that parties challenging agency decisions can do better before more accommodating local judges. The judicial delay associated with the current framework also undermines public trust in agencies as well as courts, for many petitioners granted a stay of an agency decision realize they can tie agency action up in court, while many petitioners not granted a stay must conform with an agency decision they believe to be unjustified. Both dynamics do little to bolster public trust in the judicial or the administrative system.

2. *Prerequisites of Judicial Review*

The proposed APA specifies the circumstances under which a party seeking judicial review of an agency decision satisfies the judicial and constitutional standing doctrines, thereby minimizing doubt over whether a party seeking judicial review has standing. In particular, parties whose rights or interests are likely prejudiced by agency action, and whose rights or interests should have been but were not considered by the acting agency will satisfy standing barriers to judicial review, providing that a judgment in their favor would significantly redress the injury in question. Clear specification of the standing requirements will minimize litigation and judicial uncertainty over a perennially confusing issue.

3. *Scope of Review*

The proposed APA also provides for different standards of review depending on the nature of agency decision under examination. Specifically, the new chapter 5 subjects formal

orders and declaratory orders to the "substantial evidence" standard. That standard of review is particularly suited to agency adjudications, for in the formal adjudication context the reviewing court is functioning most straightforwardly as a court of appeal. As such, one of the reviewing court's principal tasks is to ascertain whether what the agency has done finds sufficient support in the agency's decisionmaking record. That same standard should also be applied to declaratory orders, for if a less scrutinizing standard of review were applied to declaratory orders, agencies then might, hoping to avoid more searching judicial scrutiny, be tempted to use declaratory orders in lieu of formal adjudications.

But whereas agency decisionmaking in the adjudication context is modeled on decisionmaking by a court, agency decisionmaking in the rulemaking context resembles decisionmaking by a legislative committee. Put differently, whereas agency adjudication typically focuses on the rights, obligations, and actions of individual parties, agency rulemaking typically focuses on broader issues of public policy. On the rulemaking side, then, less exacting judicial scrutiny is called for. Thus, the scope of review section of the proposed Act subjects agency rulemaking to review to ensure that an agency is acting within its statutory authority, with due observance to applicable procedures, in a manner consistent with the Constitution, and otherwise not arbitrarily, capriciously, or in a manner constituting an abuse of agency discretion. These standards apply to agency adjudication as well; the difference between formal adjudication and rulemaking for the purposes of judicial review is simply that adjudication is subject to the "substantial evidence" test in addition.

The proper scope of judicial review in the context of claims that an agency has acted outside of its statutory authority or otherwise in contravention of a statute has long perplexed courts, at both the federal and the state level. At the federal level, the so-called *Chevron* doctrine constitutes one attempt by the U.S. Supreme Court to provide guidance on the level of deference courts should show toward agency interpretations of statutory provisions, see Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), a problem that continues to plague the lower courts. Chapter 5 offers clarified judicial standards

here as well, taking an approach that resembles *Chevron*, but according to which greater or lesser judicial deference is required depending on whether the statute is question falls within the agency's expertise and on whether the legislature intended to delegate to the agency the task of further specifying the meaning of a statutory term. Specifically, Chapter 5 provides for no deference in the context of a statutory term which the legislature has already clearly defined or when the statute in question falls outside the scope of the agency's expertise, some deference when the legislature has not clearly defined a term of a statute falling within the agency's expertise, and greater judicial deference in cases where the legislature intended the agency to supply the full meaning of a term.

4. *Appellate Court Review*

To avoid the problems with trial-court review of agency decisions, the proposed Act provides that judicial review take place in the Michigan Court of Appeals. This change was seriously considered by the Commission in 1990. Ultimately, however, the Commission declined to recommend such a change. At that time, the Commission expressed the view that judicial review in the Court of Appeals instead of in the circuit courts was justified by considerations of uniformity, expertise, speed, and judicial resources. The main reason the Commission offered for declining to recommend moving judicial review to the Court of Appeals was a concern about imposing a new case load on the court. The Commission also mentioned the benefits of familiarity, the burden of bringing a case upon parties challenging agency decisions, and parties' greater confidence in the ability or willingness of local judges to protect them from agencies as factors counseling against change.

It is difficult to say how those factors stack up against the considerations the Commission identified in 1990 as counseling in favor of appellate-court review. Indeed, in retrospect, it is not clear whether all of the factors the Commission identified as pulling against appellate-court review in fact argue for trial-court review. Familiarity with existing

arrangements, for example, can always be invoked as an argument against change, but precisely because it can always be invoked it seldom makes for a powerful argument. For another example, parties' greater confidence in local judges may or may not be justified, and to the extent it is justified, local judges' greater willingness to protect parties from agencies may be undesirable. And as for the burdens on parties bringing judicial challenges to agency action, judicial review by the Court of Appeals will not add any new burdens. In fact, appellate-court review does not add anything to the current system at all, for even under the current Act parties can appeal decisions by the circuit courts. The question is which level of the judiciary is the appropriate starting place for a party challenging agency action. Unless review by a trial court provides something meaningful to the proceedings, there is no reason to retain that costly step in the system of judicial review.

In any event, under the proposed APA judicial review will be substantially simplified, thus ameliorating what seemed to be the Commission's primary hesitation about moving to appellate-court review in its 1990 proposal. Because issues such as standing and especially the proper standards of judicial review are well clarified under the new Act, and because agencies' decisionmaking processes themselves are also streamlined and clarified—thereby minimizing the occasion for confusion about the validity of agency action—judicial review of agency action will impose no great burden on the appellate courts. Put simply, under the new Act courts will likely see fewer cases, and the cases courts do see will likely present crystallized legal questions. Given that considerations such as uniformity, expertise, and timeliness argue in favor of appellate-court review, and given moreover that judicial review of agency action is not fundamentally an exercise in fact-gathering but rather concerns the meaning of statutory terms, the application of legal rules, and assessments of the evidentiary basis for legal conclusions, review in the Court of Appeals makes considerable sense.

This is not to say, however, that appellate-court review is appropriate for every type of administrative appeal. (Indeed, it is not perfectly clear that any judicial review—whether appellate-court or trial-court review—is desirable for certain categories of administrative

decisions.) It may well be that the sheer volume of certain types of agency decisions cannot be handled by the Circuit Court given the resources currently committed to that court. The proposed Act leaves room for this possibility by allowing for the designation of other courts for reviewing certain types of administrative cases. The proposed Act differs from the current Act, however, by reversing the default jurisdictional rule; in absence of an exception, the Circuit Court will have jurisdiction to hear administrative appeals, rather than the other way around. For all of the reasons mentioned above, this expectation of appellate-court review is sensible.

IV. SECTION-BY-SECTION EXPLANATION OF THE DRAFT LANGUAGE

This Part briefly analyses the language of the proposed Act, section by section: It explains the content and purpose of each section of the proposed Act, and how each echoes, integrates, or relates to corresponding sections of the current Act. For further comparison, Appendix A contains the text of the current Act.

A. *Chapter 1: "Definitions; General Provisions"*

Section 101. Definitions.

Section 101 represents an organizational reworking of the current Act, containing all of the proposed Act's definitions. It thus corresponds to Sections 3, 5, 7a, 75a, and 122 of the current Act. It introduces several new definitions such as "agency action" and "administrative law judge," as well as definitions for each species of rule. It also modifies other definitions, such as the definition of "rule," which now contains fewer exclusions. In the main, however, Section 101 simply incorporates the current Act's definitions.

Section 102. Effects on Other Laws.

Section 102 corresponds to Section 11 of the current Act. It introduces no substantive changes, retaining the current Act's relationship to existing laws.

Section 103. General Provisions on Rules and Rulemaking: Continuation of Existing Rules; Successor Agencies; Recision, Amendment; Definitions of Terms; Discrimination; Violations; Adoption by Reference; Final Promulgation; Transmittal to Legislature.

Section 103 contains all of the general provisions relating to rules and rulemaking. It corresponds to Sections 31, 32, and 49, and to parts of Section 46 of the current Act. The changes are largely organizational.

Section 104. General Provisions on Orders and Formal Adjudication.

Section 104 is to orders what Section 103 is to rules. It contains all of the general provisions relating to orders and adjudication. It corresponds to Section 86 of the current Act. Again, the changes are largely organizational. Section 104 does, however, require agencies to maintain and make available records of decisions rendered in formal adjudications, which the old Section 86 does not do.

B. *Chapter 2: "Legislative Service Bureau, Michigan Register, and Michigan Administrative Code"*

Section 201. Legislative Service Bureau.

Section 201 contains provisions relating to the Legislative Service Bureau. It explains the Legislative Service Bureau's functions and duties in editing and publishing the *Michigan Register* and the *Michigan Administrative Code*, and supplements thereto. It thus corresponds to Sections 56 and 59 of the current Act.

Section 202. *Michigan Register.*

Section 202 simply lists the contents of the *Michigan Register*. It corresponds to Sections 8, 57, and 58 of the current Act.

Section 203. *Michigan Administrative Code.*

Similarly, Section 203 contains provisions relating to the *Michigan Administrative Code*, and its supplements. It corresponds to Sections 55, 57, and 58 of the current Act. Its one substantive change is the requirement that the *Michigan Administrative Code* be compiled at least every seven years.

C. *Chapter 3: "Rulemaking"*

Section 301. Request for Rulemaking.

Section 301 provides that any party may request that an agency make a rule. It corresponds to Section 38 of the old Act, but does not exclude from judicial review agency refusals to initiate a rulemaking (which refusals would always be upheld so long as the agency in question was not acting arbitrarily and capriciously or in violation of its statute).

Section 302. Informal Rulemaking: Notice; Comment; Explanation of Final Rule.

Section 302 is a new section. It sets forth the process of informal rulemaking. This process essentially entails three stages. First, an agency is to provide notice of a proposed rule. Second, the agency will then provide an opportunity for interested parties to comment on that proposed rule. And finally, the agency following the comment period will issue a final rule, along with a statement explaining why the final rule took the form it did.

Section 303. Formal Rulemaking.

Section 303 is a counterpart of Section 302. It sets forth the process of formal rulemaking. Formal rulemaking entails a public hearing in conjunction with the agency's

development of a rule. A formal rulemaking is now required only where the legislature requires a public hearing in conjunction with the agency's rulemaking powers. Section 303 corresponds to Sections 42-44 of the current Act.

Section 304. Negotiated Rulemaking.

Section 304, like Section 302, is a new section. It authorizes an agency to engage in negotiated rulemaking, when the agency deems appropriate. A negotiated rulemaking procedure will precede, and not supplant, the ordinary informal or formal rulemaking process. In a negotiated rulemaking, the agencies will convene interested parties for the purposes of developing a text of a proposed, substantive rule. When doing so, the agency must provide notice of all meetings of the parties it has convened, and shall keep minutes of each meeting, which shall become part of the agency's rulemaking record.

Section 305. Housekeeping Rules.

Section 305 is also a new section. It authorizes an agency to develop housekeeping rules, for which the informal and formal rulemaking procedures of Sections 302 and 303 do not apply. Still, an agency must maintain a written record of all of its housekeeping rules, but they are not required to be published in the *Michigan Register* or the *Michigan Administrative Code*.

Section 306. Procedural Rules.

Section 306 similarly authorizes agencies to adopt procedural rules detailing the decisionmaking procedures an agency will use, whenever its decisionmaking processes are not required by this Act or other statues. Section 306 provides that Section 302 and 303 do not apply to procedural rules, but that to become effective procedural rules must be promulgated in

the *Michigan Register*, and that they shall also be compiled in the *Michigan Administrative Code*. Section 306 retains the basic substance of Section 33 of the current Act.

Section 307. Interpretive Rules.

Section 307 authorizes an agency to develop interpretive rules, which explain the agency's understanding of any statutory term the meaning of which the legislature did not intend for the agency to determine authoritatively. Interpretive rules are not binding on the agency or on any other party. Interpretive rules also need not be published in the *Michigan Register*, although an agency must so publish an interpretive rule if requested to do so by any party. Interpretive rules need not, however, be codified in the *Michigan Administrative Code*. Section 307 supplants Section 24 of the current Act.

Section 308. Information Requirements for Substantive Rulemaking: Small Business Economic Impact Statement; Cost-Benefit Analysis.

Section 308 sets forth the information requirements that an agency undertaking substantive rulemaking must fulfill. These include Small Business Economic Impact Statements, and Cost Benefit Analyses. Section 308 specifies the required contents of small business impact statements and of cost benefit analyses. The cost benefit analysis is a new requirement, but otherwise Section 308 integrates Section 40 and part of Section 45 of the current Act.

Section 309. Emergency Rules.

Section 309 pertains to emergency rules. Thus it corresponds to Section 48 of the current Act. Unlike the current Act, however, Section 309 shortens the effective duration of emergency rules.

Section 310. Agency Review of Existing Rules.

Section 310 requires agencies to undertake periodic review of their existing rules. Specifically, it requires each agency to prepare a plan for a review of its rules, and then to conduct a review of those rules and inform the legislature of the results of its rule review. It contains new requirements, but otherwise corresponds to Section 53 of the current Act.

Section 311. Legislative Oversight of Agency Rulemaking: Concurrent Resolution of Disapproval; Joint Resolution of Rejection; Legislative Corrections' Day.

Section 311 integrates and adds to Section 51 of the current Act. It provides for concurrent resolutions of legislative disapproval, joint resolutions of legislative rejection, and legislative "corrections days." Section 311, along with Section 310, supplants the JCAR provisions of the current Act.

D. *Chapter 4: "Adjudication"*

Section 401. Applicability.

Section 401 is a new section. It simply makes clear that Chapter 4 applies to all agency decisions other than rules.

Section 402. Informal Orders: Procedure; Declaratory Orders; Licensing Decisions.

Section 402 contains the proposed Act's provisions relating to informal adjudication. It corresponds to and incorporates Sections 63 and 64 of the current Act, as well as the entire Chapter 5 of the current Act. It thus includes declaratory orders and licensing decisions within its scope. Section 402 furthermore makes clear that an agency is to develop decisionmaking

procedures for informal orders, including licensing decisions the procedures for which are not prescribed by statute. Section 402 also provides for comparative licensing hearings.

Section 403. Formal Orders.

Section 403 is also a new section. It explains when an agency must engage in the formal adjudication process.

Section 404. The Formal Adjudication Process: Notice; Scheduling; Answer; Failure to Appear; Hearings; Ex Parte Communications; Subpoena; Administrative Law Judges; Evidence.

Section 404 specifies the details of the formal adjudication process, including notice requirements, scheduling, answers, failure to appear, hearings, prohibitions on ex parte communications, subpoena powers, the role of administrative law judges, and the receipt of evidence. Section 404 corresponds to Sections 71-75, 76-80, and 82 of the current Act.

Section 405. Final Decisions.

Section 405 corresponds to Section 85 of the current Act. Section 405 provides, however, that the decision of an administrative law judge shall become the final decision of the agency in a formal adjudication, subject to appeal of that decision to a higher level within the agency.

Section 406. Awards of Costs and Fees: Availability; Criteria; Payment; Exceptions; Report to Legislature.

Section 406 corresponds to Sections 123-24, and 126-27 of the current Act. In other words, Section 406 integrates all of Chapter 8 of the old Act. It preserves the substance of the

old Chapter 8, but updates the dollar amounts governing availability and amount of cost awards.

Section 407. Agency Appeals and Rehearings.

Section 407 provides for agency rehearings and agency appeals. It corresponds to Section 87 of the current Act.

E. *Chapter 5: "Judicial Review of Agency Action"*

Section 501. Availability of Judicial Review: Agency Action; Jurisdiction.

Section 501 provides that final agency action is appealable to a court in accordance with general court rules and subject to the requirements of Chapter 5. Section 501 grants default jurisdiction to hear challenges of final agency action to the Michigan Court of Appeals. It otherwise corresponds to Section 101 and Section 103(1) of the current Act.

Section 502. Petition for Judicial Review: Venue; Exception, Contents of Petition; Stay of Enforcement of Agency Action.

Section 502 corresponds to Sections 103(2)-(4), and 104(1)-(2) of the current Act. Besides providing that a petition for judicial review shall be filed in the Court of Appeals for the division where the party seeking judicial review resides, or for the division in which that party has his or her place of business, Section 502 otherwise adds nothing new.

Section 503. Requirements: Timing, Standing, Exhaustion.

Section 503 sets forth the requirements for obtaining judicial review of agency action. These include timing, standing, and exhaustion requirements. Section 503 corresponds to parts of Section 101 of the current Act. Its provision on standing, however, is new.

Section 504. Record on Review.

Section 504 sets forth the record of review for a court hearing a challenge to agency action. It corresponds to parts of Section 105 and also to Section 104(3) of the current Act. It makes clear that the reviewing court shall receive written briefs and may, if it deems necessary or helpful, hear oral arguments.

Section 505. Scope of Review.

Section 505 sets forth the scope of review that a reviewing court shall adopt when hearing a challenge to agency action. It thus corresponds to Section 106(1) of the current Act. In contrast to the current Act, however, Section 505 provides that the substantial evidence test shall apply to formal agency adjudication, and to declaratory orders, but that all other agency action shall be subject to the other standards provided for in the current Act. Section 505 also sets forth the appropriate inquiries for a court reviewing an agency's interpretation of a statute.

Section 506. Forms of Relief.

Section 506 sets forth the forms of relief that a reviewing court may grant. It thus corresponds to parts of Section 105, and to Sections 106(2), and 125 of the current Act.

ADMINISTRATIVE PROCEDURES ACT OF 1969 (AS AMENDED)

CHAPTER 1. GENERAL PROVISIONS.

AN ACT to provide for the effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters; to provide for the printing, publishing, and distribution of the Michigan register; to provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters; to provide for declaratory judgments as to rules; to repeal certain acts and parts of acts; and to repeal certain parts of this act on a specific date.

24.201. Short title

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1969".

24.203. Definitions

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.
(6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

24.205. Definitions; license, licensing, party, person, processing of a rule, promulgation of a rule

Sec. 5. (1) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Michigan Compiled Laws.
(2) "Licensing" includes agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.
(3) "Michigan register" means the publication described in section 8.
(4) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case.
(5) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization of any kind other than the agency engaged in the particular processing of a rule, declaratory ruling, or contested case.
(6) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.
(7) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.

24.207. Rule, defined

Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:

(a) A resolution or order of the state administrative board.

(b) A formal opinion of the attorney general.

(c) A rule or order establishing or fixing rates or tariffs.

(d) A rule or order pertaining to game and fish and promulgated under part 411 (protection and preservation of fish, game, and birds) of the Natural

Resources and Environmental Protection Act, Act No. 451 of the Public Acts of 1994, being sections 324.41101 to 324.41105 of the Michigan Compiled Laws, part 487 (sport fishing) of Act No. 451 of the Public Acts of 1994, being sections 324.48701 to 324.48740 of the Michigan Compiled Laws, and part 401 (wildlife conservation) of Act No. 451 of the Public Acts of 1994, being sections 324.40101 to 324.40119 of the Michigan Compiled Laws.

(e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.

(f) A determination, decision, or order in a contested case.

(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.

(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.

(i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

(k) Unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates which was promulgated before December 4, 1986, shall be considered a rule and shall remain in effect until rescinded but shall not be amended. As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.

(l) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:

(i) The designation, deletion, or revision of covered medical equipment and covered clinical services.

(ii) Certificate of need review standards.

(iii) Data reporting requirements and criteria for determining health facility viability.

(iv) Standards used by the department of public health in designating a regional certificate of need review agency.

(v) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.

(m) A policy developed by the family independence agency under section 6(3) of the social welfare act, Act No. 280 of the Public Acts of 1939, being

section 400.6 of the Michigan Compiled Laws, setting income and asset limits, types of income and assets to be considered for eligibility, and payment standards for administration of assistance programs under that act.

(n) A policy developed by the family independence agency under section 6(4) of Act No. 280 of the Public Acts of 1939, being section 400.6 of the Michigan Compiled Laws, to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.

(o) Until the expiration of 12 months after the effective date of this subdivision, a regulation issued by the family independence agency under section 6(2) of Act No. 280 of the Public Acts of 1939, being section 400.6 of the Michigan Compiled Laws, setting standards and policies for the administration of programs under that act. Upon the expiration of 12 months after the effective date of this subdivision, regulations described in this subdivision are not binding and effective unless processed as emergency rules under section 48 or promulgated in accordance with this act. This subdivision does not apply to policies permanently exempted under subdivisions (m) and (n).

24.207a. Small business, small business economic impact statement, defined

Sec. 7a. (1) "Small business" means a business concern incorporated or doing state agency which meets the requirements of section 45(3).

24.208. Michigan register; publication; contents; index; fee

Sec. 8. (1) The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:

(a) Executive orders and executive reorganization orders.

(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.

(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.

(d) Proposed administrative rules.

(e) Small business economic impact statements on proposed rules as required by section 45.

(f) Notices of public hearings on proposed administrative rules.

(g) Administrative rules filed with the secretary of state.

(h) Emergency rules filed with the secretary of state.

(i) Notice of proposed and adopted agency guidelines.

(j) Other official information considered necessary or appropriate by the legislative service bureau.

(k) Attorney general opinions.

(l) All of the items listed in section 7(l) after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws.

(2) The legislative service bureau shall publish a cumulative index for the Michigan register.

(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

(4) If publication of an agency's proposed rule, guideline, or small business economic impact statement or an item described in subsection (1)(l) would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule, guideline, small business impact statement, or item described in subsection (1)(l), including information on how to obtain a complete copy of the proposed rule, guideline, small business impact statement, or item described in subsection (1)(l) from the agency at no cost.

(5) An agency shall transmit a copy of the small business economic impact statement, together with the applicable proposed rules and notice of public hearing, to the legislative service bureau for publication in the Michigan register.

24.211. Additional requirements imposed by law

Sec. 11. This act shall not be construed to repeal additional requirements imposed by law.

CHAPTER 2. GUIDELINES.

24.224. Adoption of proposed guideline, notice

Sec. 24. Before the adoption of a guideline, an agency shall give notice of the proposed guideline to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them.

25.225. Status as public record; transmittal

Sec. 25. When adopted, a guideline is a public record. Copies of guidelines shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them.

24.226. Adoption in lieu of rule; prohibited

Sec. 26. An agency shall not adopt a guideline in lieu of a rule.

24.227. Adoption of guidelines; validity; proceedings to contest

Sec. 27. (1) A guideline adopted after the effective date of this section is not valid unless processed in substantial compliance with sections 24, 25, and 26. However, inadvertent failure to give notice to any person as required by section 24 does not invalidate a guideline which was otherwise processed in substantial compliance with sections 24, 25, and 26.

(2) A proceeding to contest a guideline on the grounds of noncompliance with sections 24, 25, and 26 shall be commenced within 2 years after the effective date of the guideline.

CHAPTER 3. PROCEDURES FOR PROCESSING AND PUBLISHING RULES.

24.231. Continuance of existing rules; amendment or rescission of rules, effect

Sec. 31. (1) Rules which became effective before July 1, 1970 continue in effect until amended or rescinded.

(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or

the abolition of the agency.
(3) The rescission of a rule does not revive a rule which was previously rescinded.
(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.
(5) Except in the case of the amendment of rules concerning inmates as described in section 7(k), a rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.

24.232. Statutory definitions and rules of construction, applicability, discrimination, violations; adoptions by reference

Sec. 32. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.
(2) A rule or exception to a rule shall not discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.
(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.
(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost and the rules shall state where copies of the adopted matter are available from the agency and the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.

24.233. Descriptions of agency organization, operations and procedures; forms with instructions

Sec. 33. (1) An agency shall promulgate rules describing its organization and stating the general course and method of its operations and may include therein forms with instructions. Sections 41 and 42 do not apply to such rules.
(2) An agency shall promulgate rules prescribing its procedures available to

the public and the methods by which the public may obtain information and submit requests.

(3) An agency may promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.

