Textualism and the Michigan Supreme Court

By C. Thomas Ludden

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A Review of the Michigan Supreme Court

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Introduction

When John Engler became Michigan's forty–sixth governor in 1991, he stated that one of his goals was to restore the Michigan Supreme Court to what he believed was its proper role: interpreting the law while allowing the other branches of government to make the law.[1] In 1999, Governor Engler appointed[2] Michigan Court of Appeals Judges Robert P. Young, Jr. and Stephen J. Markman to the Michigan Supreme Court.[3] Their joining Justices Clifford Taylor and Maura Corrigan on the Michigan Supreme Court is generally acknowledged to have shifted this court's judicial philosophy.[4] As Professor Abbe Gluck put it, in describing Michigan's "textualist revolution," "The newly appointed textualist jurists took office with a mission to change the way the state court approached statutory interpretation."[5] After their appointment, the composition of the Michigan Supreme Court remained unchanged until January 2009. During this eight year period, the Michigan Supreme Court overturned and modified its precedent in a number of areas,[6] generating a great deal of debate and commentary. Some praised the Michigan Supreme Court, calling it one of finest in the nation.[7] Others, however, criticized the Michigan Supreme Court for being activist.[8]

There was significant turnover on the Michigan Supreme Court from 2009 to 2011. In the 2008 election, then Chief Justice Clifford Taylor was defeated by Justice Diane Marie Hathaway, who began her term on January 1, 2009.[9] During an

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1 John Engler; Address to the Michigan Supreme Court Historical Society Annual Membership Luncheon, April 18,2002, *available at* http://www.micourthistory.org/pdfs/speeches_vignettes/engler.pdf (last visited October 9, 2010).

2 Vacancies on the Michigan Supreme Court are filled in two ways. First, in the case of a mid–term vacancy due to retirement or death, the governor would appoint a new justice until the next subsequent election. Compare Mich. Const. of 1850 art. VI, § 14 with Mich. Const. of 1963 art. VI, § 23. Justice Markman was appointed to replace Justice James H. Brickley, who had retired. Second, in the case of an end–of–term vacancy, candidates for the Court are nominated by partisan political conventions, and the candidates for the Supreme Court run in the general election on the non–partisan section of the ballot. Mich. Const. of 1963 art. VI, § 2 ("The supreme court shall consist of seven justices elected at non–partisan elections as provided by law."); Mich. Comp. Laws § 168.392 (authorizing "each political party [to] . . . nominate . . . candidates for the office of justice of the supreme court. . ."); Mich. Comp. Laws § 600.203 (providing for election of supreme court justices "in the manner provided by the constitution and the election laws of the state").

3 Michigan Supreme Court, Biography of Chief Justice Robert P. Young, Jr., *available at* http://www.courts.michigan.gov/courts/michigansupremecourt/justices/pages/chief-justice-robert-p-young-jr.aspx and Michigan Supreme Court, Biography of Justice Stephen J. Markman, available at http://courts.michigan.gov/courts/michigansupremecourt/justices/pages/justice-stephen-j.-markman.aspx (last visited October 12, 2012).

4 A comprehensive history of the Michigan Supreme Court is described in Matthew Schneider, Michigan's Big Four: An Analysis of the Modern Michigan Supreme Court 5–14 (2008).

5 Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism (2010). *Faculty Scholarship Series*. Paper 3813, *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4839&context=fss_papers.

6 Schneider, *supra* note 4.

7 Patrick J. Wright, *The Finest Court in the Nation: Hurray for Michigan Justice,* Wall St. J., Oct. 13, 2005; John Gizzi, *Here Comes the Judge (Campaign)*, Human Events, Oct. 26, 2007; Abigail Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Election*, Wall St. J., May 8, 2000.

8 Brian Dickerson, *Adultery, Life and Engler's High Court*, The Detroit Free Press, Jan. 17, 2007.

9 Michigan Supreme Court, Biography of Justice Diane M. Hathaway, *available at* http://courts.michigan.gov/courts/michigansupremecourt/justices/pages/justice-diane-m.-hathaway.aspx (last visited October 12, 2012).

initial two year period of time, in 2009 and 2010, her election briefly shifted the judicial philosophy on the Michigan Supreme Court.[10] On January 1, 2011, Justice Mary Beth Kelly began an eight year term,[11] and Justice Brian Zahra was appointed a few days later to fill the seat left vacant when Justice Corrigan retired from the bench.[12] It is generally believed that, since Justices Kelly and Zahra joined the court, it has resumed the same path it was following before January 1, 2009.

Fluctuations in the Court's approach to the Michigan constitution and statutes enacted by the Michigan Legislature are significant because of the impact those fluctuations can have on the state's public policy environment. In fact, some of the most controversial decisions of the Michigan Supreme Court involve the interpretation and application of those legal texts. Another category of controversial cases concerns the interpretation of written contractual agreements between private parties. In both types of cases, the Court must decide how it will approach and apply written documents. This paper will examine the Michigan Supreme Court's recent jurisprudence with an eye toward discerning whether the Court has been applying a consistent methodology in interpreting documents. Before diving right into the Court's decisions, however, the author will provide some background on various approaches to the task of interpreting and applying legal documents.

The language in some documents is relatively straightforward and easy to apply. Such documents do not create lawsuits, at least not ones that are difficult to resolve. For example, the Third Amendment to the United States Constitution provides that "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[13] While this Amendment has been mentioned in United States Supreme Court cases, it is generally acknowledged that there are no significant Supreme Court cases applying it.[14] In fact, there have not been very many cases at all since the Civil War determining if the Third Amendment has been violated.[15]

Not every text can be applied so easily. Despite the best intentions of drafters, language can be vague, ambiguous, or even contradictory. Crucial words, phrases or terms may not be defined, or an unanticipated situation may have arisen since the document was written. Alternatively, a document may be deliberately vague so that it can be applied to a variety of future circumstances. For example, the Fourth Amendment bars "unreasonable searches and seizures," while the Eighth Amendment prevents "cruel and unusual punishment." As a result, courts will need to resolve cases where it may be difficult to determine how to apply the words and phrases in a written document.

Judges have applied many different methods of determining how to resolve such disputes. *Reading Law: The Interpretation of Legal Texts,* the second book written by the Honorable Antonin Scalia and Professor Bryan Garner, was recently published and focuses on the judge's approach to determining the meaning of the written word. Justice Scalia and Professor Garner argue that judges should "return to the oldest and most commonsensical interpretive principle: In their full context, words mean what they conveyed to reasonable people at the time they were

10 *See* C. Thomas Ludden, Recent History of the Michigan Supreme Court (2008), *available at* https://www.fed-soc.org/doclib/20101020_Michigan2010WP.pdf.

