

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Murphy, P.J. and Sawyer and Bandstra, JJ.

CATHERINE WILCOX, individually and
as next friend of ISAAC WILCOX, a minor,

Plaintiffs-Appellants,

S Ct No 138602

and

Ct App No 290515

SUNRISE HOME HEALTH SERVICES, INC.,

Kent Cir Ct No 08-010129-NF

Intervening Plaintiff,

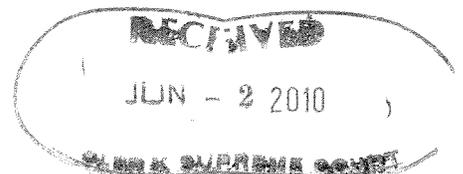
vs.

STATE FARM MUTUAL AUTOMOBILE
MUTUAL INSURANCE COMPANY

Defendant-Appellee.

**AMICUS CURIAE BRIEF OF
JOHN A. BRADEN**

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**AMICUS CURIAE BRIEF OF
JOHN A. BRADEN**

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STATEMENT OF QUESTIONS PRESENTED

I. SHOULD *GRIFFITH V STATE FARM*, 472 MICH 521 (2005) BE OVERRULED?

Amicus Curiae John A. Braden says “yes.”

II. DOES THE NO-FAULT ACT AUTHORIZE APPORTIONING BENEFITS BETWEEN INJURY AND NON-INJURY CAUSES?

Amicus Curiae John A. Braden says “no.”

STATEMENT OF FACTS

This case is a claim for no-fault benefits, consisting of housing expenses, modifications and accommodations for the disabled insured. The trial court granted partial summary disposition, and the Plaintiff sought leave to appeal. The court of appeals summarily reversed and remanded to apply, inter alia, *Griffith v State Farm Mutual Auto Ins Co, supra.* Ct App no 290515 (July 1, 2009).

The Supreme Court has granted leave, directing briefing of the issue of whether *Griffith* was correctly decided.

DISCUSSION

I. *GRIFFITH* CONTRADICTS ESTABLISHED RULES OF CONSTRUCTION

STANDARD OF REVIEW: Whether a decision comports with law is a legal question, reviewable de novo.

Griffith v State Farm Mutual Automobile Ins Co, supra, was a case in which a no-fault insured who suffered brain damage in an automobile accident sought benefits for, inter alia, groceries.

The relevant section of the No-Fault Act (NFA) states,

...personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. MCL 500.3107.

In a decision signed by justices Taylor, Young, Markman and Corrigan (henceforth referred to as the *Griffith* majority), the court conceded that "care" includes whatever is necessary to sustain a person, including food (at 472 Mich 534). Nevertheless, the *Griffith* majority denied that food was an allowable expense under the NFA, unless the need for it was caused by the automobile injury.

A. "FOR AN INJURED PERSON'S CARE"

Construing "for an injured person's care" in IC² 3107(a) as a limitation on the type of care that is recoverable, the *Griffith* majority concluded that care that would be as necessary for an uninjured person is not covered (at 472 Mich 534). Although that may be *one* way to construe

“for an injured person’s care,” it is just as reasonable to conclude that the quoted phrase was meant merely to identify the *beneficiary* of the care (ruling out care of the insured’s dependents, for example), and not to limit the *type* of care that is recoverable.

The mere existence of such competing constructions shows that the statute is ambiguous. Where a statute is ambiguous, rules of statutory construction kick in. The most salient such rule is that statutes should be construed consistent with their purposes. *Geraldine v Miller*, 322 Mich 85, 96 (1948). Where a statute’s purpose is remedial (as is manifestly the case with the NFA), ambiguities in remedial portions of such statutes should be resolved to further rather than to narrow the remedy. *Shannon v People*, 5 Mich 36, 48 (1858). Application of that constructional rule requires giving “for an injured person’s care” the more modest effect of defining whose care is covered rather than reading it more expansively as a limitation on the type of care available to an injured person.

B. EFFECT OF IC 3015

Ranging further afield, the *Griffith* majority cited MCL 500.3105(1):

Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle...

Specifically, the majority construed “for” as “because of” (at 472 Mich 531, n 6) and concluded that the care for which benefits are sought must have been caused by the accidental bodily injury (at 472 Mich 530-531).

However, “because of” is but one of several dictionary definitions of “for.” Other definitions that make sense in the context of the statute are “concerning” (i.e., associated with)

or “in place of” (i.e., in exchange or compensation for). *Webster’s New Collegiate Dictionary* (G.& C. Merriam Co, Springfield, Mass. 1975). These other definitions do not require any causal relationship. Rather, if the Legislature says that given benefits are payable when a person suffers bodily injury in an automobile accident, then such benefits are “associated with” or “in compensation for” the injury, and are thus “for accidental bodily injury” as used in IC 3105(1). Here again, the remedial construction rule requires resolving this ambiguity by adopting the less restrictive definition of “for” rather than the restrictive definition chosen by the *Griffith* majority.