24.235. Joint committee on administrative rules; creation; membership, expenses; meetings; hearings; action by concurring majorities; reports

Sec. 35. (1) The joint committee on administrative rules is created and consists of 5 members of the senate and 5 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Of the 5 members in each house, 3 shall be from the majority party and 2 shall be from the minority party. The chairperson of the committee shall alternate between houses each year. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house of representatives shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

(2) The committee may hire staff to assist the committee under this act. However, the supervision of staff, budgeting, procurement, and related functions of the committee shall be performed by the council administrator under section 104a of the legislative council act, Act No. 268 of the Public Acts of 1986, being section 4.1104a of the Michigan Compiled Laws.

24.236. Procedures and standards for drafting, processing, publication, and distribution of rules; manual

Sec. 36. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication and distribution of rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

24.238. Requests for promulgation of rule, procedure, review

Sec. 38. A person may request an agency to promulgate a rule. Within 90 days after filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of the request. The denial of a request is not subject to judicial review.

24.240. Reduction of economic impact of proposed rule on small businesses

Sec. 40. (1) When an agency proposes to adopt a rule which will apply to a small business, and the small business economic impact statement discloses that the rule will have a disproportionate impact on small businesses because of the size of those businesses, the agency proposing to adopt the rule shall reduce the economic impact of the rule on small businesses by doing 1 or more of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

(a) Establish differing compliance or reporting requirements or timetables for small businesses under the rule.

(b) Consolidate or simplify the compliance and reporting requirements for small businesses under the rule.

(c) Establish performance rather than design standards, when appropriate.

(d) Exempt small businesses from any or all of the requirements of the rule.

(2) If appropriate in reducing the disproportionate economic impact on small business of a rule as provided in subsection (1), an agency may use the following classifications of small business:

(a) 0-9 full-time employees.

(b) 10-49 full-time employees.

(c) 50-249 full-time employees.

(3) For purposes of subsection (2), an agency may include a small business with a greater number of full-time employees in a classification that applies to a business with fewer full-time employees.

(4) This section and section 45(3) shall not apply to a rule which is required by federal law and which an agency promulgates without imposing standards more stringent than those required by the federal law.

24.241. Notice of hearing, necessity, time, contents, form, recipients; hearing, sufficiency

Sec. 41. (1) Except as provided in section 44, before the adoption of a rule, an agency shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none, in the manner prescribed in section 42(1).

(2) The notice described in subsection (1) shall include all of the following:

(a) A reference to the statutory authority under which the action is proposed.

(b) The time and place of the public hearing and a statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency at other times.

(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

(3) The agency shall transmit copies of the notice to each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person.

(4) The public hearing shall comply with any applicable statute, but is not subject to the provisions governing a contested case.

(5) The head of the promulgating agency or 1 or more persons designated by the head of the agency who have knowledge of the subject matter of the proposed rule shall be present at the public hearing and shall participate in the discussion of the proposed rule.

24.241a. Proposed rules or changes in rules, transmission to requesting legislator

Sec. 41a. A member of the legislature may annually submit a written request to the legislative service bureau requesting that a copy of all proposed rules or changes in rules, or any designated proposed rules or changes in rules submitted to the legislative service bureau for its approval, be transmitted to the requesting member upon receipt of the same by the legislative service bureau.

24.242. Methods of publishing notice

Sec. 42. (1) Except as provided in section 44, at a minimum, an agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, the agency shall publish the notice not less than 10 days and not more than 60 days before the date of the public hearing in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be in the Upper Peninsula.

(2) Additional methods that may be employed by the agency, depending upon the circumstances, include publication in trade, industry, governmental, or professional publications.

(3) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau for publication in the Michigan register. An agency's notice shall be published in the Michigan

register not less than 30 days and not more than 90 days before the public hearing.

24.243. Failure to comply with procedural requirements; effect

Sec. 43. (1) Except in the case of an emergency rule promulgated in the manner described in section 48, a rule is not valid unless processed in compliance with section 42 and unless in substantial compliance with section 41(2), (3), (4), and (5).

(2) A proceeding to contest a rule on the ground of noncompliance with the requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

24.244. Notice of public hearings; exceptions to requirements; definition

Sec. 44. (1) Sections 41 and 42 do not apply to an amendment or rescission of a rule that is obsolete or superseded, or that is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to that effect is included in the legislative service bureau certificate of approval of the rule.

(2) Sections 41 and 42 do not apply to a rule that is promulgated under the Michigan occupational safety and health act, Act No. 154 of the Public Acts of 1974, being sections 408.1001 to 408.1094 of the Michigan Compiled Laws, that is substantially similar to an existing federal standard that has been adopted or promulgated under the occupational safety and health act of 1970, Public Law 91-596, 84 Stat. 1590. However, notice of the proposed rule shall be published in the Michigan register at least 60 days before the submission of the rule to the secretary of state pursuant to section 46(4).

A reasonable period, not to exceed 30 days, shall be provided for the submission of written comments and views following publication in the Michigan register.

(3) For purposes of subsection (2), "substantially similar" means identical, with the exception of style or format differences needed to conform to this or other state laws, as determined by the department of attorney general pursuant to section 45(1).

24.245. Approval, disapproval, and adoption of rules

Sec. 45. (1) The legislative service bureau promptly shall approve a proposed rule if the legislative service bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The

department of attorney general promptly shall approve a proposed rule if the department considers the proposed rule to be legal.

(2) Except as provided in subsection (13), after publication of the proposed rule in the Michigan register and after notice is given as provided in this act and before the agency proposing the rule has formally adopted the rule, the agency shall transmit by letter to the committee copies of the rule bearing certificates of approval from the legislative service bureau and the department of attorney general and copies of the rule without certificates. The agency transmittal shall be received by the committee within 2 years after the date of the last public hearing on the proposed rule unless the proposed rule is a resubmission under subsection (11). The agency shall include with the letter of transmittal a regulatory impact statement on a 1-page form provided by the committee. The statement shall provide estimates of the impact of the proposed rules upon all of the following:

(a) The revenues, expenditures, and paper work requirements of the agency proposing the rule.

(b) The revenues and expenditures of any other state or local government agency affected by the proposed rule.

(c) The taxpayers, consumers, industry or trade groups, small business, or other applicable groups affected by the proposed rule.

(3) Except as provided in subsection (13) and section 40(4), if the regulatory impact statement discloses an impact on small businesses, the agency shall include with the letter of transmittal a small business economic impact statement in a form prescribed by the committee. A small business economic impact statement shall contain all of the following with respect to the proposed rules:

(a) The nature of any reports and the estimated cost of their preparation by small businesses that would be required to comply with the proposed rules.

(b) An analysis of the costs of compliance for all small businesses affected by the proposed rules, including costs of equipment, supplies, labor, and increased administrative costs.

(c) The nature and estimated cost of any legal, consulting, and accounting services that small businesses would incur in complying with the proposed rules.

(d) A statement regarding whether the proposed rules will have a disproportionate impact on small businesses because of the size of those businesses.

(e) The ability of small businesses to absorb the costs estimated under subdivisions (a) to (c) without suffering economic harm and without adversely affecting competition in the marketplace.

(f) The cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses.

(g) The impact on the public interest of exempting or setting lesser standards

of compliance for small businesses.

(h) A statement regarding the manner in which the agency reduced the economic impact of the rule on small businesses as required under section 40, or a statement regarding the reasons such a reduction was not feasible.

(i) A statement regarding whether and how the agency has involved small businesses in the development of the rule.

(4) In order to obtain cost information for purposes of subsection (3), an agency may survey a representative sample of affected small businesses or trade associations or may adopt any other means considered appropriate by the agency.

(5) The agency shall transmit a copy of the small business economic impact statement to the director of commerce at the same time as required in subsection (3) for transmittal to the committee. The director of commerce shall review the statement and within 30 days after receipt shall notify the committee of any additional information pertinent to the committee's review.

(6) After receipt by the committee of the agency's letter of transmittal, the committee has 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection, subsections (2) to (5), and subsections (7) to (12) do not apply to an emergency rule.

(7) The committee shall furnish the senate fiscal agency and the house fiscal agency with a copy of each rule and regulatory impact statement filed with the committee, as well as a copy of the agenda identifying the proposed rules to be considered by the committee. The senate fiscal agency and the house fiscal agency shall analyze each proposed rule for possible fiscal implications which, if adopted, would result in additional appropriations in the current fiscal year or commit the legislature to an appropriation in a future fiscal year. The senate fiscal agency and the house fiscal agency shall report their findings in writing to the senate and house appropriations committees and to the committee before the date of consideration of the proposed rule by the committee.

(8) If the committee approves the proposed rule within the time period provided by subsection (6), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.

(9) If, within the time period provided by subsection (6), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within

60 days after the committee report has been received by, and read into the respective journal of, each house.

(b) The committee subsequently approves the rule.

(10) If the time permitted by this section expires and the committee has not taken action under either subsection (8) or (9), then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses of the legislature simultaneously. Each house of the legislature shall place the concurrent resolution directly on its calendar. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution requires a majority of the members elected to and serving in each house of the legislature.

(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.

(11) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (9) with changes following a committee meeting on the proposed rule or with minor modifications. A resubmitted rule is a new filing and subject to this section, but is not subject to further notice and hearing as provided in sections 41 and 42.

(12) If the committee approves the proposed rule within the time period provided by subsection (6), or the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule pursuant to any applicable statute and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.

(13) Subsections (2) through (12) do not apply to a rule that is promulgated under the Michigan occupational safety and health act, Act No. 154 of the Public Acts of 1974, being sections 408.1001 to 408.1094 of the Michigan Compiled Laws, that is substantially similar to an existing federal standard that has been adopted or promulgated under the occupational safety and health act of 1970, Public Law 91-596, 84 Stat. 1590.

24.246. Procedure for promulgating rules; arrangement, binding and certification, and inspection of rules

Sec. 46. (1) Except for a rule processed pursuant to section 44(2), to promulgate a rule an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall

not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.

(2) The secretary of state shall endorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.

(3) The secretary of state, as often as he or she considers it advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter filed in his or her office with their attached certificates and published in a supplement to the Michigan administrative code. The secretary of state shall certify under his or her hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record of the rules is required to be kept. The bound rules are subject to public inspection.

(4) To promulgate a rule processed pursuant to section 44(2), an agency, after the period provided for written comments, shall file in the office of the secretary of state 3 copies of the rule along with the approval of the legislative service bureau and the department of attorney general.

24.247. Effective date of rule; withdrawal or rescission of rules

Sec. 47. (1) Except in case of a rule processed under section 48, a rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.

(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons,

(a) to the secretary of state on or before the last day for filing rules for the interim period in which the rules were first filed, or

(b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code.

In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.

24.248. Emergency rules, promulgation without notice and participation procedures, effective date, term, numbering and compiling, publication, rescission

Sec. 48. (1) If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 8.

(2) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.

(3) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.

24.249. Persons entitled to copies of filed rules; indorsements on copies

Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of rules are filed in his office, copies on which the day and hour of such filing have been indorsed, as follows:

(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.

(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail 1 copy to each member of the legislature at his home address.

(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.

24.251. Amendment or rescission of rules, grounds, procedure

Sec. 51. If the joint committee on administrative rules, an appropriate standing committee or a member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:

(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.

(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.

24.252. Suspension of rules, procedure, effect

Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a rule or a part of a rule promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.

24.253. Review of agency rules

Sec. 53. (1) Each agency shall prepare a plan for the review of the agency's rules that are brought to the attention of the Michigan business ombudsman. The plan shall be transmitted to the committee and to the director of the department of commerce. The agency shall conduct a review pursuant to the plan.

(2) In conducting the review required by this section, the agency shall prepare a small business economic impact statement if the review discloses an impact on small businesses. The agency shall prepare a recommendation based on the review as to whether the rules should be continued without change or should be amended or rescinded. If the small business economic impact statement discloses that an existing rule has a disproportionate impact on small

businesses because of the size of those businesses, the agency reviewing the rule shall, if it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule, amend or rescind the rule pursuant to this act to reduce or eliminate the disproportionate impact of the rule on small businesses.

(3) The small business economic impact statement and recommendation shall be transmitted to the committee and the director of the department of commerce. The director shall review the statement and shall notify the committee of any additional information pertinent to the committee's review.

(4) Four years after its effective date, this section shall not apply.

24.255. Michigan administrative code; supplements; public subscription

Sec. 55. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated rules published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments and additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

24.256. Editorial work for code and supplements; classification compliance with compiled laws; form of publication; supplements, time

Sec. 56. (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

24.257. Omission of rules from code or register; publication costs; proration; payment

Sec. 57. (1) The legislative service bureau may omit from the Michigan register and the Michigan administrative code, and the code's annual

supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, small business economic impact statements, administrative rules and emergency rules filed with the secretary of the state, notices of proposed and adopted agency guidelines, and the items listed in section 7(l) in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies.

24.258. Reproduction proofs or negatives; reimbursement; publication in pamphlets

Sec. 58. (1) When requested by an agency, the legislative service bureau shall prepare reproduction proofs or negatives of the rules, or a portion of the rules, of the agency. The requesting agency shall reimburse the legislative service bureau for preparing the reproduction proofs or negatives, and the cost of the preparation shall be paid out of appropriations to the agency.

(2) The Michigan administrative code may be arranged and printed to make convenient the publication in separate pamphlets of the parts of the code relating to different agencies. Agencies may order the separate pamphlets, and the cost of the pamphlets shall be paid out of appropriations to the agencies.

24.259. Distribution of register and code by department of management and budget

Sec. 59. (1) The legislative service bureau shall publish or order published a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this section. Unless otherwise directed by the legislative service bureau, the department of management and budget shall deliver or provide copies as follows:

(a) To the secretary of the senate, a sufficient number to supply each senator.

(b) To the clerk of the house of representatives, a sufficient number to supply each representative.

(2) The copies of the Michigan register, the Michigan administrative code, and

the annual code supplement are for official use only by the agencies and persons prescribed in subsection (1), and they shall deliver them to their successors. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau.

(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.

24.261. Presumptions arising from filing and publication of rules; judicial notice

Sec. 61. (1) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(2) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:

(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(b) The rule printed in the publication is a true and correct copy of the promulgated rule.

(c) All requirements of this act relative to the rule have been complied with.

(3) The courts shall take judicial notice of a rule which becomes effective under this act.

24.263. Declaratory rulings by agencies as to applicability of statutes, rules, or orders; effect, procedure, changing rulings, review

Sec. 63. On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

24.264. Declaratory judgment actions, validity or applicability of rule; grounds, venue, parties; other actions

Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

CHAPTER 4. PROCEDURES IN CONTESTED CASES.

24.271. Opportunity to be heard; reasonable notice of hearing, necessity, contents; service of legislators

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or

other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272. Failure to appear; pleadings; evidence; arguments; cross-examination

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273. Subpoenas; issuance, form, revocation, witness fees, remedy for noncompliance

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274. Oaths or affirmations; certificates as to official acts; depositions; discovery; impeachment of witnesses; agency records

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take

depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275. Rules of evidence

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.275a. Child or developmentally disabled witnesses in contested cases; testimony of sexual, physical, or psychological abuse; application and effective date

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(2) This section only applies to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse. "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(7) This section applies to hearings beginning on or after January 1, 1988.

(8) This section shall take effect January 1, 1988.

24.276. Record, evidence included; effect of matter not included; documentary evidence, admissibility, comparison of copies with original

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277. Official notice of facts, grounds, issue as to fact or materiality; evaluation of evidence

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278. Stipulations as to facts; disposition by stipulation, settlement, consent order, waiver, default, other agreed methods

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279. Presiding officers in contested cases; impartiality; affidavit of bias or disqualification, determination, review; assignment of another presiding officer

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280. Powers of presiding officer

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a

scheduled partisan caucus of the members of the house of which he or she is a member.

24.281. Proposal for decision, necessity, service, exceptions, argument, contents, review; finality of decision; waiver

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282. Communications by decision maker or fact finder with others

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285. Final decisions or orders; findings of fact, rulings on proposed findings; conclusions of law

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

24.286. Official record of hearing, contents; record of oral proceedings

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287. Rehearings, authorization; procedure; amendment or vacation of decision or order

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the

agency on its own motion or on request of a party shall order a rehearing.
(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

CHAPTER 5. LICENSES.

24.291. Notice and hearing required, applicability of act; license application, effect on expiration of existing license

Sec. 91. (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.
(2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section 92.

24.292. Suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of licenses; notice, opportunity to be heard; summary suspension

Sec. 92. Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. Except as otherwise provided in the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, or the regulated occupations support enforcement act, he licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

CHAPTER 6. JUDICIAL REVIEW.

24.301. Right to review; exhaustion of administrative remedies; aggrieved person; preliminary procedural, or intermediate action or ruling

Sec. 101. When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

24.302. Special statutory review proceedings

Sec. 102. Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

24.303. Petitions for review, place of filing, contents

Sec. 103. (1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county.

(2) As used in this subsection, "adoptee" means a child who is to be or who is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:

(a) For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.

(b) For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.

(3) A petition for review shall contain a concise statement of:

(a) The nature of the proceedings as to which review is sought.

(b) The facts on which venue is based.

(c) The grounds on which relief is sought.
(d) The relief sought.
(4) The petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought.

24.304. Filing of petitions for review, time, effect; record, transmission to reviewing court, costs; scope of review

Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.
(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.
(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.

24.305. Taking of additional evidence; modification of findings, decision, or order

Sec. 105. If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

24.306. Scope of review; setting aside decision or order, grounds; affirming, reversing, or modifying decisions or orders; remands

Sec. 106. (1) Except when a statute or the constitution provides for a

different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

CHAPTER 7. MISCELLANEOUS PROVISIONS.

24.311. Repealer

Sec. 111. Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948, are repealed.

24.312. References to prior law

Sec. 112. A reference in any other law to Act No. 88 of the Public Acts of 1943, as amended, or Act No. 197 of the Public Acts of 1952, as amended, is deemed to be a reference to this act.

24.313. Effective date

Sec. 113. This act is effective July 1, 1970, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.

24.314. Processing and publication of rules

Sec. 114. When an agency has completed any or all of the processing of a rule pursuant to Act No. 88 of the Public Acts of 1943, as amended, before July 1, 1970, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act. An effective date may be added to such a rule

although it was not included in the notice of hearing on the rule pursuant to subsection (1) of section 41, when such notice was given before July 1, 1970.

24.315. Application

Sec. 115. (1) Chapters 4 and 6 do not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(2) Chapters 4 and 8 do not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.256 of the Michigan Compiled Laws.

(3) Chapter 8 does not apply to any of the following:

(a) A contested case or other proceeding regarding the granting or renewing of an operator's or chauffeur's license by the secretary of state.

(b) Proceedings conducted by the Michigan employment relations commission.

(c) Worker's disability compensation proceedings under Act No. 317 of the Public Acts of 1969.

(d) Unemployment compensation hearings under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.73 of the Michigan Compiled Laws.

(e) Department of social services public assistance hearings under section 9 of the social welfare act, Act No. 280 of the Public Acts of 1939, being section 400.9 of the Michigan Compiled Laws.

(4) Chapter 6 does not apply to final decisions or orders rendered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws.

(5) Chapters 2, 3, and 5 do not apply to the municipal employees retirement system and retirement board created by the municipal employees retirement act of 1984, Act No. 427 of the Public Acts of 1984, being sections 38.1510 to 38.1555 of the Michigan Compiled Laws, on and after the certification date. As used in this subsection, "certification date" means that term as defined in section 2a of Act No. 427 of the Public Acts of 1984, being section 38.1502a of the Michigan Compiled Laws.

CHAPTER 8. COST AWARDS.

24.321. Definitions; application

Sec. 121. For the purposes of this chapter, the words and phrases described in section 122 have the meanings ascribed to them in that section.

24.322. Definitions

Sec. 122. (1) "Contested case" means a contested case as defined in section 3(3) but does not include a case that is settled or a case in which a consent agreement is entered into or a proceeding for establishing a rate or approving, disapproving, or withdrawing approval of a form.

(2) "Costs and fees" means the normal costs incurred, after a party has received notice of an initial hearing under section 71(2), in being a party in a contested case under this act and include all of the following:

(a) The reasonable and necessary expenses of expert witnesses as determined by the presiding officer.

(b) The reasonable cost of any study, analysis, engineering report, test, or project which is determined by the presiding officer to have been necessary for the preparation of a party's case.

(c) Reasonable and necessary attorney or agent fees including those for purposes of appeal.

(3) "Party" means a party as defined in section 5(4), but does not include any of the following:

(a) An individual whose net worth was more than $500,000.00 at the time the contested case was initiated.

(b) The sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded $3,000,000.00 at the time the contested case was initiated and which is not either exempt from taxation pursuant to section 501(c)(3) of the internal revenue code or a cooperative association as defined in section 15(a) of the agricultural marketing act, 12 U.S.C. 1141j(a).

(c) The sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees, as determined by the total number of employees multiplied by their working hours divided by 40, at the time the contested case was initiated.

(d) As used in this subsection "net worth" means the amount remaining after the deduction of liabilities from assets as determined according to generally accepted accounting principles.

(4) "Presiding officer" means an agency, 1 or more members of the agency, a person designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a contested case.

(5) "Prevailing party" means as follows:

(a) In an action involving several remedies, or issues or counts which state different causes of actions or defenses, the party prevailing as to each remedy, issue, or count.

(b) In an action involving only 1 issue or count stating only 1 cause of

action or defense, the party prevailing on the entire record.

24.323. Contested cases; award of costs and fees; frivolous agency position; application

Sec. 123. (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:

(a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.

(b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.

(c) The agency's legal position was devoid of arguable legal merit.

(2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:

(a) That the position of the agency was frivolous.

(b) That the party is a prevailing party.

(c) The amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.

(d) That the party is eligible to receive an award under this section. Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.

(e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case.

(3) The presiding officer may reduce the amount of the costs and fees to be awarded, or deny an award, to the extent that the party seeking the award engaged in conduct which unduly and unreasonably protracted the contested case.

(4) The final action taken by the presiding officer under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings.

(5) Subject to subsection (6), the amount of costs and fees awarded under this section shall include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this

act. Subject to subsection (6), the amount of fees awarded under this section shall be based upon the prevailing market rate for the kind and quality of the services furnished, subject to the following:

(a) The expenses paid for an expert witness shall be reasonable and necessary as determined by the presiding officer.

(b) An attorney or agent fee shall not be awarded at a rate of more than $75.00 per hour unless the presiding officer determines that special circumstances existed justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances.

(6) The costs and fees awarded under this section shall only be awarded to the extent and amount that the agency caused the prevailing party to incur those costs and fees.

(7) This section does not apply to any agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an agency acting ex rel. on the information and at the instigation of a nonagency person who has a private interest in the matter nor to an agency required by law to commence a case upon the action or request of another nonagency person.

(8) This section does not apply to an agency that has such a minor role as a party in the case in comparison to other nonprevailing parties so as to make its liability for costs and fees under this section unreasonable, unjust, or unfair.

24.324. Entry of final order

Sec. 124. An application for costs and fees and the awarding thereof under this chapter shall not delay the entry of a final order in a contested case.

24.325. Judicial review; award of costs and fees

Sec. 125. (1) A party that is dissatisfied with the final action taken by the presiding officer under section 123 in regard to costs and fees may seek judicial review of that action pursuant to chapter 6.

(2) The court reviewing the final action of a presiding officer pursuant to subsection (1) may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence.

(3) An award of costs and fees made by a court under this section shall only be made pursuant to section 2421d of Act No. 236 of the Public Acts of 1961, being section 600.2421d of the Michigan Compiled Laws.

24.326. Annual report of costs and fees paid

Sec. 126. (1) The director of the department of management and budget shall report annually to the legislature regarding the amount of costs and fees paid by the state under this chapter during the preceding fiscal year. The report shall describe the number, nature, and amount of the awards; the claims involved; and any other relevant information which would aid the legislature in evaluating the scope and impact of the awards. Each agency shall provide the director of the department of management and budget with information as is necessary for the director to comply with the requirements of this section.
(2) If costs and fees are awarded under this chapter to a prevailing party, the agency or agencies over which the party prevailed shall pay those costs and fees.

24.327. Multiple recovery of costs and fees

Sec. 127. If a prevailing party recovers costs and fees under this chapter in a contested case, the prevailing party is not entitled to recover those same costs for that contested case under any other law.