11 Michigan Supreme Court, Biography of Justice Mary Beth Kelly, *available at* http://courts.michigan.gov/courts/michigansupremecourt/justices/pages/justice-mary-beth-kelly.aspx (last visited October 12, 2012).

12 Michigan Supreme Court, Biography of Justice Brian K. Zahra, *available at* http://courts.michigan.gov/courts/michigansupremecourt/justices/pages/justice-brian-k.-zahra.aspx(last visited October 12, 2012).

13 U.S. Const. amend III.

14 *See, e.g.*, Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 Wm. & Mary Bill Rts. J. 117, 140 (1993).

15 The only case interpreting the Third Amendment is probably *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982), in which striking prison guards contended that quartering National Guard troops called up to replace the striking guards in the guards' barracks violated the Third Amendment.

written . . . ."[16] They define this "exclusive reliance on the text when interpreting text . . . as textualism"[17] And argue that this method (1) limits the ability of judges to substitute their own policy preferences for those actually enacted, (2) encourages legislatures to draft statutes more carefully, (3) increases certainty in the law and (4) encourages greater respect for the rule of law.[18]

Reading Law distinguishes textualism from two common methods of interpretation, which it identifies as purposivism and consequentialism. *Reading Law* describes "purposivism" as the method in which judges interpret language "to achieve what [is] believe[d] to be the provision's purpose."[19] In other words, purposivism is using "an abstract purpose . . . to supercede text"[20] whereas textualism determines the meaning of words "from a close reading of the text."[21] The purpose underlying all statutes is preventing a perceived evil, promoting a perceived good, or both. Far more people can agree upon the ends to be achieved than upon the means of achieving those desirable ends. The legislative process often involves compromises between these competing means of achieving the same ends so the statutory language can receive the majority approval needed for passage. Competing proposals may be rejected or merged during this process. The statutory language that results is a specific means of trying to achieve one or more of these ends that was actually approved by the legislature. Therefore, purposivism provides a method by which a judge can substitute a different means from the one actually passed by the legislature to achieve the same or similar ends.

The second method distinguished by *Reading Law* is called consequentialism, which is sometimes called pragmatism or workability.[22] The professed advantage of this method touted by its proponents is that it produces "sensible desirable results, since that is surely what the legislature must have intended."[23] Everyone believes that his own goals and methods are both sensible and rational and that others should agree with him. The "sensible desirable results" achieved by this method, then, often end up being what the judge using this method has concluded are sensible and desirable.[24] There is rarely, however, unanimous agreement on what is the sensible desirable result actually is.

In this paper, the author will analyze selected Michigan Supreme Court cases interpreting the Michigan Constitution of 1963, Michigan statutes, contracts, and other written documents to show that it has followed a textualist approach over the last twelve years. With one exception, in which the Michigan Supreme Court's reasoning is compared with that of the United States Supreme Court, all of these cases were closely divided in the Michigan Supreme Court. This review shows that many of the selected cases are ones in which the Michigan Supreme Court applied the textual method to reverse prior precedent and answer questions of first impression. This paper will also discuss the extent to which the Court's approach has provided the types of benefits that Justice Scalia and Professor Garner suggest that a textualist approach provides.

In performing this review, it is important to remember that textualism is not the same as "strict construction." *Reading Law* recognizes that the meaning of a word or phrase will depend upon the context in which the word or phrase is used. The basic rule is that the common and everyday meaning of the word or phrase should be applied.[25] In other circumstances, however, the context might show that the word or phrase has a technical meaning.[26] Moreover, because the meaning of words may change over time, the textualist should give words the meaning that they had when the document was

16 Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 16 (2012).

17 Scalia & Garner, *supra* note 16, at 16.

18 Scalia & Garner, *supra* note 16, at xxviii–xxix.

19 Scalia & Garner, *supra* note 16, at 18.

20 Scalia & Garner, *supra* note 16, at 20.

21 Scalia & Garner, *supra* note 16, at 20.

22 Scalia & Garner, *supra* note 16, at 22.

23 Scalia & Garner, *supra* note 16, at 22.

24 Scalia & Garner, *supra* note 16, at 22.

25 Scalia & Garner, *supra* note 16, at 69.

26 Scalia & Garner, *supra* note 16, at 69.

written.[27] Furthermore, texts are to be construed as a whole,[28] and, if possible, every word and phrase in a document should be given meaning.[29]

I. Defining a "Public Use" for Takings

One of the most controversial recent decisions by the United States Supreme Court is *Kelo v. City of New London*,[30] which held that the United States Constitution did not prevent the City of New London from taking private homes and turning them over to various commercial developers for their own use. A few years earlier, the Michigan Supreme Court had considered the same question in *County of Wayne v. Hathcock*,[31] but reached the opposite conclusion, finding that a substantially similar attempted government taking violated the Michigan Constitution. *Kelo* and *Hathcock* considered provisions the United States and Michigan Constitutions that are essentially identical.[32] The two cases also involved substantially similar proposed uses for the taken property. In *Hathcock*, the government intended to use the property at issue for development as a business and technology park,[33] while *Kelo* involved development of a new research park for Pfizer, along with a conference center, restaurants, and shopping.[34] A review of these two decisions reveals that the difference in result stems from the Michigan Supreme Court applying a strict textual analysis, while the United States Supreme Court considered other factors.

In *Hathcock,* the crucial question was whether the proposed taking by Wayne County was barred by the Michigan constitution.[35] The *Hathcock* court explained that the "primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification."[36] The Michigan Constitution only authorizes the taking of private property for a "public use."[37] *Hathcock* first determined that the phrase "public use" was a legal term of art.[38] Having done so, it then determined what the phrase "public use" meant in 1963, when the current Michigan Constitution was adopted.[39] A review of applicable legal authority, including case law and treatises, showed that "public use" encompassed the subsequent transfer of the land to private ownership under only three circumstances: (1) when the land will be used a public necessity such as a highway, railroad, canal or public utility, (2) when the land would be subject to significant public regulation such as a petroleum pipeline or (3) when the condemnation itself was the public purpose, because it accomplished a public use such as eliminating a public nuisance.[40] Wayne County's decision to condemn the property to develop the business and technology park did not fit within any of these public purposes. Therefore, *Hathcock* concluded that the Michigan Constitution barred Wayne County's attempt to take this property.

In contrast, the *Kelo* analysis did not quote the language of the Fifth Amendment in full, instead a portion of Fifth Amendment appeared in a footnote in an introductory sentence summarizing

27 Scalia & Garner, *supra* note 16, at 74.

28 Scalia & Garner, *supra* note 16, at 167.

29 Scalia & Garner, *supra* note 16, at 174.

30 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

31 471 Mich. 445, 684 N.W.2d 765 (2004).