More fundamentally, IC 3105 is an introductory section which describes *when* a right to benefits attach, and does not purport to describe of what those benefits consist. Rather, it is IC 3107 which defines what personal protection benefits consist of. Consequently, it ignores the structure of the Act and the context of each section to use IC 3105 to limit the *type* of PIP benefits available. This in turn violates the rule that statutory language should be construed in light of the context in which it appears, a rule espoused by the *Griffith* majority in both this and other cases,³ yet ignored in this instance.

C. PURPOSE OF ACT

Last (and least), the *Griffith* majority noted that construing the NFA to cover care required of even uninjured people would transform the NFA into a general welfare statute, which could not have been the Legislature’s intent (at 472 Mich 536, n 13). However, these same justices

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Timmis & Co v Guardian Alarm Co, 468 Mich 416, 421 (2003); *Griffith* at 472 Mich 533-534.

have held that one must derive the legislature’s intent from the language used. *People v Schaefer*, 473 Mich 418, 430 (2005);⁴ *Omdahl v West Iron County Bd of Ed*, 478 Mich 423, 427 (2007); *Kreiner v Fischer*, 471 Mich 109, 129 (2004). If the legislature chooses a word like “care” which (it must know) includes food, the inevitable conclusion is that the purpose of the statute was to mandate compensation for food. Any other conclusion must ascribe some secret intention to the legislature, and give greater weight to that *secret* intent than to the intent *manifest* in the statute itself.

This presumed intent theory seems custom made to facilitate judicial legislation: if a judge wants a statute to do X, all he has to say is “although the literal language of the statute says it does Y, that literal language must give way before the statute’s overall intent, which is X.” Once one opens the door to presumed or secret intent, statutes will start reflecting the will of the courts rather than the will of the legislature. And indeed, returning to *Griffith*, one is left with the conviction that the majority was less concerned with whether *the legislature* thought food should be compensable than with whether *they personally* thought food should be compensable.

D. CONCLUSION

In short, the *Griffith* majority

- applied the opposite of the remedial construction rule, by resolving ambiguities in a

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Schaefer is especially ironic, in that the *Griffith* majority there cited the unexpressed intent rule to refuse to infer a causal requirement that would have *hurt* the corporate party (i.e., the government), even as it *ignored* the unexpressed intent rule in *Griffith* and inferred a causal requirement to *avoid* hurting the corporate party.

remedial statute contrary to the remedy;

- in using IC 3105 to define and limit what is included in PIP benefits (when in fact IC 3107 fills that role), ignored its own previously stated rule that the context of a statute must be taken into account;
- in relying on presumed intent of the Legislature not to provide general welfare through the NFA, ignored its own previously stated rule that legislative intent cannot be presumed, but must be derived from the language of the statute.

The failure of the *Griffith* majority to adhere to established rules of statutory construction is reason enough not to grant it any deference in the case at bar.

E. “ACCOMMODATIONS”

Although the case at bar involves “accommodations” rather than “care,” what we have said about *Griffith*’s misconstruction applies equally to that clause:

1. The dictionary definition of “accommodations” includes “lodging.”
 2. Both the plain language, and a remedial construction, of IC 3107(a) includes the housing Plaintiff seeks in the case at bar.
 3. Attempts to limit compensable housing are illegitimate, because
- based on pro-insurer (rather than remedial) constructions of “for an injured person’s care, recovery, or rehabilitation” in 3107(a), which a) assumes that “for” means “because of” and b) assumes that the clause limits the *nature* of benefits, when a remedial construction would read the clause as merely describing the *recipient* of the benefits;
 - based on pro-insurer (rather than remedial) constructions of “benefits for accidental bodily

injury” in 3105(1), which a) again assumes that “for” means “because of” and b) lifts 3015(1) out of context, by using it to delineate PIP benefits when in fact that purpose is served by 3107(a).

- based on an unexpressed, secret but presumed legislative intent to provide only specific welfare benefits rather than general welfare benefits to insureds covered by no-fault insurance.

II. *GRIFFITH* IS THE PRODUCT OF BIASED JUDGES⁵

STANDARD OF REVIEW: Whether a decision is impermissibly biased is a legal question, reviewable de novo. *Renny v Port Huron Hospital*, 427 Mich 415, 418 (1986).

A. INTRODUCTION

Had the *Griffith* majority based its decision solely on rejection of the remedial construction rule, we might chalk the decision up to philosophical differences. The *Griffith* majority has occasionally admitted that it does not believe in that rule of construction. *Rakestraw v General Dynamic Land Systems*, 469 Mich 220, 233-234 (2003).