24.328. Applicability of contested cases

Sec. 128. Sections 121 to 127 shall apply to contested cases commenced after September 30, 1984.

APPENDIX B: FURTHER INFORMATION ON AGENCY USE OF ELECTRONIC COMMUNICATION

This Appendix summarizes the general investments that would be required to enhance electronic communication between agencies and the public.

First, agency personnel would be required to read, respond and route e-mail communications. This can be the same staff that is now used to answer the mail and respond to the telephones. Some additional computer training for all staff might be required, though most agencies already have trained there staff in the use of e-mail. Agency personnel would also have to maintain and update the WWW servers (computers). All of the WWW computers could be centralized in a multi-agency computer center, and this central site could maintain all of the Michigan agency homepages, guided by the instructions from the agencies themselves. Such centralization would be more cost effective than having each agency maintain its own Internet computer and with modem communication, centralization of the actual computers would make repair and maintenance easy, but would not limit the ability of agency personnel to change and edit material on a daily basis.

Second, putting the State's agencies on-line would require either individual WWW servers (computers) for each agency, or a pool of Internet servers maintained in one central location. Again, the most cost effective method would be to centralize the State's Internet computers. This would greatly lower then number of computer technicians and programmers required to maintain homepages for every agency in the state, and realistically the homepages for many different agencies can fit on one server. The number of actual servers which the state might be required to provide could conceivably be less than five high speed computers.

Along with the actual computers, the computers would have to be connected to the Internet through a high speed phone line. If these connections do not already exist, they are relatively simple to set up. Again, centralization reduces the number of high speed connections required.

Finally, the computers would require software to run, and hardware to enable back-ups and storage. To the extent that the agencies already track and maintain electronic communications then a move to greater Internet access will not require the creation of an infrastructure to secure and save these communications, just an increase in actual storage space. The software required to maintain a homepage is affordable and readily accessible, and only one software package is required per computer, no matter how many sites sit on that computer.

Putting Michigan agencies on-line would also require clear guidelines and policies to facilitate and ensure the proper use of Internet technology. Such guidelines would include provisions for the maintenance of security, and procedures for how to incorporate electronic notice and comment materials into the existing rulemaking structure. Additionally, timelines would need to be set for how rapidly information will be made available on the Internet, and how often it would be modified and updated.

To reiterate, agencies within Michigan and throughout the nation have already begun to rely increasingly on electronic media to inform and communicate with the public, as the following list suggests:

Michigan Homepages:

State of Michigan Home Page
http://www.migov.state.mi.us/

Legislative Branch

House of Representatives
http://www.house.state.mi.us/
State Senate
http://www.coast.net/~misenate/senhp.html

Executive Branch

Department of Education
http://web.mde.state.mi.us:1024/
Department of Management and Budget, Michigan Environmental Science Board
http://www.great-lakes.net/partners/mesb/mesb.html
Michigan Information Center
http://mic1.dmb.state.mi.us/
Department of Environmental Quality
http://www.deq.state.mi.us/
Department of Mental Health
http://www.mdmh.state.mi.us/
Department of Natural Resources
http://www.dnr.state.mi.us/
Department of State
http://www.sos.state.mi.us
Michigan Historical Center
http://www.sos.state.mi.us/history/history.html
Department of Transportation
http://www.mdot.state.mi.us/
Energy and Regulatory Matters Information Service
http://ermis.commerce.state.mi.us/
HEALTHLINE--Public Health's Info Server
telnet://hline.mdph.state.mi.us/
Michigan Jobs Commission
http://web.miep.org/mjc/index.html
Rehabilitation Services
http://www.mrs.mjc.state.mi.us/
Michigan Travel Bureau
http://www.travel-michigan.state.mi.us/
Office of Services to the Aging
http://mass.iog.wayne.edu/

Even so, Michigan agencies could rely increasingly on electronic communication and the Internet to inform citizens both about agency decisions that affect them and about future agency activities in which they may have an interest, as well as to solicit feedback from interested parties in proposed agency decisions. Indeed, such developments are probably inevitable.

Prior Enactments Pursuant to Michigan Law Revision Commission Recommendations

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

1968 Legislative Session

Subject	Commission Report	Act No.
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgage of Corporate Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardians Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

1969 Legislative Session

Subject	Commission Report	Act No.
Access to Adjoining Property	1968, p. 19	55
Recognition of Acknowledgments	1968, p. 64	57
Dead Man's Statute Amendment	1966, p. 29	63
Notice of Change in Tax Assessments	1968, p. 30	115
Antenuptial and Marital Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue for Civil Actions	1968, p. 17	333

1970 Legislative Session

Subject	Commission Report	Act No.
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships	1969, p. 41	90
Minor Students' Capacity to Borrow Act	1969, p. 46	107
Warranties in Sales of Art	1969, p. 43	121
Appeals from Probate Court	1968, p. 32	143
Circuit Court Commissioner Powers of Magistrates	1969, p. 57	238

1971 Legislative Session

Subject	Commission Report	Act No.
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts	1970, p. 40	158

Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Subject	Commission Report	Act No.
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments	1969, p. 59	135
Business Corporations	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 60	HJR "M"

1973 Legislative Session

Subject	Commission Report	Act No.
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Choice of Forum	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90

Technical Amendments to the Michigan General Corporations Act	1973, p. 37	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to Dead Man's Statute	1972, p. 70	305
Attachment and Collection Fees	1968, p. 22	306
Contribution Among Joint Tortfeasors	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Due Process in Seizure of a Debtor's Property (Elimination of Pre-judgment Garnishment)	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Hit-Run Offenses	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 12	288
Disposition of Community Property Rights at Death	1973, p. 50	289
Insurance Policy in Lieu of Bond	1969, p. 54	290
Child Custody Jurisdiction	1969, p. 23	297

1976 Legislative Session

Subject	Commission Report	Act No.
Due Process in Seizure of a Debtor's Property (Replevin Actions)	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

Subject	Commission Report	Act No.
Juvenile Obscenity	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Company Act	1973, p. 48	63
Elimination of References to Abolished Courts:		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Plats	1976, p. 58	367

Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures	1968, p. 8	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace:		
Sheriff's Service of Process	1976, p. 74	148
Court of Appeals Jurisdiction	1980, p. 34	206

1982 Legislative Session

Subject	Commission Report	Act No.
Limited Partnerships	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Interest on Probate Code Judgments	1980, p. 37	412

1983 Legislative Session

Subject	Commission Report	Act No.
Elimination of References to Abolished Courts: Police Courts and County Board of Auditors	1979, p. 9	87
Federal Lien Registration	1979, p. 26	102

1984 Legislative Session

Subject	Commission Report	Act No.
Legislative Privilege:		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

Subject	Commission Report	Act No.
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

1987 Legislative Session

Subject	Commission Report	Act No.
Amendments to Article 8 of the Uniform Commercial Code	1984, p. 97	16
Disclosure in the Sale of Visual Art Objects Produced in Multiples	1981, p. 57	40, 53, 54

1988 Legislative Session

Subject	Commission Report	Act No.
Repeal of M.C.L. §764.9	1982, p. 9	113
Statutory Rule Against Perpetuities	1986, p. 10	417, 418
Transboundary Pollution Reciprocal Access to Courts	1984, p. 71	517

1990 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Procedures of Justice Courts and Municipal Courts	1985, p. 12; 1986, p. 125	217
b. Noxious Weeds	1986, p. 128; 1988, p. 154	218
c. Criminal Procedure	1975, p. 24	219
d. Presumption Concerning Married Women	1988, p. 157	220
e. Mackinac Island State Park	1986, p. 138; 1988, p. 154	221
f. Relief and Support of the Poor	1986, p. 139; 1988, p. 154	222
g. Legal Work Day	1988, p. 154	223

h. Damage to Property by Floating Lumber	1988, p. 155	224

1991 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Land Contracts	1988, p. 157	140
b. Insurance	1988, p. 156	141
c. Animals	1988, p. 155	142
d. Trains	1986, pp. 153, 155; 1987, p. 80; 1988, p. 152	143
e. Appeals	1985, p. 12	144
f. Crimes	1988, p. 153	145
g. Library Corporations	1988, p. 155	146
h. Oaths	1988, p. 156	147
i. Agricultural Products	1986, p. 134; 1988, p. 151	148
j. Deeds	1988, p. 156	149
k. Corporations	1989, p. 4; 1990, p. 4	150
l. Summer Resort Corporations	1986, p. 154; 1988, p. 155	151
m. Association Land	1986, p. 154; 1988, p. 155	152
n. Burial Grounds	1988, p. 156	153
o. Posters, Signs, and Placecards	1988, p. 157	154
p. Railroad Construction	1988, p. 157; 1988, p. 156	155
q. Work Farms	1988, p. 157	156
r. Recording Duties	1988, p. 154	157
s. Liens	1986, pp. 141, 151, 158; 1988, p. 152	159

1992 Legislative Session

Subject	Commission Report	Act No.
Determination of Death Act	1987, p. 13	90

1996 Legislative Session

Subject	Commission Report	Act No.
Felony Murder and Arson	1994, p. 179	20, 21

RICHARD D. McLELLAN

Richard D. McLellan, is the head of the Government Policy and Practice Group of Dykema Gossett PLLC, a Michigan-based law firm. He is responsible for the firm's public policy, administrative law and lobbying practices in Lansing and Washington, D.C.

As a business and community leader, Mr. McLellan is a former Chairman of the Board of Directors of the Michigan Chamber of Commerce and President of the Library of Michigan Foundation. He is presently the President of the Michigan/Japan Foundation.

In 1990, Mr. McLellan was appointed by President George Bush as a Presidential Observer to the elections in the People's Republic of Bulgaria. The elections were the first free elections in the country following 45 years of Communist rule.

Following the 1990 elections, Mr. McLellan was named Transition Director to then Governor-elect John Engler. In that capacity, he assisted in the formation of Governor Engler's Administration.

By appointment of Governor John Engler, he is a member and secretary of the Michigan International Trade Authority, a member of the Michigan Jobs Commission, and a member of the Library of Michigan Board of Trustees.

In addition, Mr. McLellan formerly served as Chairman of the Michigan Corrections Commission. He is a member of the Board of Directors of the Detroit College of Law at Michigan State University, the Chief Okemos Council of the Boy Scouts of America, the Mackinac Center for Public Policy, the Oxford Foundation and the Cornerstone Foundation. He is a member of the Board of Governors of the Cranbrook Institute of Science.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School. He has served as an adjunct professor of international studies at Michigan State University.

Mr. McLellan is a member of the Board of Directors of the Mercantile & General Life Reassurance Company of America and a Trustee of JNL Trust established by the Jackson National Life Insurance Company. He is Chairman of the Michigan Competitive Telecommunications Providers Association.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski is Assistant Director for policy services of the Michigan Association of School Boards. He also is an adjunct professor of law at The University of Michigan Law School.

He is a graduate of Muskegon Catholic Central High School, Marquette University, the University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and resides in Ann Arbor, Michigan.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University, and also of the Board of the Michigan Theater Foundation.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post No. 7729, the International Association of Defense Counsel, the National Health Lawyers' Association, and the National Association of College and University Attorneys.

MAURA D. CORRIGAN

Judge Corrigan is a public member of the Michigan Law Revision Commission and has served since her appointment in November 1991.

Judge Corrigan is a judge on the Michigan Court of Appeals and was nominated by her colleagues and appointed by the Michigan Supreme Court to serve as Chief Judge of the Court of Appeals, effective January 1, 1997.

She is a graduate of St. Joseph Academy, Cleveland, Ohio; Marygrove College; and the University of Detroit Law School. She is married and has two children.

Prior to her appointment to the Court of Appeals, Judge Corrigan was a shareholder in the law firm of Plunkett & Cooney, P.C. She earlier served as First Assistant United States Attorney for the Eastern District of Michigan, Chief of Appeals in the United States Attorney's Office, Assistant Wayne County Prosecutor, and a law clerk on the Michigan Court of Appeals. She was selected Outstanding Practitioner of Criminal Law by the Federal Bar Association as well as awarded the Director's Award for superior performance as an Assistant United States Attorney by the United States Department of Justice. She has served on numerous professional committees and lectured extensively on law-related matters.

GEORGE E. WARD

Mr. Ward is a member of the Michigan Law Revision Commission and has served since his appointment in August 1994.

Mr. Ward has been the Chief Assistant Prosecuting Attorney in Wayne County since January 1986. Prior to this, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for twenty years in the City of Detroit.

He is a graduate of Sts. Peter and Paul High School, Saginaw, the University of Detroit, and the University of Michigan Law School. He is married and the father of five children.

Mr. Ward is an Adjunct Professor of State and Local Government and Franchise Law at the Detroit College of Law at Michigan State University; a member of the Boards of Directors of Wayne Center, Wayne County Catholic Social Services and Wayne County Neighborhood Legal Services; a former member and President of the Board of Control of Saginaw Valley State University; a former commissioner of the State Bar of Michigan; a former commissioner and President of the Wayne County Home Rule Charter Commission; and former Executive Director of the City of Detroit Charter Revision Commission.

BILL BULLARD, JR.

Mr. Bullard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since July 1996.

Mr. Bullard is a Republican State Senator representing the 15th Senatorial District. He was first elected to the Michigan House of Representatives in 1982 and served in that body until his election to the Senate in June 1996. He is currently Chairman of the Senate Government Operations Committee and also serves on the Education, Health Policy and Senior Citizen Committees.

He is a graduate of the University of Michigan and the Detroit College of Law. He is married and has three children.

Mr. Bullard is the recipient of the first annual "Legislator of the Year" award from the Michigan Townships Association and also the Guardian Award from the National Federation of Independent Business.

GARY PETERS

Gary Peters was elected to the Michigan Senate on November 8, 1994. He serves as Vice Chair of the Senate Finance Committee, and a member of the Education, Judiciary, and Families, Mental Health and Human Services Committees. He is also a member of the Michigan Law Revision Commission.

Prior to being in the legislature, Mr. Peters was Vice President, Investments, for a major national financial services firm. He serves as a Securities Arbitrator for the New York Stock Exchange, National Association of Securities Dealers, and the American Arbitration Association.

Mr. Peters taught Strategic Management and Business Policy at Oakland University, and was an instructor in the Finance & Business Economics Department at Wayne State University. His educational credentials include a B.A. from Alma College (Magna Cum Laude, Phi Beta Kappa), an M.B.A. in Finance from the University of Detroit, and a J.D. from Wayne State University Law School.

His previous government experience includes a term on the Rochester Hills City Council where he served as Chair of the Solid Waste Management Committee, Vice Chair of the Budget & Finance Committee, and a member of the Zoning Board of Appeals and Paint Creek Trailways Commission.

Mr. Peters' community involvement includes serving on the Board of Directors for Common Cause of Michigan, a member of the Environmental Policy Advisory Committee for the Southeast Michigan Council of Governments (SEMCOG) and as Chair of the Air Issues Committee for the Michigan Sierra Club.

Senator Peters is also a commissioned officer in the U.S. Naval Reserve. He is married to Colleen Ochoa and has two children, Gary, Jr., and Madeleine Adriana.

MICHAEL E. NYE

Mr. Nye is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1991.

Mr. Nye is a Republican State Representative representing the 58th House District. He was first elected to the Michigan House in November 1982. He is Chair of the House Judiciary and Civil Rights and serves on the House Oversight & Ethics Committee.

He is a graduate of Purdue University and University of Detroit Law School. He is married and has two children.

Mr. Nye was named the 1991 Legislator of the Year by the Michigan Association of Chiefs of Police and the 1990 Michigan Environmental Legislator of the Year by the Michigan Environmental Defense Association.

He is a member of the Michigan Sentencing Guidelines Commission, a member of the Trial Court Assessment Commission, and Chairman of the American Legislative Exchange Council (ALEC) Task Force on Criminal Justice. He has received the Michigan Aeronautics Commission's Individual Award of Excellence (1996), and the Michigan Association of Counties special award for court reform legislation.

Mr. Nye has been a leader against Drunk Driving and has received the GLADD award (Government Leader Against Drunk Driving) from the Mothers Against Drunk Drivers.

TED WALLACE

Representative Ted Wallace is a legislative member of the Michigan Law Revision Commission and has served on the Commission since April 1993. Representative Wallace is a Democrat from Detroit and has represented the 5th House District since November 1988.

Representative Wallace served in the U.S. Navy during the Vietnam war and is an in-active member of the Michigan National Guard.

He holds a Bachelor of Science Degree in Accounting from Wright State University and a law degree from the University of Michigan Law School. He also took post-graduate classes at the University of Michigan Institute of Public Policy, and post-legal classes at Wayne State Law School.

Representative Wallace is a practicing attorney in the Detroit area and was previously an adjunct professor at Wayne State University and an assembler for the Chrysler Corporation. Representative Wallace has been a tax analyst for the General Motors Corporation and a tax accountant for Arthur Anderson and Company.

He is affiliated with the Michigan Democratic Party, Urban League, T.U.L.C., University of Michigan Alumni Association, and other various legal organizations. He is also a life member of the N.A.A.C.P. and a member of the issues committee of the Michigan State N.A.A.C.P. His past history has included tenure as President of the Democratic Voters League; Vice-President, Young Democrats; Member, Board of Governors Young Democrats; Chairman, Upper Neighborhood City Council; Delegate to the 1972 Black National Convention; and Vice-President, Government Affairs, Greater Dayton Jay-Cees.

Representative Wallace is the immediate-past Chairman of the Michigan Legislative Black Caucus. He serves as Parliamentarian for the National Black Caucus of State Legislators. He is a member of the Michigan Sentencing Guidelines Commission, and serves in the House as an Assistant Floor Leader. He is also the Democratic Vice-Chair of the House Judiciary and Civil Rights Committee and a member of the House Tax Policy Committee.

Rep. Wallace is married to the former Bernice Jones, and has three children.

DIANNE M. ODROBINA

Since January, 1996, Ms. Odrobina, as the Legislative Council Administrator, has served as the ex-officio member of the Michigan Law Revision Commission.

Ms. Odrobina has served the Michigan Legislature in several capacities since 1991, serving as the Director of the Senate Majority Policy Office from February 1993 to January 1996. She was previously an Assistant Prosecuting Attorney for Wayne County and an attorney for Macomb County Friend of the Court.

Ms. Odrobina holds the degrees of Bachelor of Arts in Political Science from Michigan State University, Master of Business Administration from the University of Detroit, and Juris Doctor from Wayne State University and is completing her degree as Master of Asian Studies from the University of Michigan.

KEVIN C. KENNEDY

Mr. Kennedy is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since December 1995.

Mr. Kennedy joined the faculty of the Detroit College of Law at Michigan State University in 1987 and has taught courses in civil procedure, conflict of laws, international trade, and international litigation.

He is a graduate of the University of Michigan, Wayne State University, and Harvard University. He was a law clerk at the U.S. Court of International Trade, was a private practitioner in Hawaii, and served as a trial attorney for the U.S. Department of Justice. He is married.

Mr. Kennedy is the author of more than thirty law review articles concerning international law, international trade, and civil procedure.

GARY GULLIVER

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has four children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

Gross Negligence in Michigan

A Special Report to the

Michigan Law Revision Commission

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Michigan
Law Revision Commission

1996

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GROSS NEGLIGENCE IN MICHIGAN

A STUDY REPORT SUBMITTED TO THE MICHIGAN LAW REVISION COMMISSION[1]

EXECUTIVE SUMMARY

As part of its statutory charge to examine the common law and statutes of the state and its current judicial decisions, the Michigan Law Revision Commission undertook a study of the law of gross negligence in Michigan. Two Michigan Supreme Court cases decided on August 2, 1994, *Dedes v. Asch* and *Jennings v. Southwood*,[2] represent significant case law developments in the area of gross negligence. Despite the important changes these two decisions have made, however, major gaps in the law of gross negligence nevertheless persist in Michigan.

In *Jennings v. Southwood*, the Supreme Court overruled the 70-year-old landmark, *Gibbard v. Cursan*,[3] which had defined gross negligence in a way that was both anachronistic and unique to Michigan. *Gibbard* and its progeny defined gross negligence to mean that the negligent individual had the last clear chance to avert the harm. Even though Michigan had adopted a pure comparative negligence standard of conduct in 1979 and had abolished the "last clear chance" doctrine in common law tort actions, Michigan retained the "last clear chance" definition of gross negligence, an obvious holdover from the days of contributory negligence. Michigan's common law definition of gross negligence had led to more than a little confusion in the Michigan courts.

The Supreme Court in *Jennings* was asked to define gross negligence in the context of the Emergency Medical Services Act. The Court first rejected the *Gibbard* definition of gross negligence, a definition that was grounded in legal principles that were no longer good law in Michigan.

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[1] An earlier draft of this study report was prepared by Professor Kent D. Syverud, University of Michigan School of Law. A revised draft was prepared by Professor Kevin Kennedy, Detroit College of Law at Michigan State University. Professor Kennedy wishes to acknowledge the invaluable research assistance of Russell Meyers, Class of 1998, Detroit College of Law.

[2] Dedes v. Asch, 446 Mich. 99, 521 N.W.2d 488 (1994); Jennings v. Southwood, 446 Mich. 125, 521 N.W.2d 230 (1994).

[3] 225 Mich. 311, 196 N.W. 398 (1923).

But rather than fashioning its own gross negligence definition, the Court instead borrowed the definition contained in the Government Tort Liability Act (GTLA), the only statute in Michigan that defines that term. (As explained below, the GTLA extends immunity from suit to government employees, unless their conduct is grossly negligent and "the proximate cause" of the plaintiff's injuries.) Under the GTLA, "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

As a result of the Supreme Court's decision in *Jennings*, two statutes, the GTLA and the Emergency Medical Services Act (EMSA), now use the same statutory definition of gross negligence. The Supreme Court has rejected Michigan's outdated definition of gross negligence, but left a vacuum in its wake. Filling it may require action either by the Legislature or the courts. The *Jennings* decision may signal a trend in which the Michigan courts borrow the Legislature's only definition of gross negligence and makes general use of it in other gross negligence settings. For the forty other Michigan statutes that use the term "gross negligence," but which do not have a gross negligence definition, current case law leaves unsettled how to define gross negligence in contexts other than the GTLA and the EMSA.

The second judicial development came in *Dedes v. Asch.* In the *Dedes* case, the Court was asked to interpret the phrase "the proximate cause" found in the GTLA. As previously noted, a government employee cannot be held civilly liable for damages unless his conduct was grossly negligent and the proximate cause of the harm. The Court held in *Dedes* that "***the*** proximate cause" does not mean "sole proximate cause," but rather "***a*** proximate cause" of the plaintiff's injuries. Consequently, the school bus driver in *Dedes* could be sued when children were hit by a passing car immediately after alighting from the bus.[4]

This report also examines the issue of police officer liability in high-speed pursuit cases under the GTLA's gross negligence standard. The report includes a 50-state survey on government employee immunity and the standards other states use for imposing liability on government employees, be it ordinary negligence, gross negligence, or willful misconduct. With varying qualifications, three states -- Nebraska, Pennsylvania, and California -- have extended absolute immunity to police

[4] As a matter of the plain meaning of words, the dissent in *Dedes* questioned whether the Supreme Court majority had correctly determined the Legislature's intent on this question of statutory interpretation.

officers for claims arising out of high-speed pursuits.

This study report makes no specific recommendations to the Legislature on revisions to Michigan statutes dealing with gross negligence. However, this report does suggest that the Legislature may want to consider enacting a uniform definition of the term "gross negligence" to promote a more consistent application of the gross negligence standard of conduct in cases where the issue arises.

Introduction

Part I of this report traces the legal contexts in which the term "gross negligence" is and has been used in Michigan case law and statutes, with a special emphasis on the GTLA definition of gross negligence and its application to police officers. Part II examines definitions of gross negligence generally. Part III reviews definitions of gross negligence in Michigan. Part IV examines the contexts and definitions of gross negligence in other jurisdictions. Finally, Part V considers options available to the Legislature should it decide to enact a comprehensive, uniform definition of gross negligence.

I. Contexts in Which the Term "Gross Negligence" Is and Was Used in Michigan

The first Part of this report examines the contexts in which the term "gross negligence" is used in Michigan, including current definitions of gross negligence, their origin, and the development and eventual demise of last clear chance as the preeminent definition of gross negligence in Michigan.