32 The Michigan Constitution proves that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Mich. Const., Art. 10, § 2. The Fifth Amendment to the United States Constitution provides, among other things, that "nor shall private property be taken for public use, without just compensation."

33 471 Mich. at 476–477, 684 N.W.2d at 783.

34 545 U.S. at 473–474.

35 Hathcock began by analyzing whether Michigan statutes authorized Wayne County to exercise eminent domain to take the property for the proposed use, ultimately concluding that Wayne County had the statutory authority to do so. 471 Mich. at 456–467, 684 N.W.2d at 772–779. This made the question of whether the taking was allowed under the Michigan Constitution into the central question of the case.

36 471 Mich. at 467–468, 684 N.W.2d at 779.

37 Mich. Const., art. 10, § 2.

38 471 Mich. at 468–471, 684 N.W.2d at 779–780.

39 471 Mich. at 472–476, 684 N.W.2d at 781–783.

40 471 Mich. at 472–476, 684 N.W.2d at 781–783.

the issue before it.[41] Nor did the *Kelo* majority try to determine what the language of the Fifth Amendment meant at the time it was adopted. Instead, *Kelo* excerpted portions of prior decisions to show that state and local governments have wanted to condemn property for different purposes at different times.[42] Other than a hypothetical case in which a single citizen's property was condemned and immediately transferred to another citizen, *Kelo* did not offer any examples of takings that might be prohibited by the Fifth Amendment.[43]

II. Interpretation of Criminal Law Statutes

In *People v. Williams*, the Michigan Supreme Court held, by a narrow four to three decision, that a criminal defendant should not be permitted to withdraw his guilty plea and conviction for armed robbery.[44] The decision was written by Justice Young, who was joined by Justices Markman, Mary Beth Kelly and Zahra. The defendant argued that his guilty plea should be withdrawn because he had not taken actual property from a convenience store.[45] The resolution of *Williams* depended upon whether recent amendments to Michigan statutes defining the crimes of robbery and armed robbery eliminated the requirement that the crime of robbery include successfully taking property from a person or place.

The *Williams* majority recognized that the common law crime of robbery and armed robbery both required that the robber actually take property from a person.[46] It also recognized that Michigan statutory law, from the time it was enacted in 1838 until it was amended in 2004 also required proof that that the property had been taken from a person to support a conviction for robbery and armed robbery.[47] Therefore, had the Michigan Legislature not amended the robbery and armed robbery statutes, it seems fair to conclude that the entire Michigan Supreme Court would have agreed that Mr. Williams should have been permitted to withdraw his plea.

In 2004, however, the Michigan Legislature had amended the robbery statutes.[48] After this amendment, robbery was defined by MCL 750.530 as:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny or during the commission of the larceny or in flight or attempted flights after the commission of the larceny, or in an attempt to retain possession of the property.[49]

The armed robbery statute was also amended, now providing that:

> A person who engages in conduct proscribed under [MCL 750.530, the robbery statute] and who in the course of engaging in that conduct, possess a dangerous weapon or an article used or fashioned in a manner to lead any person to believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous

41 Kelo v. City of New London, 545 U.S 69, 472 n. 1 (2005).

42 *Id.* at 480–488.

43 *Id.* at 486–487 and n. 17.

44 491 Mich. 164, 166, 814 N.W.2d 270, 271 (2012).

45 *Id.* at 167, 814 N.W.2d at 271.

46 *Id.* at 169, 814 N.W.2d at 272–273.

47 *Id.* at 170, 814 N.W.2d at 273.

48 *Id.* at 171, 814 N.W.2d at 273–274; 2004 Michigan Public Act 128 (amending Mich. Comp Laws §§ 750.529, 750.730.

49 People v. Williams, 491 Mich. 164, 171, 814 N.W.2d 270, 273–274 (2012) (citing Mich. Comp Laws §750.730).

> weapon, is guilty of a felony punishable by imprisonment for life or an term of years.[50]

The Michigan Supreme Court found that these 2004 Amendments "removed the prior requirement that a robber feloniously 'rob, steal or take' property from another, and it replaced that language with a new statutory phrase 'in the course of committing a larceny.'" [51] That phrase, in turn, was defined by the amended statute to include "acts that occur in an attempt to commit the larceny".[52] *Williams* therefore determined that "the plainest understanding" of that phrase included "an 'overt act' with an intent to deprive another person of his property, but that does not achieve the deprivation of property." [53] Based upon this examination, the Michigan Supreme Court found that the Michigan Legislature had made "a substantive change in the law governing robbery in Michigan such that a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery." As a result, it affirmed the conviction of Mr. Williams.

The dissent[54] in *Williams* applied a much different method of interpretation. The *Williams* dissent began by finding that the "common law underlies Michigan's criminal statutes."[55] It then stated the common law crime of robbery was "defined as the felonious *taking of money or goods of value . . . .*"[56] It continued by noting that the Michigan "Court of Appeals has also long observed that a completed larceny is an essential element of armed robbery."[57] The *Williams* dissent then recounted that the Supreme Court had held in *People v. Randolph*[58] that the pre–2004 version of section 530 required that a robbery was not complete until the robber "escaped with the stolen merchandise."[59] The majority had not held otherwise.

But, the dissent then determined that the 2004 amendments were "[i]n response to our decision in *Randolph*."[60] It further concluded that the legislature had rejected *Randolph*, but that it had not intended to "eliminate the requirement of an actual larceny."[61] The dissent substantiated its reasoning with extensive quotations from "legislative history", referencing various committee reports,[62] and the Michigan criminal jury instructions.[63] Based upon these extra-textual sources, the *Williams* dissent found that the trial court has abused its discretion by not allowing Mr. Williams to withdraw his plea and would have set aside his conviction.[64]

Williams, then, presents two distinct methods of attempting to determine the meaning of a statute that contained two phrases that had not previously been interpreted by the Michigan Supreme Court. Both the majority and the dissent agreed that the position taken by Mr. Williams would have been correct at the common law and under Michigan statutory law until 2004. The *Williams* majority limited itself to an examination of the text itself, while the dissent resorted to sources outside the text. Many textualists criticize the use of legislative history such the committee reports used by the *Williams* dissent because a court cannot determine if the legislators who voted for the amendment had even read the committee reports, let alone based their decisions to amend the statute solely for the reasons stated in the committee reports.[65] In this case, the dissent also contended that the Michigan Legislature had amended the statute "[i]n response to our

50 *Id.* at 171, 814 N.W.2d at 273 (citing Mich. Comp Laws §§ 750.529).