A. Statutory Contexts In Which the Term "Gross Negligence" Is Currently Used in Michigan

Michigan statutes employ the term "gross negligence" 42 times,[5] but

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[5] M.C.L. §29.7c, M.S.A. §4.559(7c) (firefighters); M.C.L. §30.407, M.S.A. §4.824(17)(5) (director of emergency management); M.C.L. §30.411, M.S.A. §4.824(21) (disaster relief personnel); M.C.L. §30.432, M.S.A. §13.31(72) (hazardous waste spills, volunteers); M.C.L. §41.711a, M.S.A. §5.160(l) (ambulance drivers, attendants, police, firefighters); M.C.L. §125.996, M.S.A. §19.410(36) (mobile home vendors); M.C.L. §286.576, M.S.A. §12.340(26) (pesticide users); M.C.L. §299.612(a)-(b), M.S.A. §§ 13.32(12a)-(12b), M.C.L. §§ 299.613, M.S.A. §13.32(13) (hazardous waste, various persons); M.C.L. §300.201, M.S.A. §13.1485 (recreational landowners); M.C.L. §316.605, M.S.A. §13.1350(605) (lessors of hunting lands); M.C.L. §317.176, M.S.A. §13.1482(6)(recreational trespass); M.C.L. §330.1427b, M.S.A. §14.800(427b) (officers taking persons into protective custody); M.C.L. §330.1439, M.S.A. §14.800(439). (persons filing treatment petitions under Mental Health Code); M.C.L. §333.6508, M.S.A. §14.15(6508) (treatment of substance abusers); M.C.L. §333.9203, M.S.A. §14.15(9203) (free immunizations); M.C.L. §333.20965, M.S.A. §14.15(20965) (providers of emergency medical services); M.C.L. §338.981, M.S.A. §18.86(11) (mechanical contractors); M.C.L. §339.604, M.S.A. §18.425(604) (violations of occupational code); M.C.L. §339.2715, M.S.A. §18.425(2715) (optometrists); M.C.L. §380.1178, M.S.A. §15.41178 (administration of medication to students); M.C.L. §§ 445.1672, .1681, .1682, M.S.A. §§ 23.1125(72), (81), (82) (disclosures of information required by law, failure to service mortgage loans); M.C.L. §450.2209, M.S.A. §21.197(209)

only once, in the Government Tort Liability Act,[6] does a statute provide its own definition of gross negligence. The Legislature has enacted at least one statute using the term "gross negligence" nearly every year from 1974 to 1990.[7] Only five of the 42 statutes that use gross negligence are more than twenty years old, and the oldest, which was passed in 1953, is only forty years old.[8] One explanation for the Legislature's increased use of the gross negligence standard in recent years is legislative tort reform to limit the liability of certain classes of persons who would otherwise be held to an ordinary negligence standard of care.

As explained in the next section, gross negligence is most frequently used in statutes granting qualified immunity from suit to individuals and organizations engaged in governmental activities or public service. It is also used as a basis for awarding extraordinary damages, as a ground for disciplining professional licensees, and as a restriction on private organizations which seek to indemnify or release from liability their officers and directors.

(nonprofit corporation officers); M.C.L. §484.1604, M.S.A. §22.1467(604)(emergency telegraph/telephone operators); M.C.L. §487.1707, M.S.A. §23.1189(707) (officers of financial institutions); M.C.L. §500.2124, M.S.A. §24.12124 (automobile insurers, issuance of policies); M.C.L. §500.2130, M.S.A. §24.12130 (automobile insurers, exchange of information); M.C.L. §554.455, M.S.A. §27.3178(241.25) (custodians of minor's account); M.C.L. §559.154, M.S.A. §26.50(154) (officers of condominium associations); M.C.L. §600.5839, M.S.A. §27A.5839 (architects, engineers and contractors); M.C.L. §691.1407, M.S.A. §3.996(107) (governmental units, employees); M.C.L. §691.1501, M.S.A. §14.563 (physicians and nurses, competitive sports); M.C.L. §691.1502, M.S.A. §14.563(12) (medical personnel, emergency care and immunizations); M.C.L. §691.1504, M.S.A. §14.563(14) (CPR volunteers); M.C.L. §691.1505, M.S.A. §14.563(15) (block parents); M.C.L. §691.1507, M.S.A. §14.563(17) (ski patrols); M.C.L. §691.1522, M.S.A. §14.16(102) (restaurant employees); M.C.L. §700.173, M.S.A. §27.5173 (personal representatives of estate); M.C.L. §700.553, M.S.A. §27.5553 (fiduciaries). *See also* MICH. CONST. art. V, §10 (gross neglect of duty a ground for the governor to discharge officials).

[6] M.C.L. §691.1407, M.S.A. §3.996(107). This section was added in 1986.

[7] *See* notes 8-52, *infra.*

[8] The term "gross negligence" was added to the following statutes in the year noted. M.C.L. §41.711a, M.S.A. §5.160(1)(1967) (a Good Samaritan act); M.C.L. §300.201, M.S.A. §13.1485 (1953) (liability of owners for recreational uses of their land); M.C.L. §691.1501, M.S.A. §14.563 (1963) (a Good Samaritan act); M.C.L. §380.1178, M.S.A. §15.41178 (liability of teachers administering medication to students; the Act was passed in 1971 as a codification of prior law); M.C.L. §554.455, M.S.A. §27.3178(241.25) (1960) (liability of custodians of gifts to minors). *See also* M.C.L. §559.154, M.S.A. §26.50(154) (liability of condominium association officers; passed in 1978 as a recodification of prior section M.C.L. §559.13).

1. *Gross Negligence As A Statutory Exception to Immunity From Suit*

In statutes that grant immunity from suit to specific persons and organizations for acts committed in the line of duty, immunity is usually qualified as not extending to acts that are grossly negligent. Typical is the qualified immunity from liability in the Ambulance and Inhalator Service Act which provides:

> Any municipal or private ambulance driver or attendant or policeman or fireman engaged in emergency first aid service, who, in good faith renders emergency care at the scene of an emergency, *shall not be liable for any civil damages as a result of acts or omissions* in rendering the emergency care, *except acts or omissions constituting gross negligence or wilful and wanton misconduct.*[9]

Nearly identical language is found in statutes granting immunity from liability to the owners of land leased for hunting,[10] owners of land used without compensation for recreational purposes,[11] mass immunization personnel,[12] doctors and nurses in emergency or sports situations,[13] hospital

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[9] M.C.L. §41.711a, M.S.A. §5.160(1)(emphasis added). This section was added in 1967.

[10] M.C.L. §316.605, M.S.A. §13.1350(605) ("A cause of action shall not arise for injuries to persons . . . unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee"). This section was added in 1986.

[11] M.C.L. §300.201, M.S.A. §13.1485 ("No cause of action shall arise for injuries to any person. . . unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee"). This Act was passed 1953; the section was amended in 1964 to include motor cycling and snowmobiling to the list of recreation uses, and again in 1987 to include u-pick farms.

M.C.L. §317.176, M.S.A. §13.1482(6) ("No cause of action shall arise for injuries to any person . . . unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, his lessee or agent"). This Act was passed in 1976.

[12] M.C.L. §333.9203, M.S.A. §14.15(9203) ("[A mass immunization official] is not liable to any person for civil damages as a result of an act or omission . . . except for gross negligence or wilful and wanton misconduct"). This Act was passed as a codification of prior law in 1978.

[13] M.C.L. §691.1501, M.S.A. §14.563 ("[Doctors and nurses] shall not be liable for civil damages as a result of acts or omissions . . . in rendering emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This Act was passed 1963. This section was amended in 1964, adding the term "professional" to the definition of nurse, and again in 1987, adding sports situations.

personnel in emergency situations,[14] CPR volunteers,[15] block parents in emergency situations,[16] ski patrols in emergency situations,[17] peace officers taking mental patients into protective custody,[18] persons filing commitment petitions for mental patients,[19] and school officials administering medicine to students on a doctor's orders.[20]

A similar, but not identical, phraseology is found in provisions granting immunity from suit to firefighters dealing with hazardous waste,[21]

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[14] M.C.L. §691.1502, M.S.A. §14.563(12)("[Hospital personnel] shall not be liable for civil damages as a result of acts or omissions . . . in rendering emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This section was added in 1975.

[15] M.C.L. §691.1504, M.S.A. §14.563(14)("[CPR volunteers] shall not be liable for civil damages as a result of an act or omission in rendering cardiopulmonary resuscitation, except an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1986.

[16] M.C.L. §691.1505, M.S.A. §14.563(15)("[Block parents] shall not be liable for civil damages resulting from an act or omission in the rendering of that assistance except an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1985.

[17] M.C.L. §691.1507, M.S.A. §14.563(17)("[Ski patrol members] shall not be liable for civil damages as a result of acts or omissions . . . in rendering the emergency care except acts or omissions amounting to gross negligence or willful and wanton misconduct"). This section was added in 1987.

[18] M.C.L. §330.1472b, M.S.A. §14.800(427b)(A peace officer . . . is not civilly liable . . . [unless he or she] engages in behavior involving gross negligence or wilful and wanton misconduct"). This section was added in 1978.

[19] M.C.L. §330.1439, M.S.A. §14.800(439)("A cause of action shall not be cognizable in a court of this state against a [petitioner] . . . unless the petition is filed as the result of an act or omission amounting to gross negligence or willful and wanton misconduct"). This section was added in 1986.

[20] M.C.L. §380.1178, M.S.A. §15.41178("[A school official] is not liable in a criminal action or for civil damages as a result of the administration [of medicine] except for an act or omission amounting to gross negligence or wilful and wanton misconduct"). This Act was passed as a codification of prior law in 1971; this section was amended in 1978 to include officials other than teachers.

[21] M.C.L. §29.7c, M.S.A. §4.559(7c)("[Firefighters] shall not be liable in a civil action for damages as a result of an act or omission by the person arising out of and in the course of the person's good faith rendering of that assistance unless the person's act or omission was the result of that person's gross negligence or wilful misconduct"). This section was added in 1984.

hazardous waste cleanup volunteers,[22] government disaster relief workers,[23] and emergency medical technicians.[24] In these statutes the immunity is qualified by excluding "gross negligence or *willful* misconduct," instead of the "gross negligence or *willful and wanton* misconduct" standard found in the Ambulance and Inhalator Service Act.[25] In a similar vein, statutes granting immunity from suit to individuals providing disaster aid,[26] pesticide users,[27] and restaurant employees trying to aid choking patrons,[28] grant immunity unless the person's conduct amounted to "gross negligence," but do not add the phrase, "or willful and wanton misconduct."

A third variation is found in the statute granting governmental units immunity from liability when attempting to deal with a hazardous waste release,[29] unless the clean-up effort caused injury due to "gross negligence,

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[22] M.C.L. §30.432, M.S.A. §13.31(72)("[Hazardous waste volunteers] shall not be liable in a civil action for damages resulting from an act or omission arising out of and in the course of the volunteer's good faith rendering of that assistance. [This immunity] shall not apply to a volunteer whose act or omission was the result of the volunteer's gross negligence or willful misconduct"). This section was added in 1990.

[23] M.C.L. §30.411; M.S.A. §4.824(21) ("[Disaster relief workers], except in cases of willful misconduct, gross negligence, or bad faith .. shall not be liable for the death of or injury to persons, or for damage to property"). This Act was passed in 1976; this section was amended in 1990 to correct spelling and grammatical errors.

[24] M.C.L. §333.20965, M.S.A. §14.15(20965)("Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of [emergency medical technicians] do not impose liability . . . "). This section was added in 1990.

[25] M.C.L. §41.711a, M.S.A. §5.160(1). This section was added in 1967.

[26] M.C.L. §30.407, M.S.A. §4.824(17)("The director may issue a directive relieving the donor or supplier of voluntary or private assistance from liability for other than gross negligence in the performance of the service"). This Act was passed in 1976; this section was amended in 1990 to accommodate an administrative re-organization.

[27] M.C.L. §286.576, M.S.A. §12.340(26)("A civil cause of action shall not arise for injuries to any person or property if [a pesticide user] was not grossly negligence, and [used the pesticides in compliance with the act]"). The relevant subsection was added in 1988.

[28] M.C.L. §691.1522, M.S.A. §14.16(102)("[A restaurant employee] shall not be liable for civil damages . . . unless the employee . . . was grossly negligence in his or her actions"). This Act was passed in 1978.

[29] M.C.L. §299.612a, M.S.A. §13.32(12a)("This subsection shall not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct"). This section was added in 1990.

including reckless, willful, or wanton misconduct, or intentional misconduct."

Special language has sometimes been used in statutes that grant immunity in contexts where financial harms, as opposed to the physical harms covered by the statutes described above, are likely to occur. While the act granting telephone companies immunity when they interrupt normal service to establish and maintain 911 service uses the common "gross negligence or willful and wanton misconduct" language,[30] and Michigan's version of the Uniform Gifts to Minors Act uses conventional language that waives immunity for acts that "result from bad faith, intentional wrongdoing or gross negligence,"[31] other statutes in this category use more specialized language. For example, two parts of the Insurance Code of 1956 speak of acts "made with gross negligence or bad faith with malice in fact," rather than the more open-textured "good faith" requirement found in other statutes,[32] while two provisions dealing with probate link "wilful fraud" and "gross negligence" as alternate bases for liability.[33]

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[30] M.C.L. §484.1604, M.S.A. §22.1467(605)("[A telephone company] shall not be liable for civil damages to any person as a result of an act or omission [necessary to comply with the statute] unless the act or omission amounts to gross negligence or willful and wanton misconduct"). This Act was passed in 1986.

[31] M.C.L. §554.455, M.S.A. §27.3178(241.25)("A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this act"). This Act was passed in 1960.

[32] M.C.L. §500.2130, M.S.A. §24.12130 ("There shall be no civil liability on the part of, and a cause of action of any nature shall not arise against . . . [various individuals involved with the act] for acts or omissions, other than acts made with gross negligence or in bad faith with malice in fact, related to the exchange of claim information"). This section was added in 1979.

M.C.L. §500.2124, M.S.A. §24.12124("[Immunity from liability for furnishing requested information] shall not apply if a statement made is shown to have been made with gross negligence or in bad faith with malice in fact . . ."). This section was added in 1979.

[33] M.C.L. §700.173, M.S.A. §27.5172 ("After the final distribution of an intestate or testate estate, a will or another will if one is admitted to probate, shall not be admitted to probate, except if the personal representative or an interested party commits *wilful fraud or gross negligence*"). This Act was passed in 1978.

M.C.L. §700.553, M.S.A. §27.5553 ("When a fiduciary continues the business of a decedent or ward, the fiduciary . . . shall not be personally liable . . .[except for] his or her wilful fraud, gross negligence, or other wilful misconduct"). This Act was passed in 1978; this section was amended in 1979 to include creditors of continued businesses in the definition of creditor.

Many of these immunity provisions, such as the Ambulance and Inhalator Service Act, also require that in order for conduct to be immune from suit it must be performed in "good faith."[34] A few statutes also provide that the class of persons who are the beneficiaries of the particular act enjoy immunity from criminal sanctions.[35]

What is the interplay of gross negligence, reckless conduct, and wanton and wilful misconduct? Are the three terms synonymous? Gross negligence is usually considered to carry a lower threshold of *mens rea* than that associated with reckless misconduct, willful and wanton misconduct, willful misconduct, and intentional misconduct. Only if all these various standards of conduct have the same level of *mens rea* would they be synonymous as a matter of law. The Supreme Court's 1923 *Gibbard* decision suggested that that indeed might be the case. However, such an interpretation flouts a fundamental rule of statutory construction that all words of a statute are to be given meaning and effect. A statutory interpretation that treats these phrases as synonymous would render parts of the statute surplusage. Moreover, in 1994 in its decision in *Jennings v. Southwood*, the Supreme Court was asked to interpret the term "wilful misconduct" contained in the EMSA. The Court noted in passing that "it is unfortunate that the judiciary and the Legislature have used the phrase `wilful *and* wanton misconduct,' as opposed to `wilful *or* wanton

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[34] *See* M.C.L. §29.7c, M.S.A. §4.559(7c)(firefighters); M.C.L. §30.432, M.S.A. §13.31(72)(hazardous waste spill volunteers); M.C.L. §41.711a, M.S.A. §5.160(1)(ambulance and inhalator service); M.C.L. §330.1439, M.S.A. §14.800(439)(persons filing mental health commitment petitions); M.C.L. §380.1178, M.S.A. §15.41178 (school officials dispensing medicine); M.C.L. §691.1501, M.S.A. §14.563 (doctors and nurses in emergency and sports situations); M.C.L. §691.1502, M.S.A. §14.563(12) (hospital personnel); M.C.L. §691.1504, M.S.A. §14.563(14) (CPR volunteers); M.C.L. §691.1522, M.S.A. §14.16(102) (restaurant employees). *See also* M.C.L. §30.411, M.S.A. §4.824(21) (no liability "except in cases of willful misconduct, gross negligence, or bad faith"); M.C.L. §554.455, M.S.A. §27.3178(241.25) (no liability except for "bad faith, intentional wrongdoing or gross negligence"); M.C.L. §500.2130, .2124, M.S.A. §24.12130, .12124 (acts "made with gross negligence or in bad faith with malice in fact").

For examples of statutes with no good faith qualification, see M.C.L. §30.407, M.S.A. §4.824(17) (disaster assistance donors); M.C.L. §286.576, M.S.A. §12.340(26) (pesticide users); M.C.L. §299.612(a)-(b), M.S.A. §13.32(12a)-(12b) (governments and persons responding to hazardous waste releases); M.C.L. §300.201, M.S.A. §13.1485 (recreational users of land); M.C.L. §316.605, M.S.A. §13.1350(605) (hunters); M.C.L. §317.176; M.S.A. §13.1482(6) (recreational trespassers); M.C.L. §333.6508, M.S.A. §14.15(6508) (law enforcement officers); M.C.L. §333.9203, M.S.A. §14.15(9203) (mass immunization officials); M.C.L. §333.20965, M.S.A. §14.15(20965) (emergency medical technicians).

[35] See, e.g., M.C.L. §333.6510, M.S.A. §14.15(6510) (law enforcement officers placing persons in protective custody); M.C.L. §380.1178, M.S.A. §15.41178 (school officials administering medication).

misconduct,'"[36] but concluded that the phrases "wilful misconduct" and "wilful and wanton misconduct" possess distinct meanings.[37] The term "wilful" requires a finding of actual intent to harm, the Court concluded, while the term "wanton" is an intent inferred from reckless conduct.[38]

2. *Other Statutory Contexts in Which Gross Negligence Is Currently Used in Michigan*

a. Indemnification

While some Michigan statutes make gross negligence an exception to a general grant of immunity from suit, another group of Michigan statutes requires private organizations to include a "gross negligence exception" when they hold harmless and indemnify their officers and directors. For example, statutes regulating the formation of non-profit corporations[39] and condominium associations[40] prohibit these organizations from indemnifying directors from liability for intentional misconduct, wilful and wanton misconduct, or grossly negligent acts or omissions.[41]

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[36] Jennings, 466 Mich. at 141.

[37] Jennings, 446 Mich. at 139.

[38] Id., 446 Mich. at 141. Compare ILL. ANN. STAT. § 10/1-210, which defines "willful and wanton conduct" as follows:

> "Willful and wanton conduct" as used in this [Governmental Employees Tort] Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

[39] M.C.L. §450.2209, M.S.A. §21.197(209)(A charter provision freeing directors from personal liability "shall not eliminate or limit the liability of a director for any of the following: . . . (ii) Acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of the law. . . . (vi) An act or omission that is grossly negligent"). This Act was passed in 1982; this section was amended in 1987 to deal with tax exempt corporations.

[40] M.C.L. §559.154, M.S.A. §26.50(154) ("The bylaws [of a condominium association] shall provide an indemnification clause . . . [but] shall exclude indemnification for wilful and wanton misconduct and for gross negligence"). This Act was passed in 1978 as a recodification of prior section M.C.L. §559.13; this section was amended in 1982 to conform with property tax laws and make grammatical corrections.

[41] M.C.L. §450.2209, M.S.A. §21.197(209); M.C.L. §559.154, M.S.A. §26.50(154).

b. Damage Awards and the Statute of Limitations

One Michigan statute makes gross negligence a ground for enlarging the statute of limitations for one year,[42] another makes it a ground for an award of treble damages,[43] and a third makes gross negligence a ground for an award of punitive damages, litigation costs, and the appointment of a conservator to run the violating corporation's business.[44] The verbal formulations in these statutes are as varied as those found in the immunity area, with one provision requiring that an act be a "result of gross negligence,"[45] a second requiring that an act be done "wilfully or by gross negligence,"[46] and a third requiring that an act be "willful, intentional, or the result of gross or wanton negligence."[47]

c. License Revocation

Michigan statutes make gross negligence either a ground for

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[42] M.C.L. §600.5839, M.S.A. §27A.5839 ("[The statute of limitations in actions arising from improvements to real property shall be six years] or 1 year after the defect is discovered or should have been discovered provided that the defect . . . is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement . . ."). This section was added in 1967, and was amended to add the pertinent part in 1986.

[43] M.C.L. §125.996, M.S.A. §19.410(36) ("A manufacturer or dealer [of mobile homes] who knows or should have known that an alleged defect is covered by the warranty provided by this act and who willfully by gross negligence refuses or fails to take appropriate corrective action may be liable for treble damages"). This Act was passed in 1974.

[44] M.C.L. §§445.1680, .1681, M.S.A. §§23.1125(80), (81) ("[Any person bringing an action under this act may] recover actual damages resulting from a violation of this act, or $250.00, whichever is greater, together with reasonable attorney fees and the costs of bringing the action. . . . [I]f the licensee or registrant establishes by a preponderance of the evidence that the failure to comply with the act was not willful, intentional, or the result of gross or wanton negligence, the amount recovered . . . shall not exceed actual damages. . . . [I]f the commissioner determines that a licensee or registrant is, intentionally or as a result of gross or wanton negligence, not servicing mortgage loans in accordance with the terms of this act or the terms of the servicing contracts, the commissioner may appoint a conservator . . ."). This Act was passed in 1987.

[45] M.C.L. §600.5839, M.S.A. §27A.5839.

[46] M.C.L. §125.996, M.S.A. §19.410(36).

[47] M.C.L. §445.1680, .1681, M.S.A. §23.1125(80), (81).

revoking a license or the basis for imposing a lesser penalty. Such statutes are found in the areas of banking,[48] optometry,[49] and residential building contracting.[50] One banking act uses the phrase "intentionally or due to gross and wanton negligence,"[51] while another requires "dishonesty on the part of the subject person or demonstrates the subject person's gross negligence with respect to the business of the licensee or a willful disregard for the safety and soundness of the licensee."[52]

Finally, a provision in the Michigan Constitution makes "gross neglect of duty" a ground upon which the Governor may discharge public officials.[53]

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[48] M.C.L. §445.1672, M.S.A. §23.1125(72) ("It shall be a violation of this act if a licensee or registrant [under the Mortgage Brokers, Lenders, and Servicers Lending Act] . . . (c) Intentionally or due to gross or wanton negligence, repeatedly fails to provide borrowers material disclosures of information as required by state or federal law"). This Act was passed in 1987.

M.C.L. §487.1707, M.S.A. §23.1189(707) ("The commissioner may issue an order removing a subject person of a license [under the Michigan Business and Industrial Development Corporation Act] if . . . (c) The act, violation, or breach of fiduciary duty either involves dishonesty on the part of the subject person or demonstrates the subject person's gross negligence with respect to the business of the licensee or a willful disregard for the safety and soundness of the licensee"). This Act was passed in 1986.

[49] M.C.L. §339.2715, M.S.A. §18.425(2713) ("An ocularist or apprentice shall not do any of the following: (a) commit an act of gross negligence in the practice of ocularism . . . "). This section was added in 1983.

[50] M.C.L. §338.981, M.S.A. §18.86(11)("The department may investigate the activities of a licensee [under the Forbes Mechanical Contractors Act] if the board finds that any of the following grounds exist: . . . (c) An act of gross negligence . . ."). This Act was passed in 1984.