51 *Id.* at 173, 814 N.W.2d at 275.

52 *Id.* at 173, 814 N.W.2d at 275.

53 *Id.* at 173–174, 814 N.W.2d at 275.

54 The dissenting opinion was written by Justice Marilyn Kelly, who was joined by Justices Cavanaugh and Hathaway.

55 *Id.* at 187, 814 N.W.2d at 282.

56 *Id.* at 187, 814 N.W.2d at 283.

57 *Id.* at 188, 814 N.W.2d at 283 (citing People v. Needham, 8 Mich.App. 679, 683, 155 N.W.2d 267 (1967).

58 466 Mich. 532, 648 N.W.2d 164 (2002).

59 491 Mich. at 188–189, 814 N.W.2d at 283.

60 *Id.* at 189, 814 N.W.2d at 283.

61 *Id.* at 191, 814 N.W.2d at 284.

62 *Id.* at 191–193, 814 N.W.2d at 284–286 .

63 *Id.* at 195–197, 814 N.W.2d at 287–288.

64 *Id.* at 198–199, 814 N.W.2d at 289.

65 Scalia & Garner, *supra* note 16, at 369 et seq.

decision in *Randolph*."[66] That *Randolph* was issued in 2002 did not prevent the Michigan Legislature from making changes to Michigan statutory law other than abrogating *Randolph*. What is known, and cannot be disputed, is that the Michigan Legislature did amend the Michigan robbery statutes in 2004 and what these changes were. Therefore, *Williams* appears to be a clear example of the current majority applying standard, textual, tools to resolve a case of first impression.

III. Application of Statute of Limitations

In *Gladych v. New Family Homes, Inc.*,[67] the Michigan Supreme Court interpreted one of the tolling provisions for the statute of limitations. In *Gladych*, the plaintiff, who had been injured on January 23, 1996, filed a lawsuit on January 22, 1999, one day before the three-year statute of limitation expired.[68] Michigan statutory law provided that an action for personal injuries had to be commenced within three years of the claim accruing[69] and that an action was commenced by filing the complaint with the court.[70] Therefore, the plaintiff had commenced the lawsuit before the statute of limitations expired. The plaintiff, however, did not serve the defendant until May 4, 1999.[71] He only made three attempts to serve the defendant during the 91-day period when the initial summons was effective and only served the defendant after the trial court issued a second summons to him.[72] Therefore, the defendant was not served until after the statute of limitations expired, and the claim against it was barred, unless the running of the statute of limitations had been tolled.

The relevant tolling provision was section 5856 of Michigan's Revised Judicature Act,[73] which provided that the statute of limitations is tolled only if (1) the complaint is filed and a copy of the summons and complaint are served on the defendant, (2) jurisdiction was otherwise acquired over defendant or (3) the complaint is filed and a copy of the summons and complaint are placed in the hands of an officer for immediate service.[74] The trial court granted defendant's motion to dismiss, holding that the plaintiff had not complied with any of the requirements for tolling the statute of limitations.[75] The Court of Appeals, however, reversed, finding that this tolling provision was not implicated because the plaintiff had filed suit before January 23, 1999.[76]

In reaching its decision, the Court of Appeals relied upon *Buscaino v. Rhodes*.[77] *Buscaino* found that the failure to comply with the requirements of section 5856 did not control whether the statute of limitations was tolled after a lawsuit had been filed. To reach this holding, *Buscaino* determined that there was a conflict between the language of section 5856 and the language of one of the court rules that had been issued by the Michigan Supreme Court.[78] This court rule provided that "[a] civil action is commenced by filing a complaint with the court."[79] *Buscaino* resolved the conflict that it had discovered by finding that its court rule controlled over the

66 491 Mich. at 189, 814 N.W.2d at 283.

67 468 Mich. 594, 664 N.W.2d 705 (2003).

68 468 Mich. at 596, 664 N.W.2d at 706.

69 Mich. Comp. Laws. § 600.5805(1).

70 Mich. Comp. Laws. § 600.1901.

71 468 Mich. at 596, 664 N.W.2d at 706.

72 *Id.* at 596, 664 N.W.2d at 706.

73 Mich. Comp. Laws. § 600.5856.

74 468 Mich. at 598–599, 664 N.W.2d at 708. The Supreme Court also referenced a provision that applies to Michigan's notice provisions for medical malpractice claims, but that provision does not affect the issues discussed herein. *Id.*

75 *Id.* at 596, 664 N.W.2d at 706.

76 *Id.* at 596, 664 N.W.2d at 707. The Court of Appeals decision itself is unpublished, but can be found at 2001 WL 619761 (Docket No., 222343) (June 5, 2001) and is also available on the Michigan Court of Appeals website.

77 385 Mich. 474, 189 N.W.2d 202 (1971). This case one of the first decisions issued by the Williams and Swainson court. *See* Schneider, *supra* note 4, at 4.

78 385 Mich. at 480–481, 189 N.W.2d at 205.

79 When Buscaino was issued, this language was contained in General Court Rule 1963, 101. Michigan later performed a major revision to its court rules, but the relevant language was retained in Michigan Court Rule 2.101(B).

language of the statute.[80]

Justice Corrigan wrote the majority opinion in *Gladych* and was joined by Justices Taylor, Young, and Markman. The *Gladych* majority found that *Buscaino* was flawed primarily because its analysis "was not concerned with the language of the statute, focusing instead upon the language of a court rule that the Supreme Court had issued."[81] *Gladych* determined that *Buscaino*'s reading of section 5856 "contradicted the statute's plain and unambiguous language."[82] *Gladych* explained that *Buscaino* had erred because no statutory language provided that the tolling provisions in section 5856 did not apply after a lawsuit was filed.[83] Therefore, *Gladych* overruled *Buscaino* and held that the filing of a lawsuit did not toll the statute of limitations unless the plaintiff also complied with section 5856.[84] Accordingly, because the plaintiff had not taken the proper steps required to serve the defendant with the summons and complaint after the complaint had been filed, *Gladych* found that the statute of limitations barred plaintiff's claims.[85]

Soon after *Gladych* was issued, the Michigan Legislature amended the Revised Judicature Act to change the rules regarding tolling of the statute of limitations back to the rule that had existed under *Buscaino*.[86] This end result is a good example of how textualist approaches to interpreting statutes can sometimes spark democratic responses through legislative action. *Buscaino* not only reached a result different from the language of the statute, but its reliance upon a court rule to supersede the statute also prevented the Michigan Legislature from amending the statute in a way that could be effective. The approach in *Gladych* allowed the Michigan Legislature to retain its authority to determine when a statute of limitations should be tolled and will allow the Michigan Legislature to change the tolling rules in the future should it choose to do so.

80 385 Mich. at 483, 189 N.W.2d at 206.

81 Gladych v. New Family Homes, Inc., 468 Mich. 594, 599, 664 N.W.2d 705, 708 (2003).

82 *Id.* at 601, 664 N.W.2d at 709.

83 *Id.* at 605, 664 N.W.2d at 711.

84 *Id.* at 605, 664 N.W.2d at 711.

85 *Id.* at 617–618, 664 N.W.2d at 712–713.

86 2004 Michigan Public Act 87 (approved April 22, 2004) (modifying Mich. Comp. Laws § 600.5856).

IV. Governmental Immunity

Michigan has been the historical home of the domestic automobile industry, so it is perhaps not surprising that the Michigan Supreme Court has recently handled several cases involving the highway exception from Michigan's governmental tort liability act (GTLA).[87] A more likely explanation is that, as explained in more detail below, the GTLA does not define several terms that may be crucial to the application of the highway exception. The recent decisions have been by a narrow majority and provide another opportunity to evaluate whether the majority of the Michigan Supreme Court is applying a textualist approach to resolving disputes about the meaning of statutes.

The general rule in Michigan is that, subject to specified exceptions, all governmental agencies[88] are immune from liability in the performance of a governmental function.[89] The highway exception from governmental immunity provides that:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and

87 Mich. Comp. Laws §691.1401 et seq.

88 A "governmental agency" is defined as the "state or a political subdivision". Mich. Comp. Laws § 691.1401(a). The state is defined as the "state of Michigan and its agencies, departments [and] commissions." Mich. Comp. Laws § 691.1401(g). "Political subdivision" is defined to include a "municipal corporation, country, country road commission, school district [and] transportation authority." Mich. Comp. Laws § 691.1401(e).

89 Mich. Comp. Laws § 691.1407(1).

> in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commission to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[90]

The GTLA defines a highway as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway."[91] The GTLA specifically excludes "alleys, trees and utility poles" from its definition of a highway.[92] Because many terms in the highway exception are not defined by the GTLA, the Michigan Supreme Court has recognized that applying the highway exception can be problematic,[93] and that the language of the GTLA can be confusing.[94]

In *Grimes v. Michigan Department of Transportation*,[95] the Michigan Supreme Court revised its precedent regarding the scope of the highway exception from governmental immunity in a decision joined by five justices.[96] This majority opinion was written by Justice Young and joined by Justices Taylor, Weaver, Corrigan and Markman. The outcome in *Grimes* turned on how the highway exception was more limited for road commissions than it was for other state agencies. Their "duty . . . to repair and maintain highways . . . extends only to the improved portion of the highway designed for vehicular travel . . . ."[97] The plaintiff was severely injured when his car was struck by a driver who claimed that the failure to properly maintain the gravel strip adjoining the paved portion of the shoulder of I-75 caused the accident.[98] Therefore, given the scope of the road commission's statutory duty, the critical question in *Grimes* was "whether a shoulder is actually designed for vehicular travel."[99]

The GTLA does not define the word "shoulder" or the phrase "designed for vehicular travel."[100] Therefore, the *Grimes* majority[101] determined their meaning by considering both the "plain and ordinary meaning" of the words and "the context in which the Legislature employed this phrase."[102] While the shoulder of a highway is clearly *designed to be used by vehicles*, *Grimes* concluded that it was not "*designed for vehicular travel*."[103] *Grimes* certainly recognized that the broadest possible literal definition of "travel" would include any movement at all by a vehicle on the shoulder.[104] But, the same is true of every improved portion of the highway. [105] The statutory language, however, limits the duty owed by road commissions to "the improved portion of the highway designed for vehicular travel". [106] As a result, *Grimes* recognized that if "travel" included

90 Mich. Comp. Laws §. 691.1402(1).

91 Mich. Comp. Laws § 691.1401(c).

92 Mich. Comp. Laws § 691.1401(c).

93 Nawrocki v. Macomb Co. Road Comm., 463 Mich. 143, 157 n. 24, 615 N.W.2d 702, 715 n.5 (2000).

94 Suttles v. Dep't of Transportation, 457 Mich. 635, 643 n. 5, 578 N.W.2d 295, 298 n. 5 (1998) (citations omitted).

95 475 Mich. 72, 715 N.W.2d 275 (2006).

96 Mich. Comp. Laws § 691.1402. Other exceptions include the motor vehicle exception, Mich. Comp. Laws § 691.1405, the public building exception, Mich. Comp. Laws § 691.1406, the governmental hospital exception, Mich. Comp. Laws § 691.1407(4), the proprietary exception, Mich. Comp. Laws § 691.1413, and the sewage disposal system exception, Mic Comp. Laws § 691.1417.

97 Mich. Comp. Laws sec. 691.1402(1).

98 475 Mich. at 74–75, 715 N.W.2d at 276–277.

99 475 Mich. at 79, 715 N.W.2d at 279.

100 475 Mich. at 88, 715 N.W.2d at 284.

101 The majority opinion in Grimes was written by Justice Young and joined by Justices Taylor, Weaver, Corrigan and Markman.

102 475 Mich. at 88, 715 N.W.2d at 284.

103 475 Mich. at 91, 715 N.W.2d at 285 (emphasis added).

104 475 Mich. at 89, 715 N.W.2d at 284.

105 475 Mich. at 88, 715 N.W.2d at 284.

106 475 Mich. at 89–90, 715 N.W.2d at 284–285.

any movement at all, then all improved portions of the highway would be designed for vehicular travel even though the words chosen by the legislature show that it believed that some improved portions of highways are not designed for vehicular travel.[107] In other words, such a reading would eliminate a distinction created by the statutory language used by the legislature. Therefore, because this broad reading would eliminate an entire phrase from the statute, *Grimes* determined that this exception from governmental immunity only applied to the travel lanes and not the shoulder of the highway. [108]

In reaching this conclusion, *Grimes* overruled a 1990 Michigan Supreme Court decision, *Gregg v. State Highway Department*,[109] which had held that the GTLA highway exception included the shoulder within the portion of the highway "designed for vehicular traffic." The *Grimes* dissent[110] believed that *Gregg* was correctly decided and should not be overturned.[111] The *Grimes* dissent assumed that *Gregg* did not render the phrase "designed for vehicular traffic" to be mere surplusage. The *Grimes* dissent also took exception with offer an answer to the majority's view that *Gregg* had impermissibly relied upon its views as to the "common experience" of drivers in place of the language of the GTLA. [112]

In *Duffy v. Michigan Department of Natural Resources (MDNR)*,[113] the Michigan Supreme Court returned to the highway exception to consider a case of first impression: whether the Little Manistee Trail was a "highway" and therefore subject to the highway exception from governmental immunity.[114] By a four to three decision, the Michigan Supreme Court held that the highway exception did not apply to Little Manistee Trail.[115] This decision was authorized by Justice Markman, who was joined by Justices Young, Mary Beth Kelly and Zahra.