[51] M.C.L. §445.1672, M.S.A. §23.1125(72).

[52] M.C.L. §487.1707, M.S.A. §23.1189(707).

[53] MICH. CONST. art. 5, §10. The section provides:

> The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for *gross neglect of duty* or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature [emphasis added].

B. Statutory Contexts in Which The Term "Gross Negligence" Was Formerly Used in Michigan: The Guest Passenger Statute

The term "gross negligence" occupied center stage in Michigan's former automobile guest passenger statute.[54] The guest passenger statute was in force from 1929 until 1975, when the Michigan Supreme Court struck it down as unconstitutional in *Manistee Bank & Trust Co. v. McGowain*.[55] The statute granted the host driver of an automobile immunity from suit brought by a guest passenger, except in cases of "gross negligence or wilful and wanton misconduct."[56] This extensively litigated statute had an associated standard jury instruction defining the phrase "gross negligence or wilful or wanton misconduct."[57] In addition, cases interpreting the phrase have been a rich "definitional source for the terms gross negligence and wilful and wanton misconduct."[58]

C. Common Law Contexts in Which the Term "Gross Negligence" Is Used in Michigan

1. *Michigan's Criminal Law*

Gross negligence is the standard of culpability for two crimes in

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[54] Formerly codified at M.C.L. § 257.401.

[55] 394 Mich. 655, 232 N.W.2d 636 (1975).

[56] Formerly codified at M.C.L. §2567.401, M.S.A. §9.2101. Cases interpreting the statute can be found from as early as 1938 to as late as 1970. *See* Sargeson v. Yarabek, 24 Mich. App. 557, 180 N.W.2d 474 (1970); Thayer v. Thayer, 286 Mich. 273, 282 N.W. 145 (1938). The law provided that "no person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death, or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator . . . ." M.C.L. §257.401, M.S.A. §9.2101.

[57] Former SJI 14.03 provided that in cases arising under the automobile guest statute "[t]he terms `gross negligence or wilful and wanton misconduct' mean more than the failure to use ordinary care. These terms mean conduct which shows (actual or deliberate intention to harm) (or) (a reckless disregard for the safety of others in the face of circumstances involving a high degree of danger)."

[58] Nationwide Mut. Fire Ins. v. Detroit Edison, 95 Mich. App. 62, 289 N.W.2d 879, 881 (1980).

Michigan, involuntary manslaughter[59] and felonious-driving.[60] The manslaughter statute provides:

> Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.[61]

The definition of the crime of manslaughter in Michigan is a matter which has been left to common law development. The common law makes gross negligence one of the elements of involuntary manslaughter. In *People v. Roby*,[62] for example, Justice Cooley stated, "I agree that as a rule there can be no crime without criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence." More recently, the Michigan Court of Appeals stated that "to convict of involuntary manslaughter, a defendant must have been grossly negligent."[63] Both the first and second editions of the Michigan Criminal Jury Instructions state that an element of involuntary manslaughter is that the defendant committed the act causing death in "a grossly negligent manner."[64]

The felonious-driving statute provides as follows:

> Every person who drives any vehicle upon a highway *carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property* and thereby

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[59] M.C.L. § 750.321, M.S.A. § 28.553.

[60] M.C.L. §752.191, M.S.A. §28.661.

[61] M.C.L. §750.321, M.S.A. §28.553.

[62] 52 Mich. 577, 579, 18 N.W. 365, 366 (1884).

[63] People v. Zak, 184 Mich. App. 1, 457 N.W.2d 59, 62 (1990), quoting People v. Sealy, 136 Mich. App. 168, 172-173, 356 N.W.2d 614 (1984). People v. Sealy in turn cited Wayne County Prosecutor v. Recorder's Court Judge, 117 Mich. App. 442, 446, 324 N.W.2d 43 (1982), and People v. Ogg, 25 Mich. App. 372, 386, 182 N.W.2d 570 (1970), in support of the proposition that gross negligence is required to convict of involuntary manslaughter.

[64] CJI2d 16.10; CJI 16:4:03 (1977).

> injuring so as to cripple any person, but not causing death, shall be guilty of the offense of felonious driving and upon conviction thereof shall be sentenced to pay a fine not exceeding 1,000 dollars or to imprisonment in the state prison not exceeding 2 years or by both fine and imprisonment in the discretion of the court.[65]

Both the courts and prosecutors have equated the italicized language with "gross negligence," and use "gross negligence" as a short-hand expression for the statute's standard of culpability.[66] Both the first and the second editions of the Michigan Criminal Jury Instructions state that an element of felonious driving is that "the defendant drove the vehicle in a grossly negligent manner."[67]

2. *Michigan's Civil Law*

Occasionally, a contract may use the term "gross negligence" which calls upon the courts to interpret its meaning in the context of the particular contract.[68] One case has used the term to underscore its finding that a defendant's conduct was intentional within the meaning of the Worker's Compensation statute.[69] Otherwise, while gross negligence is frequently pleaded[70] and sometimes used in the course of testimony,[71] it very rarely surfaces in nonstatutory contexts in Michigan.

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[65] M.C.L. §752.191, M.S.A. §28.661 (emphasis added).

[66] See, e.g., People v. Sherman, 188 Mich. App. 91, 469 N.W.2d 19, 20 (1991).

[67] CJI2d 15.10; CJI 15:5:01 (1977).

[68] See National Mut. Fire Ins. Co. v. Detroit Edison Co., 95 Mich. App. 62, 289 N.W.2d 879, 880-882 (1980).

[69] McNees v. Cedar Springs Stamping Co., 184 Mich. App. 101, 457 N.W.2d 68, 70 (1990). The court stated, "This, if proved, is not mere negligence or even gross negligence. It is wilfully forcing an employee to work in the face of a known and certain danger with respect to the specific machine that caused the accident."

[70] See, e.g., Group Ins. Co. v. Czopek, 440 Mich. 590, 489 N.W.2d 444, 454 n. 14 (1992); Gruett v. Total Petroleum, 182 Mich. App. 301, 451 N.W.2d 608, 609 (1989).

[71] See, e.g., Rouch v. Enquirer & News of Battle Creek, 184 Mich. App. 19, 457 N.W.2d 74, 83 (1990) (court's use of the term); People v. Crawford, 187 Mich. App. 344, 467 N.W.2d 818, 823 (1991) (quoting a prosecutor who used the term).

D. Common Law Use of the Term "Gross Negligence" in Michigan Before the Adoption of Comparative Negligence

Gross negligence was an important part of Michigan's contributory negligence regime[72] until the Michigan Supreme Court abolished contributory negligence in 1979 and replaced it with a pure comparative negligence regime.[73] At common law the slightest contributory negligence on the part of a plaintiff would completely bar recovery from a tortfeasor who was negligent. However, an important exception to this rule provided that contributory negligence was not a bar to recovery from a tortfeasor who was either grossly negligent or who was guilty of wilful and wanton misconduct.[74] Gross negligence was usually defined in the Michigan cases as meaning that the tortfeasor had the last clear chance to avert the harm, while wilful and wanton misconduct was defined essentially as reckless conduct.[75] Plaintiffs could rely on either theory of recovery.

The rationale for the last clear chance doctrine as a trump card to the contributory negligence defense was that defendant's negligence, not plaintiff's contributory negligence, was the proximate cause of the plaintiff's harm. The wilful and wanton misconduct rejoinder to contributory negligence, on the other hand, was rooted in the notion that wilful and wanton misconduct, being quasi-criminal in nature, was therefore substantially different in degree from gross negligence, such that a plaintiff's contributory negligence should not relieve from liability a defendant who had behaved in a wilful or wanton manner.[76]

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[72] See, e.g., Gibbard v. Cursan, 225 Mich. 311, 196 N.W. 398 (1923).

[73] See Placek v. Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)(adopting pure comparative negligence). See also Callesen v. Grand Trunk W. Ry. Co., 175 Mich. App. 252, 437 N.W.2d 372 (1989), and Petrove v. Grand Trunk W. Ry. Co., 437 Mich. 31, 464 N.W.2d 711 (1991) (rejecting the last clear chance doctrine).

[74] See, e.g., Gibbard v. Cursan, 225 Mich. 311, 319, 332-333, 196 N.W. 398 (1923).

[75] See, e.g., Hoag v. Paul C. Chapman & Sons, Inc., 62 Mich. App. 290, 233 N.W.2d 530, 535 (1975), quoting Gibbard v. Cursan, 225 Mich. 311, 322, 196 N.W. 398 (1923).

[76] See, e.g., Gibbard v. Cursan, 225 Mich. 311, 319, 320-321, 196 N.W. 398 (1923).

II. Definitions of Gross Negligence

There are two leading approaches on defining gross negligence. The traditional approach draws from Roman Law. The prevailing approach equates gross negligence with wilful and wanton misconduct or with recklessness.

1. *The Traditional Approach to Defining Gross Negligence*

The traditional definition of gross negligence uses a three-tiered scheme of negligence: (1) slight negligence (the want of great care), (2) ordinary negligence, and (3) gross negligence (the want of even slight care). This approach has its origins in Roman law and was used primarily in the areas of bailments and automobile guest passenger statutes.[77]

The leading definition of gross negligence using this traditional approach is that of Learned Hand who stated:

> Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is a very great negligence, or the absence of even slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. . . . Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known

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[77] WILLIAM PROSSER & W. PAGE KEETON, HANDBOOK ON THE LAW OF TORTS §34, at 215 (5th ed. 1984)[hereafter PROSSER & KEETON].

to have a tendency to injure.[78]

This definition has come under heavy criticism from judges and scholars for causing confusion,[79] a criticism perhaps best captured by Baron Rolfe who described gross negligence as the same thing as ordinary negligence "with the addition of a vituperative epithet."[80] The attempt to create a three-tiered negligence scheme has been discarded in England, where it was first used at common law,[81] as well as in Illinois[82] and Kansas,[83] where this approach was experimented with in the United States.

2. *The Modern Trend in Defining Gross Negligence*

The prevailing approach to defining gross negligence is to place it at an intermediate level of mens rea between negligence and intentional conduct, and alternatively refers to it this level of mens rea as gross negligence, willful and wanton misconduct, or recklessness. Both a federal statutory[84] and a federal regulatory[85] definition of gross negligence, and Michigan's only statutory definition of the term,[86] use this formulation. The U.S. Court of Appeals has adopted this description of gross negligence

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[78] Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).

[79] PROSSER & KEETON, supra note 77, at §34.

[80] Wilson v. Brett, 11 M. & W. 113, 152 Eng. Rep. 737 (1843).

[81] Grill v. General Iron Screw Collier Co., 1866, L.R. 1 C.P. 600.

[82] City of Lanark v. Dougherty, 38 N.E. 892 (Ill. 1894).

[83] Atchison, Topeka & Santa Fe Ry. v. Henry, 45 P. 576 (Kan. 1896).

[84] Model Good Samaritan Food Donation Act, 42 U.S.C. § 12672(b)(7)(West 1993)(defining gross negligence as "voluntary and conscious conduct by a person with knowledge (at the time of the conduct) that the conduct is likely to be harmful to the health or well being of another person").

[85] Copyright Regulations, 19 C.F.R. Part 171, App. B (1993)(defining a violation as grossly negligent "if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the offender's obligations under the statute").

[86] M.C.L. §691.1407, M.S.A. §3.996 (107)(2)(c)(gross negligence is "conduct so reckless as to demonstrate lack of concern for whether an injury results").

in the context of §1983 suits.[87] In 1981, the Texas Supreme Court used a formulation of this type to replace its previous "absence of even slight care" formulation of gross negligence.[88] This is also the formulation used in Oregon[89] and Florida.[90] As previously noted in this report, the Michigan Supreme Court has apparently rejected the view that all of these terms are fungible. In the *Jennings* decision, the Michigan Supreme Court went to great lengths to make clear the distinctions among gross negligence, wilful conduct, and wilful and wanton conduct.

III. Definitions of Gross Negligence In Michigan

The next Part of this report examines definitions of gross negligence in Michigan, including the common law contributory negligence cases, the guest passenger cases, the criminal law cases, and the Government Tort Liability Act's definition of gross negligence. This Part also briefly reviews the tortured history and final demise in 1994 of the "last clear chance" definition of gross negligence in Michigan.

A. The Contributory Negligence Cases

This section analyzes the approach of Michigan's early common law cases in using gross negligence as an exception to the defense of contributory negligence in tort actions. After considering the earliest Michigan cases -- which did not use a last clear chance definition of gross negligence -- the discussion turns to an examination of the last clear chance

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[87] Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987)(gross negligence is where a person "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow").

[88] Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981)(gross negligence requires a "conscious indifference" by the defendant to the plaintiff's rights, welfare, and safety).

[89] Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 464 (9th Cir. 1977)(gross negligence in Oregon is characterized by conscious indifference to or reckless disregard of the rights' of others).

[90] Glaab v. Caudill, 236 So.2d 180, 183-185 (Fla. App. 1970) ("Gross negligence is that act or omission which a reasonable, prudent man would know would probably and most likely result in injury to another. . . . It presupposes the existence of circumstances which together constitute an `imminent' or `clear and present' danger amounting to more than the usual peril").

doctrine in Michigan and how the doctrine became confused with gross negligence in Michigan. The final portion of this section examines how gross negligence was defined in the contributory negligence context beginning with *Gibbard,* to the demise of the contributory negligence regime in Michigan in 1979, to the overruling of *Gibbard* in 1994.

In 19th century common law cases in Michigan involving exceptions to the contributory negligence defense, a clear line developed between ordinary negligence and aggravated conduct. Within aggravated conduct, however, the lines between gross negligence and recklessness, on the one hand, and between gross negligence and wilful and wanton misconduct, on the other, were far less clear. Indeed, these terms were often used interchangeably.

Illustrative is *Schindler v. Milwaukee, L.S. & W. Ry. Co.*[91] There, the Michigan Supreme Court offered the following definition of gross negligence:

> The term "gross negligence" has been used in a case decided by this Court, and has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff. It means the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them.[92]

This explanation of what constitutes aggravated conduct was followed in that same opinion by a hopelessly confused description of such conduct. Besides referring to "gross negligence," at various points in the opinion the Court interchangeably described the same aggravated conduct as "gross recklessness,"[93] "wanton and reckless conduct,"[94] and "gross and

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[91] Schindler v. Milwaukee, L.S. & W. Ry. Co., 87 Mich. 400, 49 N.W. 670 (1891).

[92] Schindler, 49 N.W. at 674.

[93] Id., 49 N.W. at 672.

[94] Id., 49 N.W. at 673, 674.

wanton negligence."[95] A concurring opinion used the term "reckless negligence"[96] to mean gross negligence, and a dissenting opinion described the aggravated conduct variously as "gross negligence,"[97] "gross and wanton negligence,"[98] and "gross negligence and reckless conduct."[99]

In another 1891 decision, *Denman v. Johnston*,[100] the Court did no better than *Schindler* on this score. The *Denman* Court showed a similar lack of analytical rigor by treating gross negligence as the equivalent of a "wanton, willful, and reckless [violation of duty]," "reckless, wanton, and malicious [neglect]," a "negligent act . . . having been wantonly, willfully, recklessly, and negligent committed," and "a reckless and wanton disregard of the personal safety of [a] child."[101] Neither *Schindler* nor *Denman* mentioned last clear chance.

From 1891 to 1923 (the year the *Gibbard* case was decided), many cases quoted the *Denman/Schindler* definition of gross negligence verbatim, and adopted the same analytically fluid resolution of gross negligence cases.[102] Parallel to the *Denman/Schindler* line of cases, however, a competing line of cases was unfolding in the Supreme Court that focused on the importance of differentiating between ordinary and gross negligence in order to preserve the contributory negligence defense. In an effort to derail a threatened merger of gross negligence and ordinary negligence that might eliminate the contributory negligence defense altogether, this

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[95] Id., 49 N.W. at 674.

[96] Id., 49 N.W. at 676.

[97] Id., 49 N.W. at 676.

[98] Id., 49 N.W. at 677.

[99] Id., 49 N.W. at 677.

[100] 85 Mich. 387, 48 N.W. 565 (1891).

[101] Id., 48 N.W. at 567.

[102] See, e.g., Frost v. Milwaukee & N.R. R. Co., 96 Mich. 470, 56 N.W. 19, 22 (1893); Putt v. Grand Rapids & I. Ry. Co., 171 Mich. 215, 137 N.W. 132, 136 (1912); Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1, 138 N.W. 320, 324-325 (1912); Wexel v. Grand Rapids & I. Ry. Co., 157 N.W. 15, 17 (1916); Vought v. Michigan United Traction Co., 160 N.W. 631, 634 (1916); Simon v. Detroit United Ry., 162 N.W. 1012, 1012 (1917).

line of authorities rejected any gross negligence exception to the contributory negligence defense, and instead substituted the "last clear chance" doctrine. These cases reasoned that it was more consistent to use last clear chance, rather than a gross negligence exception to contributory negligence, because the "last clear chance" doctrine was merely a specific instance of the general principal of proximate cause. The reasoning went that the chain of proximate causation that was broken by the plaintiff's contributory negligence was reestablished when the defendant had the last clear chance to avoid the accident.

The following statements by the Supreme Court in *LaBarge v. Pere Marquette R. Co.*,[103] highlight the split within Michigan between the *Denman/Schindler* line of cases and the competing last clear chance line:

> Counsel in this and many other cases have apparently assumed that where negligence is extraordinary, to a comparative or superlative degree, it is proper to call it "gross," and that, when it can be so denominated, certain legal consequences result. Accordingly in this case it is said that it was extremely negligent to shunt these [train] cars down the street without a lookout on duty, . . . and justified the charge of "gross" negligence, and hence nothing that the plaintiff had done or might do after the discovery of the approaching train could be effective as a defense to the action. We think this is not the rule. The doctrine of responsibility notwithstanding discovered negligence of the plaintiff, does not apply where the plaintiff's negligence is, in the order of causation, either subsequent to, or concurrent with, that of the defendant.

A case decided the next year, *Buxton v. Ainsworth*,[104] further muddied already turgid doctrinal waters by making last clear chance an element of gross negligence. Prior cases had used the last clear chance doctrine, and had even rejected the gross negligence exception in the same opinion. But none had so blurred the distinction between the two

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[103] 134 Mich. 139, 145-46, 95 N.W. 1073, 1075 (1903).

[104] 138 Mich. 532, 101 N.W. 817 (1904).

doctrines.[105] The *Buxton* Court stated:

> [T]he instruction [given at trial] failed to direct the attention of the jury to the important element of so-called gross negligence; i.e., that before gross negligence can be made out which warrants recovery notwithstanding the precedent contributory negligence of the plaintiff, the negligence of the latter must have been discovered, or the latter must have neglected the most ordinary precaution in failing to discover it. As the charge was given to the jury, the terms "wanton," "willful," and "reckless" may have been considered as words of emphasis, and, so understood, defined the doctrine of comparative negligence, which does not obtain in this state.[106]

After re-emerging briefly in 1911 in *Knickerbocker v. Detroit, G.H. & M.R. Co.*,[107] last clear chance did not surface again until the landmark case of *Gibbard v. Cursan*[108] in 1923. In analyzing gross negligence in the context of contributory negligence, the *Gibbard* Court discussed gross negligence in the following terms:

> When will gross negligence of a defendant excuse contributory negligence of a plaintiff? In a case where the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the *precedent negligence* of the plaintiff, by his *subsequent negligence* does the plaintiff an injury. Strictly, this is the basis of recovery in all cases of gross negligence. . . . The theory of gross negligence is that the antecedent negligence of the plaintiff only put him in a position of danger and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. . . . Nor can it be said that because a defendant's negligence is great, of a comparative or

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[105] See Richter v. Harper, 95 Mich. 225, 54 N.W. 768, 769 (1893) (applying the last clear chance doctrine and rejecting a gross negligence exception); LaBarge v. Pere Marquette R. Co., 134 Mich. 139, 85 N.W. 1073, 1075 (1903) (applying the last clear chance doctrine and rejecting a gross negligence exception).

[106] Buxton v. Ainsworth, 138 Mich. 532, 537, 101 N.W. 817, 818 (1904).

[107] 157 Mich. 596, 133 N.W. 504 (1911).

[108] Gibbard v. Cursan, 225 Mich. 311, 196 N.W. 398 (1923).

> superlative degree, it may therefore be called "gross," and that a plaintiff's contributory negligence may, for that reason alone be excused. The rule of comparative negligence does not obtain in this State.[109]

Even though *Gibbard* adopted wholesale a last clear chance approach to gross negligence, the Court stated that plaintiffs could use either a defendant's gross negligence (i.e., last clear chance) or a defendant's wilful and wanton misconduct to overcome the contributory negligence defense.[110] In connection with the latter, *Gibbard* stated that wilful and wanton misconduct required a showing of the following elements:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[111]

In the years after the *Gibbard* case, the *Denman/Schindler* definition of gross negligence was occasionally applied in the contributory negligence context. Sometimes this occurred without distinguishing *Gibbard* and last clear chance.[112] Other cases did acknowledge *Gibbard's* last clear chance rule, but concluded that it was only one approach available under the circumstances. For example, in 1961 in *Nass v. Mossner*, the Supreme Court stated:

> We must not be understood as confining the doctrine of gross negligence in each case to the simple situation of subsequent negligence. Its essence is a reckless disregard of the safety of another.[113]

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[109] 225 Mich. at 319-20 (emphasis in original, citations omitted).

[110] 225 Mich. at 320-21, 332-333.

[111] 225 Mich. at 322.

[112] See, e.g., Patton v. Grand Trunk W. Ry. Co., 236 Mich. 173, 210 N.W. 309, 311 (1926); Graves v. Dachille, 43 N.W.2d 64, 68 (Mich. 1950).

[113] 363 Mich. 128, 108 N.W.2d 881, 883 (1961).

This view was adopted by the Court of Appeals in 1974 in *McKeever v. Galesburg Speedway*,[114] where the court stated that "[a]lthough Michigan courts have equated `gross negligence' with 'subsequent negligence,' it is clear that Michigan recognized a separate doctrine of `gross negligence'," quoting the *Denman* definition of gross negligence.[115]

Nevertheless, most cases followed *Gibbard* by requiring the subsequent negligence associated with last clear chance up until 1979 when contributory negligence was abolished in Michigan.[116]

2. *The Guest Passenger Statute Cases*

Many cases interpreting the guest passenger statute rejected the *Gibbard* definition of gross negligence, believing that the Legislature had not intended to limit the term "gross negligence" to the "last clear chance" meaning *Gibbard* had assigned it. Typical of these cases was *Oxenger v. Ward*, a 1932 guest passenger case.[117] There, the Court reviewed the *Denman/Schindler* progeny, as well as a number of early last clear chance cases, including *Buxton*.[118] Turning its attention to *Gibbard*, the Court stated that that decision "clearly defined the term `gross negligence' as `last clear chance.'"[119] The court concluded its analysis with these words:

> It is obvious that the term "gross negligence" as used in the guest statute was not limited to subsequent negligence,

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[114] 57 Mich. App. 59, 225 N.W.2d 184 (1974).

[115] McKeever, 225 N.W.2d at 186.

[116] See, e.g., Union Trust Co. v. Detroit, G.H. & M. Ry., 239 Mich. 97, 214 N.W. 166, 167-168 (1927); Finkler v. Zimmer, 258 Mich. 336, 241 N.W. 851, 852 (1932); Agrenowitz v. Levine, 298 Mich. 18, 20-21, 298 N.W. 388 (1941); Conant v. Bosworth, 332 Mich. 51, 55, 50 N.W.2d 842, 845 (1952); Richardson v. Grezeszak, 358 Mich. 205, 208, 219, 99 N.W.2d 648, 650, 655 (1959); Shumko v. Center, 363 Mich. 504, 511-12, 109 N.W.2d 854, 857-58 (1961); LaCroix v. Grand Trunk Western R.R. Co., 379 Mich. 417, 152 N.W.2d 656 (1967); Zeni v. Anderson 56 Mich. App. 283, 224 N.W.2d 310 (1974); Hoag v. Paul C. Chapman & Sons, Inc., 62 Mich. App. 290, 233 N.W.2d 530, 536 (1975).