The plaintiff in this case, Beverly Duffy, had suffered severe injuries while riding an off-road vehicle on this trail.[116] The Little Manistee Trail is one of many recreational trailways that the MDNR maintains and manages for off-road vehicles.[117] The MDNR does so in part by making grants to individuals, local governments and non-profit organizations; the Little Manistee Trail itself is maintained by a local, non-profit, tourism association.[118] The Michigan Supreme Court concluded that the Little Manistee Trail was a "trailway," not a road or highway, and that it was not one of the trailways covered by the highway exception from governmental immunity.[119]

The initial issue that the Michigan Supreme Court had to confront was that the GTLA did not define the word "trailway" and that the word "trailway", as opposed to trail, does not appear in most dictionaries.[120] The Michigan Legislature has, however, enacted one Michigan statute, the Michigan trailways act,[121] which defines "trailway" in part as a "land corridor that features a broad trail capable of accommodating a variety of public recreational uses."[122] The Michigan Supreme Court determined that it was appropriate to read the Trailways Act *in pari material*[123] with the GTLA for the purpose of defining the word "trailways" and that the Little Manistee Trail met this definition because it was a "land corridor that features a broad trail capable

107 475 Mich. at 89–90, 715 N.W.2d at 284–285.

108 475 Mich. at 89–90, 715 N.W.2d at 284–285.

109 435 Mich. 307, 458 N.W.2d 619 (1990).

110 Justice Marilyn Kelly wrote the dissent in Grimes, which was joined by Justice Cavanuagh.

111 475 Mich. at 94–95, 715 N.W.2d at 287.

112 475 Mich. at 85, 715 N.W.2d at 282.

113 490 Mich. 198, 805 N.W.2d 399 (2011).

114 490 Mich. at 201–202, 805 N.W2d at 401.

115 490 Mich. at 209, 805 N.W.2d at 405.

116 490 Mich. at 201, 202, 805 N.W2d at 401, 402.

117 490 Mich. at 201–202, 805 N.W2d at 401.

118 490 Mich. at 203, 805 N.W2d at 402.

119 490 Mich. at 209, 805 N.W.2d at 405.

120 490 Mich. at 210 and n. 4, 805 N.W.2d at 406 and n. 4.

121 Mich. Comp. Laws § 324.72101 et seq.

122 490 Mich. at 211, 805 N.W.2d at 406 (citing a definition found at Mich. Comp. Laws § 324.72101(k)).

123 *In pari material* is a doctrine that statutes covering the same subject matter should be read together. 490 Mich. at 206, 805 N.W.2d at 404.

of accommodating a variety of public recreational uses."[124]

The Michigan Supreme Court rejected the plaintiff's contention, raised for the first time in the Michigan Supreme Court, that the Little Manistee was a "road", not a "trailway".[125] Like "trailway", the GTLA does not define "road". [126] Unlike "trailway", however, the word "road" has a common and well understood meaning, including a dictionary definition of being "a level or paved surface, made for traveling by motor vehicle." [127] The undisputed evidence before the Supreme Court was that "the primary purpose and use [of the Little Manistee Trail] is for recreational vehicles." [128] In fact, the plaintiff was using the Little Manistee Trail for recreational purposes when she was injured. [129] Therefore, the Supreme Court concluded that the Little Manistee Trail did not meet this common definition of a road.[130]

Moreover, finding that the Little Manistee Trail was a road would have turned almost every improvement mentioned in the highway exception, including a highway, street, bridge, crosswalk and culvert, into a road. [131] But, like "bridges, sidewalks . . . . crosswalks, and culverts", a "trailway" only meets the GTLA definition of a "highway" if it is "on the highway." [132] As a result, the highway exception only applies to a subset of trailways.[133] Using the dissent's definition, however, all trailways would be roads and therefore covered by the highway exception. [134] Therefore, the Michigan Supreme Court also rejected this dissent's reasoning because it would turn the phrase "trailway" into mere surplusage.[135]

Determining if the government should be immune from liability, and the circumstances under which the governmental should be immune, are questions of public policy. There is not a scientific or technical method that can establish if governmental immunity should exist or what its scope should be. Instead, answering these two questions depends upon assessing whether or not society as a whole should bear the burden of paying for certain injuries or damages. Societal opinions on this issue have changed over time and will change again in the future. As a result, it is very rational for courts to defer to the legislature on the proper scope of governmental immunity.

The disputes that have recently been resolved by the Michigan Supreme Court regarding the application of the GTLA have arisen because of the absence of definitions in the GTLA in general and the highway exception in particular. Proponents of textualism suggest that courts consistently applying textualism will lead to legislatures drafting statutes more carefully and parties drafting contracts more clearly. Even if this method does not lead to this result, *Grimes* and *Duffy* provide examples of how a court can sift through complicated and somewhat unclear language to a principled result.

V. Contractual Interpretation

Another type of dispute that involves the interpretation of a text is written, contractual agreements. The application of the language of an insurance policy is a common contractual dispute that has appeared before the Michigan Supreme Court.[136] One recent controversial decision was

124 490 Mich. at 211–212, 805 N.W.2d at 406–407.

125 490 Mich. at 217, 805 N.W.2d at 410.

126 490 Mich. at 213, 805 N.W.2d at 407.

127 490 Mich. at 213, 805 N.W.2d at 407.

128 490 Mich. at 214, 805 N.W.2d at 408.

129 490 Mich. at 214 n. 6, 805 N.W.2d at 408 n. 6.

130 490 Mich. at 214, 805 N.W.2d at 408.

131 490 Mich. at 214 n. 8, 805 N.W.2d at 408 n. 8.

132 490 Mich. at 217, 805 N.W.2d at 410.

133 490 Mich. at 217, 805 N.W.2d at 409–410.

134 490 Mich. at 216, 805 N.W.2d at 409.

135 490 Mich. at 216, 805 N.W.2d at 409.