[117] 256 Mich. 499, 240 N.W. 55 (1932).

[118] Oxenger, 240 N.W. at 56-57.

[119] Id., 240 N.W. at 57.

> discovered negligence or peril, humanitarian doctrine, last clear chance doctrine, etc., for they would not be ordinarily involved in cases brought by a guest against the owner or a driver of the car in which he was riding. The very purpose of the guest act was to absolve an owner or driver from liability for negligence except where he is guilty of wanton and willful misconduct or gross negligence. Upon examination of the meaning of the term "gross negligence," as judicially defined prior to the enactment of the guest act, and upon consideration of the statute and the correlation therein of the term with that of "wanton and wilful misconduct," we must conclude that the term "gross negligence" means such a degree of recklessness as approaches wanton and willful misconduct.[120]

Similarly, in *Johnson v. Firemont Canning Co.*, the court relied on the *Denman* definition of gross negligence in the guest passenger setting.[121]

Another guest passenger statute case, *Riley v. Walters*, held that "[g]ross negligence is such negligence as is characterized by wantonness or willfulness."[122] Other cases have also defined gross negligence using the *Gibbard* definition of wilful and wanton misconduct. Illustrative is *Wieczorek v. Merskin*,[123] where the court stated:

> Under the law of this State, gross negligence and ordinary negligence are of different character. The former is not a higher degree of the latter, for we do not subscribe to the doctrine of comparative negligence. . . . Ordinary negligence does not signify the wantonness or wilfulness that are necessary elements of gross negligence, which, however, does include ordinary negligence combined with a wilful and wanton disregard for public safety.[124]

Wieczorek has been cited in support of the proposition that ordinary

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[120] Id., 240 N.W. at 57.

[121] 270 Mich. 524, 259 N.W. 660, 662 (1935).

[122] 277 Mich. 620, 270 N.W. 160 (1936).

[123] 308 Mich. 145, 13 N.W.2d 239 (1944).

[124] Wieczorek, 13 N.W.2d at 240.

negligence, coupled with wilful and wanton misconduct, is gross negligence, regardless of subsequent negligence.[125]

The standard jury instruction for gross negligence in the guest passenger statute context provided:

> The terms "gross negligence or wilful and wanton misconduct" means more than the failure to use ordinary care. These terms mean conduct which shows (actual or deliberate intention to harm) (or) (a reckless disregard for the safety of others in the face of circumstances involving a high degree of danger.)[126]

3. *Criminal Law Cases*

Current Michigan case law establishes gross negligence as the requisite standard of culpability for the crime of involuntary manslaughter and employs a definition of that term that is identical with *Gibbard*'s definition of wilful and wanton misconduct. For example, one case stated:

> To convict of involuntary manslaughter, a defendant must have been grossly negligent. Gross negligence requires:
> 1. Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
> 2. Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
> 3. The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[127]

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[125] See, e.g., McKeever v. Galesburg Speedway, 57 Mich. App. 59, 225 N.W.2d 184, 186 (1974).

[126] SJI 14.03.

[127] People v. Zak, 184 Mich. App. 1, 457 N.W.2d 59, 62 (1990), quoting People v. Sealy, 136 Mich. App. 168, 172-173, 356 N.W.2d 614 (1984). The case quoted cited Wayne Court Prosecutor v. Recorder's Court Judge, 117 Mich. App. 442, 446; 324 N.W.2d 43 (1982) and People v. Ogg, 26 Mich. App. 372, 386; 182 N.W.2d 570 (1970), in support of the proposition that gross negligence is required to convict of involuntary manslaughter, and People v. Orr, 243 Mich. 300,307, 220 N.W.2d 777 (1928), and CJI 16:4:08 in support of the definition of gross negligence used.

Another case expanded on this definition as follows:

> In order to be convicted of involuntary manslaughter under these facts, the prosecution had to prove beyond a reasonable doubt (1) the existence of a legal duty; (2) that the defendant had the capacity, means, and ability to perform that duty; (3) *that she wilfully neglected or refused to perform that duty;* and (4) that the death . . . was the direct consequence of her failure to perform her duty. . . . *Wilful neglect or gross negligence,* is defined as (1) knowledge that a situation existed requiring the exercise of ordinary care to prevent injury; (2) having the capacity, means, and ability to avoid the harm by the use of ordinary care; (3) failing to use ordinary care where it would have been apparent to an ordinary mind that harm would result from such failure.[128]

The Michigan Criminal Jury Instructions direct that gross negligence instructions be given in felonious driving and involuntary manslaughter cases.[129] In the second edition two instructions define gross negligence, one on "Degrees of Negligence"[130] for use in motor vehicle homicide cases, and "Gross Negligence"[131] to be used as appropriate. The instruction on "Degrees of Negligence" provides:

> (1) Gross negligence is an element of manslaughter with a motor vehicle; ordinary negligence is an element of negligent homicide; slight negligence is not a crime at all. Because of that, I need to tell you the differences between slight, ordinary, and gross negligence.
>
> (2) Slight negligence means doing something that is not usually dangerous, something that only an extremely careful person would have thought could cause injury. In this case, if you find that the defendant was only slightly negligent, then you must find him not guilty.

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[128] People v. Moye, 194 Mich. App. 373, 487 N.W.2d 777, 778-779 (1992).

[129] CJI2d 15.10, CSJ 15:5:01 (felonious driving); CJI2d 16.10, CSJ2d 16.12, 16.13, CJI 16:4:03, 16:4:04, 16:4:07, 16:4:08 (involuntary manslaughter).

[130] CJI2d 16.17.

[131] CJI2d 16.18.

(3) Ordinary negligence means not taking reasonable care under the circumstances as they were at the time. If someone does something that is usually dangerous, something that a sensible person would know could hurt someone, that is ordinary negligence. If the defendant did not do what a sensible person would have done under the circumstances, then that is ordinary negligence.

(4) [Give *CJI2d 16.18 Gross Negligence.*]

(5) The degree of negligence separates negligent homicide from manslaughter. For manslaughter, there must be gross negligence; for negligent homicide, there must be ordinary negligence. If the defendant was not negligent at all, or if he was only slightly negligent, then he is not guilty of either manslaughter or negligent homicide.

(6) The fact that an accident occurred or that someone was killed does not, by itself, mean that the defendant was negligent.[132]

The second instruction on "Gross Negligence" reads:

(1) Gross negligence means more than carelessness. It means willfully disregarding results to others that might follow from an act or failure to act. In order to find that the defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt:

(2) First, that the defendant know of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another.

(3) Second, that the defendant could have avoided injuring another by using ordinary care.

(4) Third, that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious

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[132] CJI2d 16.17.

injury.[133]

The Committee on Standard Criminal Jury Instructions relies on the 1927 case of *People v. Campbell*, and subsequent case law upholding it, for its instruction on degrees of negligence.[134] The three-part test for *Campbell*'s instruction on gross negligence finds support in *People v. Orr*, and other cases that have applied it consistently over the years.[135] An examination of the definition used by *People v. Orr* shows it to be identical to the definition of wilful and wanton misconduct introduced five years earlier by *Gibbard*. The predecessor instruction in the first edition of the instructions was substantially the same.[136]

4. *Definitions of Gross Negligence in Secondary Authorities*

Eight opinions of the Michigan Attorney General since 1977 have mentioned the term "gross negligence."[137] In one of those opinions,[138] the

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[133] CSJ2d 16.18.

[134] People v. Campbell, 237 Mich. 424, 429, 212 N.W. 97 (1927), which stated in pertinent part, "Ordinary negligence is based on the fact that one ought to have known the results of his acts; while gross negligence rests on the assumption that he did know but was recklessly or wantonly indifferent to the results."

[135] See People v. Orr, 243 Mich. 300, 307, 220 N.W. 777 (1928); People v. Retelle, 173 Mich. App. 196, 199, 433 N.W.2d 401 (1988).

[136] CJI 16:4:05 provides:

> (1) Gross negligence means more than carelessness. It means wilful, wanton, and reckless disregard of the consequences which might follow from a failure to act and indifference to the rights of others. (2) In order to find that the defendant was guilty of gross negligence, you must find beyond a reasonable doubts: (3) First, that the defendant knew of the danger to another, that is, that this was a situation requiring ordinary care and diligence to avoid injuring another. (4) Second, that the defendant had the ability to avoid harm to another by exercise of such ordinary care. (5) Third, that the defendant failed to use such care and diligence to prevent the threatened danger when, to the ordinary mind, it must have been apparent that the result was likely to cause serious harm to another.

[137] Op. Att'y Gen. 6760, 1993 Mich. AG LEXIS 18 (1993) (addressing M.C.L. §338.981, M.S.A. §18.86(11), mechanical contractors); Op. Att'y Gen. 6579, 1989 Mich. AG LEXIS 23 (1989) (addressing M.C.L. §691.1407, M.S.A. §3.996(107), government units, employees); Op. Att'y Gen. 6569, 1989 Mich. AG LEXIS 23 (1989)(addressing M.C.L. §691.1407, M.S.A. §3.996(107), government units, employees); Op. Att'y Gen. 6476, 1987 Mich. AG LEXIS 9 (1987)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students); Op. Att'y Gen. 6362, 1985-1986 Op. Att'y Gen. Mich. 284 (1986)(addressing M.C.L. §691.1505, M.S.A. §14.563(15), block parents); Op. Att'y Gen.

Attorney General was asked to interpret the following statute:

> [A school official] is not liable in a criminal action or for civil damages as a result of the administration [of medicine] except for an act or omission amounting to gross negligence or wilful and wanton misconduct.[139]

In response, the Attorney General offered the *Denman/Schindler* definition of gross negligence:

> Gross negligence has been defined as an intentional failure to perform a manifest duty or a thoughtless disregard of the consequences as affecting life or property of another without the exercise of any effort to avoid them. Putt v. Grand Rapids & Indiana R. Co., 171 Mich 215; 137 NW 132 (1912).[140]

The Attorney General went on to cite *Thomas v. Consumers Power Co.*,[141] which applies the definition of wilful and wanton conduct set forth in *Gibbard.*

5. *The Government Tort Liability Act's Definition of Gross Negligence*

Only one statute which uses the term "gross negligence," the Government

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5741, 1979-1980 Op. Att'y Gen. Mich. 883 (1980)(addressing M.C.L. §30.411, M.S.A. §4.824(21) as passed in 1976); Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709 (1980)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students); Op. Att'y Gen. 6362, 1977-1978 Op. Att'y Gen. Mich. 689 (1978)(addressing common law of liability of governments towards volunteers).

[138] Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709, 1980 Mich. AG LEXIS 154 (1980)(addressing M.C.L. §380.1178, M.S.A. §15.41178, administration of medicine to students).

[139] M.C.L. §380.1178; M.S.A. §15.41178.

[140] Op. Att'y Gen. 5679, 1979-1980 Op. Att'y Gen. Mich. 709, 1980 Mich. AG LEXIS 154 at *13 (1980).

[141] 58 Mich. App. 486, 500-501, 228 N.W.2d 786 (1975).

Tort Liability Act (GTLA),[142] includes its own definition of that term.[143] In response to the liability insurance crisis of the mid-1980s, the Michigan legislature enacted a package of tort reforms in 1986, including amendments to the Government Tort Liability Act (GTLA). The Legislature retained most of the earlier statutory provisions for governmental immunity and liability originally enacted in 1964. In the context of this report, however, the most significant amendments to the GTLA are those found at M.C.L. § 691.1407, M.S.A. § 3.996(107). That section for the first time extended immunity to individual government officers and employees from tort liability "for injuries to persons or damages to property caused by the officer [or] employee . . . while in the course of employment . . . while acting on behalf of a governmental agency" if the officer or employee satisfies the following three-prong test:

> (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.[144]
>
> (c) The officer's [or] employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross

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142 M.C.L. §691.1407, M.S.A. §3.996(107).

143 The general subject of governmental tort immunity in general is beyond the scope of this study. For a thorough treatment of that subject, see RONALD E. BAYLOR, GOVERNMENTAL IMMUNITY IN MICHIGAN (Institute of Continuing Legal Education 1995)[hereinafter BAYLOR].

144 The legislature for the first time defined the term "governmental function" in 1986 as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." M.C.L. § 691.1401(f), M.S.A. § 3.996(101)(f). The legislature thus substituted a statutory definition for the common-law definition provided by the Michigan Supreme Court two years earlier in Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641 (1984). The legislature also rejected the Ross "discretionary/ministerial" test by adding that statutory immunity is conferred "without regard to the discretionary or ministerial nature of the conduct in question." M.C.L. § 691.1407(2), M.S.A. § 3.996(107)(2).

The broad definition adopted by the legislature is just as sweeping as the one formulated by the Supreme Court in Ross. Negative evidence of the breadth of the definition is found in the dearth of cases in which a successful challenge to conduct as being outside a governmental function has been made. See, e.g., Adam v. Sylvan Glynn Golf Course, 197 Mich. App. 95, 494 N.W.2d 791 (1992)(plaintiff's argument that cross-country skiing is not a governmental function rejected); BAYLOR, supra note 143, at 3-7.

negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.[145]

As the Michigan Supreme Court observed in *Dedes v. Asch*,[146] "gross negligence is not defined in the [GTLA] as it was at common law. Instead, the Legislature created a specific definition of the term in the statute itself."[147]

In marked contrast to the *Burnett/Gibbard* gross negligence definition, the GTLA has no last clear chance component. Typical of the cases applying the GTLA definition of gross negligence is *Vermilya v. Dunham*, a case where the plaintiff's eleven-year-old son was injured when a steel soccer goal was pushed over on him at school.[148] The plaintiffs sued the school and the principal, who were aware that the goals could be tipped over. The principal asked his maintenance supervisor to determine how the goals could be anchored, checked with the maintenance supervisor on his progress, made announcements in school instructing the children to stay off the goals, and disciplined students for climbing the goals.[149] On this state of the record, the court concluded that the defendant had shown substantial concern and thus was entitled to a dismissal as a matter of law. Other cases decided under the GTLA definition are to like effect.[150]

a. The GTLA's Definition of Gross Negligence Compared with *Gibbard*'s Definition of Wilful and Wanton Misconduct

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145 M.C.L. § 691.1407)2)(a)-(c), M.S.A. § 3.996(107)(2)(a)-(c).

146 446 Mich. 99, 521 N.W.2d 488 (1994).

147 Dedes, 446 Mich. at 109. In Dedes, the Court held that the definite article "the" before "proximate cause" did not limit governmental tort immunity to cases where the government employee was the sole proximate cause of the plaintiff's injuries.

148 195 Mich. App. 79, 489 N.W.2d 496, 498 (1992).

149 Vermilya, 489 N.W.2d at 499.

150 See, e.g., Reese v. County of Wayne, 193 Mich. App. 215, 483 N.W.2d 671 (1992)(county has no duty to remove snow and ice from the roads, but any actions taken to increase the dangerousness of the road would constitute gross negligence); Tallman v. Markstrom, 180 Mich. App. 141, 446 N.W.2d 618 (1989)(allegations of a failure to take any safety precautions in a high school woodshop class where power tools were used could be basis for jury finding of gross negligence since omissions as well as positive acts can constitute gross negligence).

What is the relationship, if any, between the GTLA definition of gross negligence and the *Gibbard* definition of wilful and wanton misconduct? Distinguishing "the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another"[151] -- the key phrase in the *Gibbard* definition of wilful and wanton misconduct -- from "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results" -- the GTLA definition -- presents an analytically thorny problem.

One commentator has suggested that in light of the similarity between the statutory definition of gross negligence and the common-law definition of willful and wanton misconduct, "cases that apply the `willful and wanton misconduct' standard may be of some precedential value."[152] That hope seems to have been dashed, however, by the Michigan Court of Appeals in *Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dep't,*[153] where the court held that the mens rea for wanton and wilful misconduct is greater than the reckless substantial lack of concern for gross negligence, and by the Supreme Court in the *Jennings* decision, where the Court went to great lengths to make clear the distinctions among gross negligence, wilful conduct, and wilful and wanton conduct.

6. *The Pressing Need for A Change in the Law*

One commentator described the situation prior to 1994 in the following terms:

> The concept of aggravated negligence is aggravating to the Michigan bench and bar. It is exasperating to the bar because the court decisions involving the concept appear to be in hopeless confusion and contradiction. It is annoying to the bench because attorneys lack basic understanding of the

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[151] Gibbard v. Cursan, 225 Mich. 311, 322, 196 N.W. 398 (1923).

[152] BAYLOR, supra note 143, § 5.11, at 5-16.

[153] 198 Mich. App. 103, 497 N.W.2d 551 (1993).

principals involved.[154]

Several Michigan Court of Appeals judges have discussed the undesirable state of Michigan's current common law of gross negligence. Some argued for change through legislative action. According to two panels of the Court of Appeals, "few aspects of negligence law have proven more frustrating to the courts of this state than the construction of the term `gross negligence.'"[155] A 1970 panel stated that "[there are] many decisions on the subject of gross negligence and wilful and wanton misconduct . . . [and] many [a]re irreconcilable."[156] A 1969 panel of the court of appeals stated:

> Many of the authorities have expounded on the definition of gross negligence and some of the older cases seem to confuse more than clarify. No small amount of the confusion stems from the notion that gross negligence is higher in degree and greater in culpability than simple and ordinary negligence.[157]

In *Pavlov v. Community Emergency Medical Services*, Judge Kelly expressed his frustration:

> [I]t is ludicrous to attempt to portray human suffering and trauma inflicted by the forces of nature or society as negligence in order to establish gross negligence as defined by case law. . . .
>
> I would be gratified to see the Legislature insert the government tort liability act definition of gross negligence in the present version of the emergency medical services act. . . . I agree with the plaintiff that the pre-*Placek v. Sterling Heights* . . . case law definitions of gross negligence are obsolete.[158]

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[154] Grant H. Morris, *Gross Negligence in Michigan -- How Gross Is It?*, 16 WAYNE L. REV. 457 (1970).

[155] Pavlov v. Community Emergency Medical Service, Inc., 195 Mich. App. 711, 718, 491 N.W.2d 874 (1992); Jennings v. Southwood, 198 Mich. App. 713 (1993).

[156] Sargeson v. Yarabek, 24 Mich. App. 577., 180 N.W.2d 474, 476 (1970).

[157] Id.

[158] Pavlov v. Community Emergency Medical Service, Inc., 195 Mich. App. 711, 724, 491

Judge Neff echoed and expanded upon these comments:

> In my view, the precedent negligence requirement of a gross negligence claim simply makes no sense in a comparative negligence context. I agree wholeheartedly with Judge Michael J. Kelley's concurring opinion in *Pavlov* that, in the context of emergency medical service, the only definition of gross negligence that makes sense is that provided by [the government tort liability act] . . . .
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> If I were not bound by stare decisis and Administrative Order No. 1990-6, 436 Mich. lxxxiv, as extended by Administrative Order No. 1991-11, 439 Mich. cxliv, as extended by Administrative Order No. 1992-8, 441 Mich. lii, I would find that plaintiff properly pleaded the existence of gross negligence . . . . [The Supreme Court should] dispense with the obsolete and outdated definition of gross negligence set forth in *Gibbard*.[159]

Abandonment of the *Gibbard* definition of gross negligence in Michigan was clearly long overdue. The contributory negligence context in which this definition might have made sense at one time no longer existed. In the Government Tort Liability Act, the Legislature had drafted a definition that did not include last clear chance. Judges on the Court of Appeals questioned the continued use of a last clear chance approach. Commentators, including the Attorney General, had refused to state that *Gibbard* was still the law. The time was ripe for overruling *Gibbard*.

7. Gibbard *Overruled*

As previously noted, in 1994 the Michigan Supreme Court relieved

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N.W.2d 874 (1992)(Kelly, J., concurring).

[159] Jennings v. Southwood, 198 Mich. App. 713 (1993). Administrative Order No. 1990-6, 436 Mich. lxxxiv, referred to by Judge Neff provides in part that:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990. The prior published decision remains controlling authority unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals [with twelve judges and the Chief Judge who rehear the case] as described *infra*.

some of the mounting pressure by expressly overruling *Gibbard* in *Jennings v. Southwood.*[160] In that case the Supreme Court observed that the major underpinnings of *Gibbard* had been eliminated in Michigan law. First, the adoption of a pure comparative negligence standard signaled the complete demise of both the defense of contributory negligence and the doctrine of last clear chance. Given that *Gibbard*'s formulation of gross negligence was really the doctrine of last clear chance thinly disguised, the Court was forced to conclude that "[w]hile . . . *Gibbard*'s gross negligence is a seventy-year-old doctrine, we must nevertheless discard it because it has outlived its usefulness."[161]

Having rejected *Gibbard*'s definition of gross negligence, the Court next addressed the question of what the term "gross negligence or wilful misconduct" should mean in the context of the Emergency Medical Services Act (EMSA).[162] Starting with the observation that one of the major legislative purposes for the enactment of the EMSA was to limit emergency personnel's exposure to liability, the Court noted that *Gibbard*'s definition of gross negligence failed to carry out that purpose because it permitted recovery upon a finding of ordinary negligence. Indeed, the Court observed, the *Gibbard* definition completely undercut the EMSA immunity provision, frustrating a primary legislative goal of encouraging persons to enter the emergency services field. Turning to the task of adopting an appropriate definition of gross negligence, the Court noted the lack of a settled gross negligence definition among the states. The Court continued:

> While most jurisdictions acknowledge that gross negligence falls somewhere between ordinary negligence and an intentional act, they fail to agree on the exact definition. This renders comparison of the various standards quite cumbersome and laborious. Fortunately, such a review is unnecessary because our Legislature has already declared what type of conduct constitutes gross negligence.
>
> The government tort liability act . . . confers varying degrees of immunity to governments, their agencies, and their agents. . . . Section 7 defines gross negligence as

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160 446 Mich. 125, 521 N.W.2d 230 (1994).

161 Jennings, 446 Mich. at 132.

162 M.C.L. § 333.20965(1), M.S.A. § 14.15(20965)(1).

> conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.
>
> [T]he GTLA and the EMSA share the common purpose of immunizing certain agents from ordinary negligence and permitting liability for gross negligence. Because the provisions have a common purpose, the terms of the provisions should be read in pari materia.
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> * * * *
>
> Because these provisions should be read in pari materia, we deem it appropriate to use the definition of gross negligence as found in § 7 of the GTLA, as the standard for gross negligence under the EMSA.[163]

The Supreme Court thus cut the Gordian knot of how to define gross negligence by importing wholesale the GTLA definition of that term into the EMSA.

Given that the Legislature enacted both the EMSA and the GTLA gross negligence provisions in order to broaden the scope of immunity for certain protected classes of persons, the Supreme Court's use of the GTLA definition has merit. Putting aside for the moment the wisdom of the Supreme Court's decision to use the GTLA statutory definition of gross negligence to define the same term found in the EMSA,[164] as a matter of statutory construction whatever the Legislature intended when it first used the term "gross negligence" in the EMSA in 1981, it seems problematic to attribute to that earlier Legislature the intent of a subsequent Legislature that for the first time formulated a definition of gross negligence five years later for use in a different statute. Further drawing into question the soundness of borrowing the GTLA definition of gross negligence is the Court's own statement made in an opinion handed down the same day as *Jennings*, *Dedes v. Asch*,[165] "The [GTLA] statutory definition of gross

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[163] Id., 446 Mich. at 136-37 (footnotes omitted).

[164] Elsewhere in the Jennings opinion, the Court took a different tack when confronted with the issue of defining "wilful misconduct." "When a statute fails to define a term, we will construe it `according to its common and approved usage . . . .'" 446 Mich. at 139.

[165] 446 Mich. 99, 521 N.W.2d 488 (1994).

negligence was novel. At the time of its enactment, of the thirty-four Michigan statutes that employed the term, only [the GTLA] inserted its own definition."[166]

8. *Application of the GTLA Gross Negligence Standard to Cases Involving Police Officers*

Of special interest to the Commission is the case law development of police officer liability under the GTLA's gross negligence standard.[167] Prior to the 1986 amendments, where the standard of recovery against individual government employees was ordinary negligence,[168] the Michigan Supreme Court evidenced great solicitude for the plight of police officers who are often confronted with situations calling for quick and decisive action:

> Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful activity, and the apprehension of wrongdoers. The determination of what type of action to take . . . is entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner . . . .[169]

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[166] Id., 446 Mich. at 110 n.9.