136 One type of dispute that has not appeared before the Michigan Supreme Court over the last twelve years is a dispute involving the sale of goods, which would be governed by the Uniform Commercial Code (UCC). The Michigan Supreme Court has decided only a few cases that even mention the UCC over the last twelve years, and none apply the UCC rules for interpreting agreements. The relatively infrequent reported decisions involving interpretation of contracts under the UCC cases seems to be a nationwide trend and may be the result

Rory v. Continental Insurance Company,[137] which considered two issues. First, are insurance contracts subject to the same rules of interpretation as other contracts?[138] Second, under what circumstances may a court decide not to enforce unambiguous[139] terms in a contract?[140] The Michigan Supreme Court resolved these questions in a narrow four to three decision, which was written by Justice Young and joined by Justices Taylor, Corrigan, and Markamn.

In *Rory*, the plaintiffs were involved in an automobile accident on May 15, 1998.[141] They filed a breach of contract claim for first-party no-fault insurance benefits[142] against Continental more than one year later, in September 1999.[143] They also filed a third-party[144] suit against the driver of the other vehicle, Charlene Haynes.[145] Sometime after the lawsuit against Ms. Haynes was filed, the plaintiffs learned that she was not insured.[146] Thereupon, on March 14, 2000, the plaintiffs submitted a claim to Continental for uninsured motorist benefits (UM).[147] Continental denied the claim for UM benefits because the insurance policy contained a contractual limitations period of one year after the accident for making UM claims.[148] In August 2000, the plaintiffs filed suit. The Michigan Court of Appeals found that this one year period of limitations was not enforceable because it was unreasonable and affirmed the trial court's refusal to dismiss this lawsuit.[149]

Plaintiffs' primary argument in the Michigan Supreme Court was that the Court of Appeals correctly held that the one year period should not be enforced because it was not reasonable.[150] Michigan has no-fault automobile insurance,[151] and many of the provisions of no-fault insurance coverage are set by statute.[152] UM coverage, however, is not mandatory under Michigan's no–fault scheme.[153] As a result, this type of insurance coverage is "purely contractual," and the rights and responsibilities of the parties "are construed without reference to the no–fault act."[154] Therefore, the Supreme Court followed the "fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*."[155] *Rory* recognized that a court "undermines

of the widespread use of arbitration provisions in commercial contracts.

137 473 Mich. 457, 703 N.W.2d 23 (2005).

138 473 Mich. at 460, 703 N.W.2d at 26.

139 In *Klapp v. United Insurance Group Agency, Inc.*, 468 Mich. 459, 467, 663 N.W.2d 447, 453 (2003), the Michigan Supreme Court explained that a contract is ambiguous "[i]f two provisions of the same contract irreconcilably conflict with each other" and warned that "courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity" as "contracts must be 'construed so as to give effect to every phrase as far as practicable.'"

140 473 Mich. at 460, 703 N.W.2d at 26.

141 473 Mich. at 461, 703 N.W.2d at 27.

142 Under Michigan no–fault law, persons injured in an automobile accident is compensated for personal injury protection benefits from their own automobile insurance. Mich. Comp. Laws § 500.3105. Actions for recovery of these first–party benefits are subject to a one year statute of limitations. Mich. Comp. Laws § 500.3145.

143 473 Mich. at 462, 703 N.W.2d at 27.

144 Although Michigan no–fault law generally abolishes all tort liability arising out of automobile accidents, a limited cause of action remains against the driver responsible for the accident. Mich. Comp. Laws § 500.3135. There is a three year statute of limitations for all actions involving personal injuries, including third–party claims. Mich. Comp. Laws § 600.5805(10).

145 473 Mich. at 462, 703 N.W.2d at 27.

146 473 Mich. at 462, 703 N.W.2d at 27.

147 If the person responsible for the accident is not insured, then an injured person can recover the third–party benefits from his own insurer if he has purchased UM coverage.

148 473 Mich. at 462, 703 N.W.2d at 27.

149 473 Mich. at 463, 703 N.W.2d at 27. The Court of Appeals decision is reported at 262 Mich. App. 679, 687 N.W.2d 301 (2004).

150 473 Mich. at 465, 703 N.W.2d at 29.

151 Mich. Comp. Laws § 500.3101 et seq.

152 For example, an insurer must pay for reasonable costs of medical care, wage loss and certain household services. Mich. Comp. Laws § 500.3107(1).

153 473 Mich. at 465–466, 703 N.W.2d at 29.

154 473 Mich. at 465–466, 703 N.W.2d at 29.

155 473 Mich. at 468, 703 N.W.2d at 30.

the parties' freedom of contract" by "arbograt[ing] unambiguous contractual provisions based upon its own independent assessment of 'reasonableness'. . . ."[156] If the contractual language is unambiguous, *Rory* held that Michigan courts should enforce it "unless the provision would violate law or public policy."[157]

To determine whether the one year period of limitations was enforceable, *Rory* considered both traditional contract defenses and public policy. "Reasonableness" is not one of the traditional contract defenses.[158] *Rory* recognized the risk that judge can easily equate their own policy preferences with actual public policy.[159] Consequently, *Rory* affirmed that only public "policies that, in fact, have been adopted by the public through our various legislative processes, and are reflected in our state and federal constitutions, our statutes and the common law" suffice to bar enforcement of an unambiguous contract on public policy grounds.[160] After reviewing the applicable Michigan statutes and precedent, *Rory* found that periods of limitations shortened by contract have generally been enforceable absent estoppel or waiver,[161] two traditional defenses to enforcing a contract. Therefore, *Rory* reversed the Court of Appeals and remanded the case to the trial court for entry of an order dismissing the claims.[162]

In the 2012 term, the Michigan Supreme Court applied *Rory* to resolve *DeFrain v. State Farm Mutual Automobile Insurance Company*,[163] another case involving no-fault automobile insurance contract. In *DeFrain,* the State Farm policy specifically required the policy holder to report a hit and run accident "to the police within 24 hours and to [State Farm] within 30 days" as a condition precedent to coverage.[164] By a four to three decision, *DeFrain* held that the failure of a plaintiff to comply with a 30-day deadline for notifying State Farm about a hit-and-run automobile accident barred the plaintiff from pursuing uninsured motorist (UM) coverage.[165] This decision was written by Justice Zahra and joined by Justices Young, Markman, and Mary Beth Kelly. In interpreting this language, the Supreme Court again noted that because UM coverage was optional, not statutorily required, the policy language alone controlled.[166] *DeFrain* also found that the specific 30 day notice period for hit–and–run accidents controlled the decision instead of the more general requirement in the policy that an insured had to provide notice "as soon as reasonably possible."[167] This result was based upon the well known rule that a specific provisions controls over a more general provision.[168]

DeFrain then dealt with several challenges to the enforcement of the 30 day limit as written. Following *Rory*, the Michigan Supreme Court determined that the provision did not violate law or public policy, as plaintiff contended.[169] *DeFrain* confirmed that only policies reflected in the state or federal constitution, statutes and case law, not personal predilections of the deciding court set public policy.[170] After a careful examination, *DeFrain* found that the 30 day deadline did not violate any of these sources of established public policy.[171]

Another challenge to the enforcement of the clear and unambiguous language was the contention that State Farm had not shown that the notice after the 30 day period had caused it prejudice.[172] Lack of

156 473 Mich. at 469, 703 N.W.2d at 30.