[167] The Michigan Court of Appeals has issued a number of opinions dealing with gross negligence under the GTLA outside the context of police officer liability. See, e.g., Green v. Benton Harbor School Dist., No. 141667 (Mich. Ct. App. Mar. 31, 1993)(defendants' conduct in approaching student who jumped school yard fence and was raped on private property did not constitute gross negligence as a matter of law); Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dep't, 198 Mich. App. 103, 497 N.W.2d 551 (1993)(the mens rea for wanton and wilful misconduct is greater than the reckless substantial lack of concern for gross negligence); Reese v. Wayne County, 193 Mich. App. 215, 483 N.W.2d 671 (1992)(where county had no duty to remove natural accumulation of snow, county employees likewise had no such duty); Tallman v. Markstrom, 180 Mich. App. 141, 446 N.W.2d 618 (1989)(allegation that teacher was grossly negligent in permitting student to use a table saw without safety devices sufficient to withstand motion for summary disposition).

[168] The standard of liability for units of government in cases involving automobiles remains ordinary negligence. See Friser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (1983).

[169] Zavala v. Zinser, 420 Mich. 567, 659-60, 363 N.W.2d 641 (1984).

The Legislature responded sympathetically to these concerns when it adopted the 1986 GTLA amendments. It must be remembered that cases addressing police officer immunity and liability under the pre-1986 version of the GTLA[170] -- which made ordinary negligence the standard of liability for individual government employees, and still does for government employers in cases involving automobile negligence -- would undergo a more rigorous screening under the statutory gross negligence standard. One of those pre-1986 cases, *Frohman v. City of Detroit*,[171] is particularly noteworthy for its candor. In the aftermath of a high-speed chase, the pursued vehicle entered an intersection striking the plaintiff's car. Although the police officer was not personally liable because he acted in the course of his employment, performing a discretionary act, the Court of Appeals was nevertheless constrained to find the City of Detroit vicariously liable for the officer's negligence under the motor vehicle exception to governmental immunity. In so holding, the Court of Appeals issued the following invitation:

> We invite the Supreme Court or Legislature to establish a bright line test which provides that a decision to engage in pursuit, as a matter of law, cannot be the basis of a claim of negligence. Only when the officer's driving itself is a direct cause of an injury would the question of negligence be submitted as a fact question to the jury. The determination should not turn on how the officer was conducting the pursuit, but rather on what effect the manner in which the officer drove his vehicle had on the cause of the accident.[172]

It appears that the court's invitation has been declined by the Supreme Court. In 1994, in *Dedes v. Asch*, that Court held that the use of the definite article "the" before "proximate cause" in M.C.L. § 691.1407(2)(c), M.S.A. § 3.996(107)(2)(c), could not limit a plaintiff's

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[170] See, e.g., Friser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (1983); Frohman v. City of Detroit, 181 Mich. App. 400, 450 N.W.2d 59 (1989). Before the 1986 amendments, a police officer could be personally liable for ordinary negligence in driving cases. In most cases it will be difficult for plaintiffs to meet the statutory gross negligence standard in order to establish individual liability, although the police officer's employer may nevertheless be held liable for ordinary negligence under the motor vehicle exception to governmental immunity, M.C.L. § 691.1405, M.S.A. § 3.996(105).

[171] 181 Mich. App. 400, 450 N.W.2d 59 (1989).

[172] Frohman, 181 Mich. App. at 414-15, 450 N.W.2d 59.

recovery in a case in which a government employee is grossly negligent and the plaintiff or some third party is also a cause of the accident.[173]

Three Court of Appeals' decisions have addressed the liability of police officers under the 1986 GTLA amendments. Two of three recent Court of Appeals' decisions involving the individual liability of police officers have turned on the issue of whether the police officer breached a duty owed to the plaintiff. The third turned on the issue of whether the police officer acted in a grossly negligent manner as a matter of law.

In the first of the two duty cases, *Jackson v. Oliver*,[174] the issue was whether the representative of a driver of a vehicle who is killed while fleeing police who are in hot pursuit has a claim for wrongful death. Although the literature on accident rates in high speed pursuits is sparse and the research on the subject not especially noteworthy for its comprehensiveness, research from the 1980s indicates that nationwide property damage occurs in about one of every five pursuits, personal injury in one out of seven, and death in approximately one out of every thirty-five pursuits.[175] In response to the complex problem of high speed pursuit by police, Wisconsin enacted legislation requiring police departments to issue written guidelines for its officers regarding exceeding speed limits when in pursuit of actual or suspected violators,[176] but still holds officers liable for ordinary negligence. Other states have extended absolute immunity to police officers involved in high speed pursuit, or have extended qualified immunity provided the officers' conduct is not

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[173] See Brown v. Shavers, 210 Mich. App. 272, 532 N.W.2d 856 (1995), where the court rejected the defendant-officer's argument that since it was the suspect who shot the bystander, and not the officer, that the officer could not be "the" proximate cause of the victim's death. See also Michelle L. Hirschauer, *Casenote: Dedes v. Asch*, 72 U. DET. MERCY L. REV. 685 (1995).

As the 50-state survey below shows, a few states have addressed the joint tortfeasor problem in the immunity context by making the government defendant liable only for its pro rata share of damages. See, e.g., IDAHO CODE § 6-903(a).

[174] 204 Mich. App. 122, 514 N.W.2d 195 (1994).

[175] Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQUETTE L. REV. 237, 239 n.4 (1987). For a discussion of the literature on the subject, see Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521 (1989). See also Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander Is Injured*, 30 VALPO. U. L. REV. 161 (1995).

[176] WIS. STAT. § 346.03(6).

grossly negligent.[177] This subject is considered in detail below. The court in *Jackson v. Oliver* held that police officers in pursuit of a suspect did not owe the suspect a duty to refrain from chasing the suspect at speeds dangerous to the suspect.

In the second breach of duty case, *White v. Humbert*,[178] the Court of Appeals concluded that a police officer who is at the scene of a reported crime, is informed of the danger to a specific victim, and is in a position to render possible assistance owes a specific duty to the victim so that the public duty doctrine[179] does not apply. The court in that case was careful to stress that "this does not make the police the guarantor of the safety of every crime victim. . . . [T]he officer is immune unless his conduct rises to the level of gross negligence."[180]

In a case dealing specifically with the issue of gross negligence, *Brown v. Shavers*,[181] a robbery victim was caught in the cross-fire between an off-duty police officer and the suspect. The court concluded that the officer's decision to draw his weapon and confront the robber was discretionary and entitled to immunity, and that once the officer was fired upon he was entitled to defend himself. The court concluded that "it is clear that plaintiff has set forth nothing that can be characterized as gross negligence."[182]

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[177] See Phillip M. Pickus, *Police Officer Pursuing Suspect Owes Duty of Care to Third Parties Injured by the Fleeing Suspect*, 21 BALT. L. REV. 363, 370 n.43 (1992).

[178] 206 Mich. App. 459, 522 N.W.2d 681 (1994).

[179] The public duty doctrine provides that law enforcement personnel owe a duty to the general public to provide protection, and not to any specific individual, unless a special relationship exists between the official and the individual such that the performance by the official would affect the individual in a manner different in kind from the way performance would affect the public. Harrison v. Director, Dep't of Corrections, 194 Mich. App. 446, 456-57, 487 N.W.2d 799 (1992). For a discussion of the public duty doctrine, see Mark L. Van Valkenburgh, *Note, Massachusetts General Laws Chapter 258, § 10: Slouching Toward Sovereign Immunity*, 29 NEW ENGLAND L. REV. 1079 (1995); Karen Mahon Tullier, *Note, Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873 (1992).

[180] White, 206 Mich. App. at 465.

[181] 210 Mich. App. 272, 532 N.W.2d 856 (1995). The court in Brown also concluded that the plaintiffs had not made out a case for an exception to the public duty doctrine. 210 Mich. App. at 275, 532 N.W.2d 856.

[182] Brown, 210 Mich. App. at 277, 532 N.W.2d 856.

The next Part of this report contains the results of a 50-state survey dealing with government employee immunity from suit, and the standard of care (e.g., ordinary negligence, gross negligence) government employees must exercise in order to enjoy immunity from suit.

IV. The Law of Gross Negligence In Other Jurisdictions

A. State Law

1. *Contexts in Which the Term "Gross Negligence" Is Used in the Statutes of Other States*

a. Government Tort Claims Statutes

The government tort claims context is of special interest to the Commission, especially as it relates to the issues of liability for police officers and their employers for injuries resulting from high-speed pursuits. The following table summarizes the immunity law of the other 49 states and the District of Columbia.

STATE	IMMUNITY ABROGATED	LIABILITY OF POLICE OFFICERS	RESPONDEAT SUPERIOR LIABILITY OF CITIES AND COUNTIES	DAMAGE CAPS
ALABAMA	ALA. CODE § 6-5-338	absolute immunity for discretionary acts; negligence for other acts: § 11-47-190	liability for negligence of employees: § 11-47-190	$100,000/ person $300,000/ occurrence: § 11-47-190
ALASKA	AK. STAT. § 09.65.070	absolute immunity for discretionary acts; negligence for other acts	absolute immunity for discretionary acts; negligence for other acts	
ARIZONA	AR. REV. STAT. §§ 12-820.02, 26-314	gross negligence	gross negligence, wilful misconduct, bad faith: § 26-314	
ARKANSAS	ARK. CODE ANN. § 21-9-301	negligence, but only to insurance limits; otherwise, intentional or malicious conduct: § 19-10-305	no respondeat superior liability: § 21-9-301	$25,000/ person $50,000/ occurrence (limits of mandatory liability insurance): § 21-9-301
CALIFORNIA	CAL. GOVT CODE § 820	negligence, but no liability for emergency or high-speed pursuit: CAL. VEH. CODE §§ 17004, 17004.7	same as private person, but respondeat superior liability limited to same extent as employee liability: CAL. GOVT CODE §§ 815, 820.2	
COLORADO	COLO. REV. STAT. § 24-10-106	wilful, intentional, malicious conduct: § 24-10-118(2)(a)	no liability unless employee acted wilfully, intentionally, or maliciously: § 24-10-106(1), (3)	$150,000/ person $600,000/ occurrence: § 24-10-114, -118
CONNECTICUT	CONN. GEN. STAT. § 52-557n	no personal liability	negligence	

DELAWARE	DEL. CODE ANN. tit.10, § 4001	gross, willful, or wanton negligence, or bad faith conduct; no liability in emergency vehicle cases: § 4106	liable to same extent as employee	
DISTRICT OF COLUMBIA	D.C. CODE § 1-1212	negligence; gross negligence for emergency vehicles: §§ 1-1212, 4-176	liable to same extent as employee	
FLORIDA	FLA. STAT. ANN. § 768.28	personal liability for conduct that is in bad faith, malicious, or in wanton & wilful disregard of safety: § 768.28(9)(a)	negligence	$100,000/ person $200,00/ occurrence: § 768.28(5)
GEORGIA	GA. CONST. art. I, § 2, para. XI	negligence: GA. CONST. art. I, § 2, para. XI	not liable for torts committed by police officers: GA. CODE ANN. § 36-33-3	
HAWAII	HAW. REV. STAT. § 662-2	negligence	liable to same extent as employee	
IDAHO	IDAHO CODE § 6-901	negligence	negligence: § 6-903	among joint tortfeasors, liability limited to pro rata share of total damages: § 6-903(a)
ILLINOIS	ILL. STAT. ANN. ch. 745, § 5/1	wilful and wanton conduct: § 10/2-202	liable to same extent as employee: § 10/2-109	
INDIANA	IND. CONST. art. 4, § 24	negligence: IND. CODE ANN. § 34-4-16.5-3	liable to same extent as employee	$300,000/ person $5 million/ occurrence: § 34-4-16.5-4
IOWA	IOWA CODE ANN. § 670.2	negligence	liable to same extent as employee: § 670.2	
KANSAS	KAN. STAT. ANN. § 75-6101	negligence: § 75-6104	liable to same extent as employee: § 75-6103	$500,000/ occurrence: § 75-6105 no recovery of punitive damages: § 75-6105(c)
KENTUCKY	KY. REV. STAT. ANN. § 44.072	negligence	liable to same extent as employee	$100,000/ person $250,000/ occurrence: § 44.070(5)
LOUISIANA	LA. CONST. art. 2, § 10	negligence in discretionary functions malicious, willful, reckless misconduct in other contexts: LA. CIV. CODE ANN. § 9:2798.1	liable to same extent as employee	

MAINE	ME. REV. STAT. tit. 14, § 8104-A	absolute immunity for discretionary acts: ME. REV. STAT. tit. 14, § 8111 negligence in use of force: ME. REV. STAT. tit. 17-A, § 107	negligence: ME. REV. STAT. tit. 14, § 8104-A	$300,00/ occurrence: ME. REV. STAT. tit.14, § 8105
MARYLAND	MD. ANN. CODE, tit. 12, § 12-104	malice or gross negligence: MD. ANN. CODE tit. 5, § 5-399.2(b); gross negligence in operation of emergency vehicle: § 19-103(b)	liable to same extent as employee: MD. ANN. CODE tit. 5, §§ 5-399.2(a), 5-403(b)	$200,000/ person $500,000/ occurrence: § 5-403(a)
MASSACHUSETTS	MASS. GEN. LAWS ch. 258, § 2	no personal liability: § 2	liable for negligence of employees: § 2	
MINNESOTA	MINN. STAT. ANN. § 3.736	negligence: § 466.04, subd. 1a	negligence: §§ 3.736, 466.02	$200,000/ person $600,000/ occurrence: § 3.726, subd. 4
MISSISSIPPI	MISS. CODE ANN. § 11-46-5	no personal liability: § 11-46-7(2)	liable if police officer shows reckless disregard of safety of others: § 11-46-9(c)	$50,000, increased to $500,000 after 2001: § 11-46-15
MISSOURI	MO. STAT. ANN. § 537.600	negligence: § 537.600	negligence: § 537.600, subd. 1(1)	$100,000/ person $1 million/ occurrence: § 537.610
MONTANA	MONT. CONST. art. 2, § 18	negligence: MONT. CODE ANN. § 27-1-701	negligence: MONT. CODE ANN. § 2-9-102	
NEBRASKA	NEB. REV. STAT. § 13-910	no personal liability for high-speed pursuits: § 13-911	negligence: § 13-908	$1 million/ person $5 million/ occurrence: §§ 13-922, 13-926
NEVADA	NEV. REV. STAT. § 41.031	negligence: § 41.032	liable to same extent as employee	
NEW HAMPSHIRE	N.H. REV. STAT. § 541-B:19	no personal liability if employer is liable under respondeat superior: § 541-B:9-a	negligence	$250,00O/ person $2 million/ occurrence: § 541-B:14
NEW JERSEY		negligence, including operation of emergency vehicles: N.J. STAT. ANN. §§ 59:3-1, 39:4-91	liable to same extent as employee (§ 59:2-2), unless employee's conduct constitutes malice or willful misconduct (§ 59:2-10)	
NEW MEXICO	N.M. STAT. ANN. § 41-4-4	negligence	liable to same extent as employee	

NEW YORK	N.Y. LAWS ANN. § 8	gross negligence in transporting person to hospital: § 9.59(a) negligence in other motor vehicle settings: § 9.59(b)	negligence of police officers: N.Y. LAWS ANN. § 50-j negligence in operation of vehicles: N.Y. LAWS ANN. § 50-a	
NORTH CAROLINA	N.C. GEN. STAT. § 160A-485	negligence: § 143-291	negligence, but only to extent of liability insurance purchased by city: § 160A-485	lesser of insurance policy limits or $150,000: § 143-291(a)
NORTH DAKOTA	N.D. CODE § 32-12.1-03	gross negligence, reckless conduct, willful or wanton misconduct: *Binstock v. Fort Yates Sch. Dist.*, 463 N.W.2d 837 (N.D. 1990)	negligence: N.D. CODE § 32-12.1-03	$250,00/person $500,000/ occurrence: § 32-12.1-03, subd. 2
OHIO	OHIO REV. CODE ANN. § 2744.02	acts committed with malicious purpose, in bad faith, or in wanton or reckless manner: § 2744.03(a)(6)(a)	negligence in operation of motor vehicle, unless police officer was responding to emergency call and operation did not constitute willful or wanton misconduct: § 2744.02(B)(1)(a)	noneconomic damages cap of $250,000: § 2744.05 (C)(1)
OKLAHOMA	OKLA. STAT. tit. 51, § 153	willful and wanton negligence: *Holman v. Wheeler*, 677 P.2d 645 (1983)	negligence: § 153	$100,000/ person $1 million/ occurrence: § 154
OREGON	OR. REV. STAT. § 30.265	no personal liability: § 30.265(1)	negligence: § 30.265(1)	$100,000/ person $500,000/ occurrence: § 30.270
PENNSYLVANIA	42 PA. CONS. STAT. ANN. § 8522	willful misconduct generally: § 8550 absolute immunity from claims brought by persons fleeing police in high-speed pursuit: § 8542(a),(b)(1) recklessness in other high-speed pursuit settings: 75 PA. CONS. STAT. ANN. § 3105	negligence, but absolute immunity from claims brought by persons fleeing police in high-speed pursuit: § 8542(a), (b)(1)	city liability limited to $500,000/ occurrence: § 8553(b) state liability limited to $250,000/ person $1 million/ occurrence: § 8528(b)
RHODE ISLAND	R.I. GEN. LAWS § 9-31-1	recklessness in operation of emergency vehicle: § 31-12-9	negligence: § 9-31-1	$100,000/ occurrence: § 9-31-2
SOUTH CAROLINA	S.C. CODE ANN. § 15-78-20	no personal liability, unless conduct constituted intent to harm or actual malice: § 15-78-70(b)	negligence: § 15-78-40	$250,000/ person $500,000/ occurrence: § 15-78-120

SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 21-32A-1	no personal liability unless government employer purchases liability insurance: § 21-32A-2	negligence	liability to insurance policy limits: § 21-32A-1
TENNESSEE	TENN. CODE ANN. § 29-20-202, -205	negligence	negligence	lesser of liability insurance limits, or $50,000/ person $300,000/ occurrence: § 29-20-403
TEXAS	TEX. CIV. PRAC. & REM. CODE ANN. § 101.201	no personal liability: § 101.026	negligence: § 101.0215	$250,000/ person $500,000/ occurrence: § 101.023(c)
UTAH	UTAH CODE ANN. § 63-30-4	no personal liability except for fraud or malice: § 63-30-4	negligence: § 63-30-10	$250,000/ person $500,000/ occurrence: § 63-30-34
VERMONT	VT. STAT. ANN. tit. 29, § 1403 (municipalities); tit. 12, § 5601 (state)	gross negligence or willful misconduct: tit. 12, § 5602	negligence	state, $250,00/ person $1 million/ occurrence: tit. 12, § 5601(b) municipalities, not in excess of liability insurance limits: tit. 29, § 1404
VIRGINIA	VA. CODE ANN. § 8.01-195.3 (waived as to state only)	negligence	same as liability of employee	$100,000: § 8.01-195.3
WASHINGTON	WASH. REV. CODE ANN. § 4.96.010	negligence: § 4.96.041	negligence	
WEST VIRGINIA	W. VA. CODE § 29-12A-4	negligence	negligence: § 29-12A-4(c)(2)	noneconomic damages capped at $500,000: § 29-12A-7
WISCONSIN	*Holytz v. Milwaukee*, 17 Wis. 2d 26 (1961)	negligence	negligence	$50,000: WIS. STAT. ANN. § 893.80(3)
WYOMING	WYO. STAT. § 1-39-102	negligence: *State v. Dieringer*, 708 P.2d 1 (1985)	negligence: § 1-39-105, -112	$250,000/ person $500,000/ occurrence: § 1-39-118

As the foregoing table shows, with regard to the individual liability of police officers, states fall into three broad categories. The first group holds police officers personally liable for their negligent acts, but accords them immunity for acts that fall within certain enumerated discretionary functions. States in this category are Alabama, Alaska, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. A second group of states holds police officers personally liable only if their conduct was grossly negligent, malicious, fraudulent, or wanton and wilful. States

in this group are Arizona, Arkansas, Colorado, Delaware, Florida, Illinois,[183] Louisiana, Maryland, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, and Vermont.[184] A third group of states relieves police officers from all personal liability, and instead holds the government employer liable under respondeat superior. States in this group are Colorado, Connecticut, Massachusetts, Mississippi, Nebraska, New Hampshire, Oregon, South Carolina, South Dakota, Texas, and Utah. Interestingly, 35 states impose damage caps on the recovery of either compensatory damages or damages for noneconomic injuries in the government tort liability context. All states with either kind of damage cap also prohibit an award of punitive damages.

Turning to the question of liability for high-speed pursuits, three states have addressed this issue through specific legislation. Nebraska relieves a police officer from personal liability for claims arising out of high-speed pursuits.[185] The government employer remains liable for personal injury claims arising out such pursuits, however. Pennsylvania extends absolute immunity to both a police officer and his or her employer for claims brought by a person fleeing the police in high-speed pursuit.[186] As to other persons injured in such a pursuit, the standard is one of recklessness.[187]

The third state, California, has taken the boldest step. California provides that a police officer is not liable for personal injuries or death to any person when in the immediate pursuit of an actual or suspected law

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[183] ILL. ANN. STAT. § 10/1-210 defines "willful and wanton conduct" as follows:

> "Willful and wanton conduct" as used in this [Governmental Employees Tort] Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

[184] The District of Columbia defines "gross negligence" as "wilful intent to injure" or "a reckless or wanton disregard of the rights of another . . . ." D.C. CODE § 4-162.

[185] NEB. REV. STAT. § 13-911. Nebraska also requires each law enforcement agency within the state to adopt a five-point policy regarding high-speed pursuits. NEB. REV. STAT. § 29-211.

[186] 75 PA. CONS. STAT. ANN. § 3105; 42 § 8545; Hawks v. Livermore, 629 A.2d 270 (Pa. Commonwealth 1993); Dennis v. City of Philadelphia, 620 A.2d 625 (Pa. Commonwealth Ct. 1993).

[187] Id.; Roadman v. Bellone, 379 Pa. 483, 108 A.2d 754 (1954).

violator.[188] California extends this immunity to public agencies employing police officers in cases in which the pursued vehicle causes injury to a third person if the public employer adopts a written policy on the safe conduct of vehicular pursuits that meet the following minimum standards:

> (1) It provides that, if available, there be supervisory control of the pursuit.
>
> (2) It provides procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit.
>
> (3) It provides procedures for coordinating operations with other jurisdictions.
>
> (4) It provides guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated.[189]

The California statute further provides that "[a] determination of whether a policy adopted pursuant to subdivision (c) complies with that subdivision is a question of law for the court."[190]

b. Other Contexts

In addition to the use of gross negligence in the government tort claims statutes of many states, gross negligence is used by every state in a variety of legal settings,[191] although the term is rarely defined. The term

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[188] CAL. VEH. CODE § 17004. That section provides in full:

> A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

[189] CAL. VEH. CODE § 17004.7(c)(1)-(4).

[190] Id., § 17004.7(d).

[191] For example, for a list of states which use the term "gross negligence" in the context of Good Samaritan statutes, see Frank J. Helminski, Note, *Good Samaritan Statutes: Time For Uniformity*, 27 WAYNE L. REV. 217, 252-267 (1980). Each of the seventeen states which

gross negligence is frequently used in Good Samaritan statutes, which grant persons aiding others in emergency situations immunity from suit based on ordinary negligence in order to encourage the rendering of aid. Thirty-two states (including Michigan), the District of Columbia, and the Virgin Islands by statute except grossly negligent assistance from the general grant of immunity in Good Samaritan statutes.[192]

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does not use gross negligence in a Good Samaritan statute does use it in some other context. *See, e.g.*, ALA. CODE §6-5-332.1 (granting immunity to persons assisting or advising as to mitigation of effects of discharge of hazardous waste; Alabama uses the term 22 times in its statutes); COLO. REV. STAT. ANN. §2-2-403 (West) (indemnifying members of the legislature; Colorado uses the term 28 times in its statutes); COLO. CONST. art. 27, §6 (personal liability of Great Outdoors Colorado Trust Fund; the only constitutional usage of the term found in the research for this report); FLA. STAT. ANN. §61.14 (West) (liability of banks for making payments pursuant to child support order; Florida uses the term 45 times in its statutes); GA. CODE ANN. §10-1-784 (dealer liability under Motor Vehicle Warranty Act; Georgia uses the term 35 times in its statutes); ILL. REV. STAT. ch. 20, para. 405/64.1 (Grounds for excluding state employees from future coverage under state employee's auto insurance plan; Illinois uses the term 38 times in its statutes); IOWA CODE ANN. §2C.20 (West) (liability of state ombudsman; Iowa uses the term 29 times in its statutes); MASS. GEN. LAWS ANN. ch. 21, §27 (West) (liability of hazardous waste cleanup volunteers; Massachusetts uses the term 47 times in its statutes); MINN. STAT. ANN. §18.78 (West) (liability of state officials for trespass while enforcing Noxious Weed Law; Minnesota uses the term 24 times in its statutes); MISS. CODE ANN. §1717-57 (liability of hazardous waste cleanup officials; Mississippi uses the term 26 times in its statutes); NEB. REV. STAT. §1-137 (grounds for disciplining accountants; Nebraska uses the term 32 times in its statutes); N.J. STAT. ANN. §2A:18-61.1 (West) (gross negligence in allowing damages to premises is lawful ground for evicting tenant; New Jersey uses the term 43 times in its statutes); OHIO REV. CODE §13111.011 (Page) (liability of banks making payments for a mechanic's lien; Ohio uses the term 13 times in its statutes); OR. REV. STAT. §30.115 (guest statutes for aircraft and watercraft; Oregon uses the term 57 times in its statutes); TEX. CODE ANN. AGRIC. CODE §143.103 (West) (immunity from liability for cars striking animals; Texas uses the term 64 times in its statutes); UTAH CODE ANN. §2-4-11 (court costs in suits against airport zoning board of adjustments allowed only in cases of board's gross negligence; Utah uses the term 24 times in its statutes); W. VA. CODE §6-3-1a (liability of sheriff for acts of "reserve" deputies; West Virginia uses the term 32 times in its statutes); WIS. STAT. ANN. §50.05 (West) (personal liability of receivers of licensed residential facilities placed in receivership; Wisconsin uses the term 16 times in its statutes).

[192] See Frank J. Helminski, Note, *Good Samaritan Statutes: Time For Uniformity*, 27 WAYNE L. REV. 217, 252-267 (1980). The author notes that gross negligence is used in Good Samaritan statutes in Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wyoming. Of these states, 19 (as well as the Virgin Islands), have Good Samaritan statutes which use the terms gross negligence and willful and wanton misconduct in conjunction with each other: California, Connecticut, Delaware, Hawaii, Indiana, Kansas, Maine, Michigan, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia, Washington, while the remaining 13 states and the District of Columbia use the term by itself. Three other states use the term willful and wanton conduct alone: Illinois, Ohio, Texas. The term gross negligence is also used in the Good Samaritan statutes of the Canadian provinces of Alberta, British Columbia, Newfoundland, and Saskatchewan. At least nine of the states that do not use the

Another common use of the term "gross negligence" -- now of historical interest -- was automobile guest passenger statutes which prevented non-paying guests from suing the car's driver for the driver's negligent operation of the vehicle.[193] Under these statutes, guests typically were not permitted to sue except in cases of gross negligence, willful or wanton misconduct, recklessness, or some similarly standard of conduct below ordinary negligence.[194] Today, most of these statutes have either been repealed or struck down as unconstitutional.[195]

B. Federal Statutes

1. *The Contexts in Which the Term "Gross Negligence" Is Used in Federal Statutes*

The term "gross negligence" is used sixty-six times in the United States Code[196] and 101 times in the Code of Federal Regulations.[197] Except

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term gross negligence in their Good Samaritan statutes (which every state and all but two Canadian provinces have) do so because they grant absolute immunity to Good Samaritans rather than because they are using another term in place of the term gross negligence: Alabama, Colorado, Georgia, Massachusetts, Nebraska, New Jersey, Utah, West Virginia, Wisconsin. But note that Helminski's Note failed to locate one of Kentucky's Good Samaritan statutes: KY. REV. STAT. ANN. §39.433. This statute grants immunity to state employees or agents in disasters or emergency situations except in cases of gross negligence. This means that, in all, 33 states and the District of Columbia have Good Samaritan statutes which use the term gross negligence.

193 PROSSER & KEETON, supra note 77, § 34, at 215.

194 Id. at 215.

195 Id. at 216-217.

196 5 U.S.C. §8321 (federal employee retirement system officers); 5 U.S.C. §8505 (payments to state unemployment funds); 7 U.S.C. §87b (violations of grain standards); 7 U.S.C. §1314e (tobacco marketing quotas); 7 U.S.C. § 1596 (violation of seed regulations); 10 U.S.C. §§ 1074a, 1084 (military medical and dental care eligibility); 10 U.S.C. §2350e (NATO AWACS officers); 12 U.S.C. §209 (national bank immunity from liability); 12 U.S.C. §1749bbb-12 (housing loan intermediary banks and agents); 12 U.S.C. §1787 (federal credit union insurance); 12 U.S.C. §1821 (FDIC officers); 12 U.S.C. §§ 1829b, 1955 (bank record keeping); 12 U.S.C. §4621 (conservators of government-sponsored banks); 15 U.S.C. §80a-17 (investment company officers); 15 U.S.C. §1607 (consumer credit cost disclosures); 15 U.S.C. §2053 (Consumer Products Safety Commission members); 16 U.S.C. §583j-2 (Forest Foundation officers); 16 U.S.C. §142le (responses to whale beachings); 16 U.S.C. §3703 (officers of National Fish and Wildlife Foundation); 17 U.S.C. §106A (copyright attribution); 18 U.S.C. §793, App. 4 §2M3.4 (criminal gathering, transmitting or losing of defense information); 19 U.S.C. §§ 1584, 1592, 1594, 1621 (customs fraud and inaccuracies); 19 U.S.C. §2112 (negotiations over nontariff trade barriers); 19 U.S.C. §2314

for a few provisions stating that the term "gross negligence" includes reckless and intentional conduct,[198] however, the term is only defined twice

(customs officers); 20 U.S.C. §1082 (Federal Family Education Loan Program officers); 20 U.S.C. §5509 (National Environmental Education and Training Foundation officers); 25 U.S.C. §450m (grounds for not granting contracts with Indian tribes); 26 U.S.C. §7431 (IRS privacy violations); 29 U.S.C. §1574 (job training partnership act corruption); 30 U.S.C. §1235 (state mining reclamation programs); 33 U.S.C. §§ 1321, 2703, 2704, 2712 (oil and hazardous waste liability); 36 U.S.C. §5203 (National Fallen Firefighter's Foundation officers); 37 U.S.C. §§ 204, 206, 310, 403 (military pay); 40 U.S.C. §333 (construction industry safety); 42 U.S.C. §§ 1395h, 1395u (private administrators of Medicare payments); 42 U.S.C. §3796a (police officer death benefits); 42 U.S.C. §4082 (flood insurance company officers); 42 U.S.C. §§ 9607, 9619 (hazardous waste liability); 42 U.S.C. §12672 (charity food donors); 43 U.S.C. §1334 (off-shore oil drilling leases); 43 U.S.C. §1653 (Alaska pipeline liability); 45 U.S.C. §§ 6, 12, 13, 34, 43, 64a, 438 (railroad safety); 46 U.S.C. §§ 2302, 4705 (negligent operation of ships and barges); 49 U.S.C. §521 (penalties under special Dep't of Transportation authority); 49 U.S.C. App. §26 (railroad safety).

[197] 7 C.F.R. §723.216 (tobacco quota transfers); 7 C.F.R. §§ 906.61, 907.89, 908.89, 911.70, 915.70, 916.70, 920.69, 921.70, 922.70, 923.70, 924.70, 925.68, 928.70, 929.75, 931.70, 948.90, 955.85, 958.86, 959.90, 965-90, 966.90, 971.90, 979.90, 985.68, 987.77, 1036.119, 1049.119, 1065.119, 1207.365, 1207.546, 1240.124 (agricultural marketing service committee members); 10 C.F.R. §10.11 (criteria for granting nuclear information top secret clearances); 10 C.F.R. §791.36 (grounds for withdrawal of electric car R&D loan guarantees); 12 C.F.R. §204.7 (failure to maintain banking reserves); 12 C.F.R. §265.11 (delegation of authority to Federal Reserve Banks); 13 C.F.R. §121.1305 (self-certification of small business status); 17 C.F.R. §230.461 (SEC effective dates of rules); 19 C.F.R. §§ 122.175, 162.73, 162.77, Pt. 171 (App. B) (customs violation penalties); 20 C.F.R. §360.25 (R.R. Retirement Board privacy violations); 20 C.F.R. §652.8 (state employment service administration standards); 23 C.F.R. §§ 360.25, 652.8 (granting and monitoring highway construction contracts); 24 C.F.R. §§ 905.140, 967.308 (certification of HUD projects and officials); 25 C.F.R. §271.74 (contracts with Indian tribes); 25 C.F.R. §276.15 (grants to Indian tribes); 26 C.F.R. §1.401-12 (IRS employee benefit trust qualifications); 26 C.F.R. §301.7701-2 (IRS association standards); 27 C.F.R. §194.111 (violations of liquor regulations); 28 C.F.R. §32.6 (death and disability benefits for police officers); 30 C.F.R. §§ 250.10, 282.13 (grounds for suspending off-shore oil drilling); 31 C.F.R. §560.701 (transactions with Iranian assets), 32 C.F.R. Pt. 155 (App. A) (defense industry security clearances); 32 C.F.R. §§ 536.40, 537.22 (claims involving the U.S. in under the Uniform Code of Military Justice); 32 C.F.R. §§ 644.86, 644.225 (military real estate law); 32 C.F.R. §757.18 (claims against the Navy); 33 C.F.R. §25.705 (Coast Guard claims not payable); 37 C.F.R. §1.765 (discovery rules in patent hearings); 38 C.F.R. §21.4202 (VA vocational rehabilitation and education overcharges); 40 C.F.R. Pt. 35, Subpt. E, App. C-1 (consulting engineering agreements); 40 C.F.R. §§ 123.27, 501.17 (requirements for state environmental enforcement authority); 40 C.F.R. §761.135 (enforcement of PCB regulations); 42 C.F.R. §§ 36.115, 36.233 (Indian health grants and contracts); 43 C.F.R. §29.3 (Alaska pipeline liability fund officers); 46 C.F.R. §§ 35.01-30, 167.65-3, 185.17-1 (negligent operation of ships); 46 C.F.R. pt. 315 §2, Pt. 318 §8 (agreements with and compensation of agents of Dep't of Transportation); 48 C.F.R. PHS §352.280-4 (Contracts with Indian tribes); 49 C.F.R. Pt. 209 (App. A), §§213.15, 214.5, 215.7, 216.7, 217.5, 218.19, 219.9, 220.7, 221.7, 223.7, 225.29, 228.21, 229.7, 230.0, 231.0, 232.0, 233.11, 234.15, 235.9, 236.0, 240.11 (railroad safety).

[198] See, e.g., 12 U.S.C. §209 ("[Conservators] shall not be liable [for their acts and omissions]. . . unless such acts or omissions constitute gross negligence, including any similar conduct or any form of similar conduct, or any form of intentional tortious conduct, as determined by a court"); 12 U.S.C. §§ 1787, 1821 ("gross negligence including intentional torts"); 30 U.S.C. §1235 ("For the purpose of the previous sentence, reckless, willful or

in these sources.[199] As is the case in Michigan, the subject matter of these statutes includes immunity from suit,[200] personal liability of corporate officers and directors,[201] and awards of special damages for particularly serious violations of a statute.[202] One federal law makes gross negligence a ground for the revocation of a contract or lease with the government.[203]

2. *Contexts in Which the Term "Gross Negligence" Is Used in Federal Case Law*

In suits against state-level units of government under 42 U.S.C. §1983 that allege violations of an individual's federally-protected civil rights, in order to overcome the government's qualified immunity it is necessary to show that the violation arose out of the government's "policy, practice, or custom," and that that policy, practice, or custom evidences "deliberate indifference, gross negligence, or recklessness," rather than mere negligence, towards the individual's rights.[204]

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wanton misconduct shall constitute gross negligence.").

199 42 U.S.C. §12672 (Model Good Samaritan Food Donation Act)("The term `gross negligence' means voluntary and conscious conduct by a person with knowledge (at the time of the conduct) that the conduct *is likely to be* harmful to the health or well-being of another person. . . . The term `intentional misconduct' means conduct by a person with knowledge (at the time of the conduct) that the conduct *is* harmful to the health or well-being of another person. [Emphasis added]").

19 C.F.R. Pt. 171, App. B. (Customs violations) ("A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.")

200 See, e.g., 12 U.S.C. §209 (national banks).

201 See, e.g., 36 U.S.C. §5203 (National Fallen Firefighter's Foundation officers).

202 See, e.g., 19 C.F.R. §§ 122.175, 162.73, 162.77, Pt. 171 (App. B) (customs violations penalties).

203 See, e.g., 43 U.S.C. §13334 (off-shore oil drilling leases); 25 C.F.R. §271.74 (contracts with Indian tribes).

204 See, e.g., Hill v. Saginaw, 155 Mich. App. 161, 71, 399 N.W.2d 398 (1986).

C. Uniform Laws, Model Acts, and Restatements

1. *Contexts in Which the Term "Gross Negligence" Is Used in Uniform Laws, Model Acts, and Restatements*

The term "gross negligence" is used sparingly in the Uniform Laws. Gross negligence appears only three times in Uniform and Model Acts prepared by the National Conference of Commissioners on Uniform State Law.[205] In the two versions of the Uniform Gifts to Minors Act, gross negligence is used as an exception to the general rule that custodians of gifts to minors who are not paid for their services are not personally liable for losses as a result of their negligence.[206] In the Uniform Health Care Information Act, gross negligence is the basis for an award of punitive damages.[207]

Turning to the Restatements, gross negligence never appears in the text of the black letter rules contained in any Restatement, but it is used in ten different comments in various Restatements.[208] The comments to the

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[205] UNIFORM GIFTS TO MINORS ACT §5 (1966 Revised Act); UNIFORM GIFTS TO MINORS ACT §5 (1956 Act); UNIFORM HEALTH CARE INFORMATION ACT §8-103 (1985 Act).

[206] "A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this act." UNIFORM GIFTS TO MINORS ACT §5 (1966 Revised Act); UNIFORM GIFTS TO MINORS ACT §5 (1956 Act).

[207] "If the court determines that there is a violation of this [Act], the aggrieved person is entitled to recover damages for pecuniary losses. . . and, in addition, if the violation results from willful or grossly negligent conduct, the aggrieved person may recover not in excess of [$5,000], exclusive of any pecuniary loss." UNIFORM HEALTH CARE INFORMATION ACT §8-103 (1985 Act).

[208] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §7, cmt. f; § 159, cmt. b (liability for gross negligence is determined by guest statute at site of accident but relationship of parties when guest statute is applied is determined by domicile of persons involved); RESTATEMENT (SECOND) OF AGENCY §242, cmt. c (master sometimes liable to unauthorized guests of servant for servant's negligence and sometimes only for servant's gross negligence); RESTATEMENT (SECOND) OF AGENCY §347, cmt. b (landowners and hosts liable to guests only in cases of gross negligence but servant's knowledge not master's pertinent to determining if an act was grossly negligence); RESTATEMENT (SECOND) OF CONTRACTS §157, cmt. a ("Although the critical degree of fault [necessary to prevent a party to a contract who has made a serious unilateral mistake from seeking relief on other grounds] is sometimes described as `gross' negligence, that term is not well defined and is avoided in this Section as it is in the Restatement (Second) of Torts. Instead, the rule is stated in terms of good faith and fair dealing"); RESTATEMENT (SECOND) OF TORTS §82, cmt. e ("In the construction of statutes which specifically refer to gross negligence, that phrase is sometimes

Restatement of Contracts state that "`gross negligence . . . is not well defined and is avoided [here] as it is in the Restatement, Second, of Torts."[209] The comments note the use of the term gross negligence in guest statutes,[210] as a way to counter a contributory negligence defense,[211] as grounds for punitive damages,[212] as a ground for lowering the level of causation required in a tort action,[213] as grounds for seeking indemnification,[214] as a minimum level of culpability for an individual to be liable to a trespasser or guest,[215] as conduct from which trustees cannot be relieved of liability,[216] and as grounds for limiting extraordinary

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construed as equivalent to reckless disregard." The comment states that reckless disregard overrides the contributory negligence defense, permits punitive damages, results in a looser application of causation principals, and is the only situation in which gratuitous licensees or trespassers can recover. Readers are referred to §500-§503 of the text for a discussion of reckless disregard"); RESTATEMENT (SECOND) OF TORTS §886B, cmt. k ("[One] type of situation in which indemnity has sometimes been sought is that in which the two parties are guilty of different types of tortious conduct. . . . Thus, if one party is negligent, the other may have been guilty of intentional misconduct or reckless misconduct or gross negligence. (This may provide grounds for indemnification although the states differ)."); RESTATEMENT (SECOND) OF TRUSTS §222, cmt. a ("[I]f by the terms of the trust it is provided that the trustee shall not be liable except for his wilful default or gross negligence, although he is not liable for mere negligence, he is liable if he intentionally does or omits to do an act which he knows to be a breach of trust or if he act or omits to act with reckless indifference as to the interest of the beneficiary"); RESTATEMENT (THIRD) OF TRUSTS §228, cmts. f & g ("Where a trust document permitted a trustee discretion in investing but did not explicitly exculpate the trustee from liability, it did [not] have the effect of providing that [the trustee] would be liable only for gross negligence or recklessness").

209 RESTATEMENT (SECOND) OF CONTRACTS §157, cmt. a.

210 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §156, cmt. f; §159, cmt. b.

211 RESTATEMENT (SECOND) OF TORTS §282, cmt. e.

212 Id.

213 Id.

214 RESTATEMENT (SECOND) OF TORTS §886b, cmt. k.

215 RESTATEMENT (SECOND) OF TORTS §282, cmt. 6; RESTATEMENT (SECOND) OF AGENCY §242, cmt. c (master sometimes liable to unauthorized guests of servant for servant's negligence and sometimes only for servant's gross negligence); RESTATEMENT (SECOND) OF AGENCY §347, cmt. b.

216 Restatement (Second) of Trusts §222, cmt. a; RESTATEMENT (THIRD) OF TRUSTS §228, cmts. f & g.

contract remedies.[217]

V. Drafting a Statutory Definition of Gross Negligence

Gross negligence, like many legal terms that are open textured and contextual -- such as "negligence," "proximate cause," "bad faith," "foreseeable," and "reasonable" -- does not lend itself to a bright-line definition that can be applied with certainty and predictability in all cases. Nevertheless, a uniform definition of the term would serve as a foundation upon which the courts could build a body of case law that eventually could be synthesized into workable rules that could then be used in a reasonably predictable manner.

The definition of gross negligence could be made uniform by comprehensive legislation enacted through one of four statutory vehicles. First, a general definition could be enacted applicable to all statutes where the term is not already defined. Second, a less ambitious variation on the first proposal would be to enact a general definition limited to the immunity setting. (Nearly half of all Michigan statutes using the term "gross negligence" fall within the immunity category.) As noted, the Michigan Supreme Court has taken a small step in this direction in *Jennings v. Southwood* by incorporating the GTLA definition of gross negligence into the EMSA. Third, a single bill could be introduced that would provide a definition of gross negligence for each statute that contains the term. Fourth, separate bills, each amending a single law that uses the term "gross negligence" could be introduced.

The first suggestion could be adopted by amending Chapter 8 of the Michigan Compiled Laws. This chapter contains a number of definitions of general application in Michigan law, including definitions of "annual meeting," "grantor," "grantee," "inhabitant," "insane person," "land," "real estate," "real property," "month," "year," "oath," "person," "preceding," "following," "seal," "state," "United States," "written," "in writing," "general election," and "firearm."[218] The chapter also provides rules of statutory construction for words in the singular and plural and gender specific pronouns, and establishes the general rule that public bodies must make decisions by at least a majority. Under the second suggestion,

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[217] RESTATEMENT (SECOND) OF CONTRACTS §157, cmt. a.

[218] M.C.L. §8.3-§8.3w (1993).

including in Chapter 8 a definition of gross negligence limited to immunity cases might also be an option.

Two state constitutional provisions have a direct bearing on the first three suggestions. The first is the "single object" clause which provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.[219]

The single object clause has two requirements: first, the title of an act must match its contents; and, second, an act must have only one "object."[220] The raison d'etre for the single object clause was threefold: (1) to insure that legislators do not pass laws without knowing what the act would do, (2) to insure that the public is generally made aware of what is included in a statute, and (3) to prevent the "logrolling" of bills that might not pass if presented separately, but which might pass if "bundled" into a single legislative package.[221]

Also potentially important is the "general revision" clause, which provides:

> No general revision of the laws shall be made. The legislature may provide for a compilation of the laws in force arranged without alteration, under appropriate heads and titles.[222]

Arguably, if legislation has only a single object then it cannot violate Article IV, § 36's prohibition against a general revision of the laws. While no reported cases have addressed the general revision prohibition of the Constitution, a 1955 Attorney General's Opinion[223] did address this

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[219] MICH. CONST. art. 4, §24.

[220] See People v. Trupiano, 97 Mich. App. 416, 296 N.W.2d 49 (1980).

[221] See, e.g., People v. Carey, 382 Mich. 285, 170 N.W.2d 232 (1969); Hildebrand v. Revco Discount Drug Centers, 137 Mich. App. 1, 357 N.W.2d 778 (1984).

[222] MICH. CONST. art. 4, §36.

[223] Op. Att'y Gen.2330, 1955-1956 Op. Att'y Gen. Mich. 680 (1955).

question under a substantially similar provision of the 1908 Constitution.[224] The opinion stated that because both the School Code of 1955[225] and the Michigan Election Law[226] did not embrace more than a single object, they did not constitute a general revision of the laws.[227] The single object clause, on the other hand, has been the subject of much litigation.[228]

Of the four suggestions, the introduction of a single bill that either creates a uniform definition of gross negligence applicable to all Michigan statutes, or which creates a uniform definition limited to immunity cases, or which through a single bill specifically amends all statutes using the term, might be considered multiple object legislation, as well as a general revision of the laws. On the other hand, if the focus is the subject matter of the legislation, rather than the number of statutes affected by the legislation, then arguably neither the single object clause nor the general revision clauses of the Michigan Constitution would be violated.

As desirable as a single bill approach would be, if for no reason other than efficiency and uniformity of result, actual legislative practice indicates that the fourth option -- a separate bill for each statute using the term "gross negligence" -- may be the preferred, as well as constitutional, course to pursue. For example, in the 1978, 1990, and 1991 legislative sessions, the elimination of references to abolished courts in some ten, eight, and nineteen different statutes, respectively, was accomplished through ten, eight, and nineteen separate bills, respectively.[229]

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[224] MICH. CONST. of 1908. art. 5, §40.

[225] M.C.L. § 340.1 (1955), repealed and replaced by comparable provisions at M.C.L. § 380.1 (1993).

[226] M.C.L. § 168.1 (1955).

[227] Op. Att'y Gen. 2330, 1955-1956 Op. Att'y Gen. Mich. 680 (1955).

[228] MICH. CONST. art. 4, §24 (1963), and its predecessors, MICH. CONST. of 1908, art. 5, §§ 21, 22, and MICH. CONST. of 1850, art. 4, §§ 20, 25, have been considered in more than 250 reported cases and in at least a dozen opinions of the Attorney General.

[229] See 1994 ANNUAL REPORT, MICHIGAN LAW REVISION COMMISSION 199, 202-03.