157 473 Mich. at 470, 703 N.W.2d at 31.

158 473 Mich. at 470 n. 23, 703 N.W.2d at 31, n. 23 (listing duress, waiver, estoppel, fraud and unconscionability as examples of these traditional defenses to the enforcement of a contract).

159 473 Mich. at 470–471, 703 N.W.2d at 32.

160 473 Mich. at 471, 703 N.W.2d at 32.

161 473 Mich. at 471–473, 703 N.W.2d at 32–33.

162 473 Mich. at 491, 703 N.W.2d at 43.

163 491 Mich. 359, 817 N.W.2d 504 (2012).

164 491 Mich. at 363, 817 N.W.2d at 507 (alterations in original).

165 491 Mich. at 362, 817 N.W.2d at 506.

166 491 Mich. at 367, 817 N.W.2d at 509.

167 491 Mich. at 367, n.22, 817 N.W.2d at 509, n. 22.

168 491 Mich. at 367, n.22, 817 N.W.2d at 509, n. 22.

169 491 Mich. at 371–373, 817 N.W.2d at 511–513.

170 491 Mich. at 372–373, 817 N.W.2d at 512.

171 491 Mich. at 372–374, 817 N.W.2d at 512–513.

172 491 Mich. at 371–372, 817 N.W.2d at 511–512.

prejudice from not complying with an unambiguous contractual provision is not one of the traditional defenses to a breach of contact action.[173] This argument was based upon a prior Michigan Supreme Court decision, *Koski v. Allstate*,[174] which held that an "insurer . . . must show actual prejudice" to enforce a condition precedent to insurance coverage. The Court of Appeals had relied upon *Koski* to excuse the failure of the plaintiff to comply with the 30 day deadline for providing notice.[175]

DeFrain, however, recognized that the critical language in *Koski* was different from the critical language in *DeFrain*. In *Koski*, the policy language did not impose a specific deadline like the 30 day deadline in *DeFrain*. Instead, the *Koski* policyholder agreed to "'immediately forward [to the insurer] any legal papers' related to the accident."[176] *Koski* followed precedent finding that an insurer must demonstrate prejudice if a policyholder did not provide notice to the insurer "within a reasonable time"[177] *Koski* then held that the policyholder's late notice had indeed caused prejudice to the insurer and reversed the Court of Appeal decision holding that Allstate had not suffered prejudice and therefore could not enforce this condition precedent.[178]

Determining whether an insured has responded "immediately or with a reasonable time" is different from determining if an insured had provided notice within 30 days and logically requires evaluation of factors such as the prejudice to the insurer. Because the policy in *DeFrain* contained a specific deadline, a similar analysis was not required.[179] Therefore, *DeFrain* reversed the decisions by the lower courts and found that State Farm had properly denied the claim because the insured had not provided notice within 30 days, regardless of whether the late notice caused prejudice.[180]

The *DeFrain* dissent[181] used a different method of interpretation and reached a significantly different conclusion. Instead of focusing purely upon the language, the dissent looked at the purpose that it believed was behind the language.[182] Finding that the purpose was to prevent prejudice, the dissent held that State Farm's failure to prove that it had suffered prejudice preventing it from enforcing the clear and unambiguous 30 day deadline. The dissent also suggests that not requiring insurance companies to prove prejudice will benefit insurance companies at the expense of policy holders.[183]

UM coverage clearly provides a benefit to one category of persons injured in automobile accidents. In the case of hit-and-run accidents, UM coverage applies because no one can determine if the driver who "ran" actually has insurance. There is, however, no legal requirement for no-fault insurers to provide the potential benefit of UM coverage, either in the case of hit-and-run accidents or otherwise. While it is known that State Farm was willing to provide UM coverage as long as policyholders complied with the 30 day deadline for reporting hit-and-run claims, it is not known whether it would be willing to do so without such a deadline. There are clearly rational reasons for having a short deadline as every day that passes makes it less likely that the hit-an-run driver will be found. Therefore, one possible alternative to offering UM coverage for hit-and-run accidents as long as the policyholder has reported the accident within 30 days is not offering UM coverage at all.

The dissent assumes that fixed deadlines only provide a benefit to insurance companies, but the majority saw a benefit for policy holders if they will know that their claim will be honored if it is submitted by fixed and clearly stated deadline. First,

173 Rory v. Continental Insurance Company, 473 Mich. 457, 470 n. 23, 703 N.W.2d 23, 31, n. 23 (2005) (listing duress, waiver, estoppel, fraud and unconscionability as examples of traditional defenses to the enforcement of a contract).

174 456 Mich. 439, 444 N.W.2d 636 (1998).

175 491 Mich. at 374, 817 N.W.2d at 513.

176 491 Mich. at 375, 817 N.W.2d at 513.

177 456 Mich. at 444, 572 N.W.2d at 639.

178 456 Mich. at 447–448, 572 N.W.2d at 640.

179 491 Mich. at 375, 817 N.W.2d at 513–512.

180 491 Mich. at 376, 817 N.W.2d at 514.

181 The *DeFrain* dissent was written by Justice Marilyn Kelly and joined by Justices Hathaway and Cavanaugh.

182 491 Mich. at 378–379, 817 N.W.2d at 515–516.

183 491 Mich. at 379–380, 817 N.W.2d at 516.

the fixed deadlines promote swift compliance by that deadline, which may lead to more hit-and-run drivers being found. Second, if the alternative to a 30 day deadline is notice "as soon as reasonable" or notice "before prejudice occurs to the insurance company," there is no certainty that policyholders will benefit from the alternative notice provisions. In fact, such vague language would mean that policyholders could never be sure that their notice was soon enough to prevent prejudice. An insurance company could argue that even a short delay causes an insurance company the prejudice of not being able to find the driver who caused the accident. Moreover, there is rarely a dispute over whether a party has complied with a fixed deadline, but uncertain deadlines are likely to create more factual disputes. Since insurance companies have far more resources than the average policy holders to litigate such factual questions, alternative policy provisions may harm policyholders who are diligent enough to comply with established deadlines.

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