The *Griffith* majority’s failure to adhere to *its own* previously stated rules of construction is another matter. Such inconsistencies bespeak a judge too lackadaisical or intellectually challenged to realize he is being inconsistent on the one hand; or, on the other hand, a judge who is deliberately being inconsistent. If the judge’s inconsistencies are random, and affect

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Every judge takes an oath to uphold the Constitution, which would be violated by applying a decision that violates the Constitution. Consequently, the judge’s oath requires him or her to refuse to apply an unconstitutional decision, whether or not the parties invoke the Constitution.

litigants on both sides of the aisle, then we are dealing with the first type of judge. However, when the inconsistencies fall into a pattern, we can infer that the inconsistencies are deliberate.⁶ When the pattern of inconsistency rarely varies, the inference that the judge is being animated by bias, rather than by objective application of legal rules, becomes irresistible.

A review of application of statutory constructions rules by Michigan Supreme Court justices from July 1, 1999 through the *Griffith* decision (on June 14, 2005) reveals that, for the *Griffith* majority, a) there has indeed been a pattern of departures from statutory construction rules, and b) that pattern proves bias in favor of corporate parties.

B. STATISTICS PROVE THAT THE *GRIFFITH* MAJORITY WAS BIASED IN FAVOR OF CORPORATIONS

1. Introduction

From July 1, 1999 through June 14, 2005, Michigan's Supreme Court decided 73 a) personal injury cases⁷ b) involving statutory construction and c) which pitted an injured individual against a corporation (public or private). As we shall see, this has provided enough data to reveal a pattern of decision-making by the *Griffith* majority.

Before presenting the data, Amicus should explain why this class of cases was selected for study. Since *common-law* rules are based on principles and public policies that often conflict, a

⁶

This distinction was drawn in "The Week" at p. 12 of *National Review*, Vol LV, No. 19 (Oct. 13, 2003), where *NR* noted that, if misstatements are mere mistakes, we would expect them to fall on either side of an issue 50% of the time; whereas if they go one way 99% of the time, they are not mistakes, but deliberate bias.

⁷

Construed broadly to include employment discrimination and other personal wrongs.

decision either way can usually be justified, depending on the weight given to the competing policies. It is therefore often impossible to tell whether the result of a given common-law case was due to bias against a given class of litigants, versus adherence to particular legal principles. Consequently, common-law cases are poor vehicles for investigating judicial bias against particular parties.

By contrast, *statutory construction* is governed by set rules,⁸ which judges are bound to follow whatever their personal judicial philosophy or view of public policy. Moreover, the definiteness of constructional rules makes it possible to determine, in a largely objective manner, whether such rules are being applied in a given case.

Within the area of statutory construction, Amicus has limited the field further to *personal injury* cases pitting the *injured individual* against a *corporation*. This is done because the question we are investigating is bias against one or the other party in *personal injury* cases, and how a justice construes, say, a probate statute would tell us nothing about such bias. Similarly, how a judge construes a statute in a case that pits an individual against an individual, or a corporation against another corporation, tells us nothing about possible bias when the parties belong to different categories.

8

Some specified in the statutes themselves. See, e.g., MCL 8.3a: “All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”

2. Relevant Rules of Construction

Although there are dozens of rules of statutory construction, some are not useful for evaluating judicial bias. For instance, *legislative acquiescence* is such a weak argument in support of a given construction that judges might legitimately refuse to apply that rule without being guilty of bias. Similarly, that a judge assails the “reasonable construction” rule (whereby the plain language of a statute might be ignored to avoid an unreasonable result) is not of itself evidence of bias for or against a particular class of litigants.

By contrast, there is a set of longstanding constructional rules that have been endorsed by practically all members of the court since 1999. If a judge who has gone on record in support of such rules nevertheless fails to apply them in given cases, that is legitimate evidence of bias. Consequently, this study looks at rulings concerning the following rules of statutory construction. To save space, in the table of cases (Table A1) the following paragraph numbers are used to identify the rules.

1. The first step in construing any statute is to ask whether the language of the statute is “plain” or ambiguous. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002); *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382, 387 (2000).

2. If the language is plain, one need only apply it, and no construction is needed. MCL 8.3a. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402 (2000). In particular,

a) The dictionary is the usual source of plain or common meaning. *Robinson v Detroit*, 462 Mich 439, 456, n 13 (2000).

b) Limitations may not be recognized that are not expressed in the statute. *Russell v*

Whirlpool Financial Corp, 461 Mich 579 (2000).

c) The plain meaning will be applied even if the result is considered absurd, unwise or unreasonable. *DiBenedetto v West Shore Hospital*, *supra* at 461 Mich 402; *Perez v Keeler Brass Co*, 461 Mich 602 (2000).

d) The plain meaning trumps judicial constructions. *Hanson v Mecosta CRC*, 465 Mich 492, 502-503 (2002); *Pobutski v Allen Park*, 465 Mich 675 (2002).

e) All parts of a statute must be given meaning, and none treated as mere surplusage. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758-759 (2002).

f) The plain language controls notwithstanding a claimed public policy to the contrary. *Calovecchi v MSP*, 461 Mich 616, 624 (2000).

3. If the language is ambiguous, one must apply rules of construction:

a) Terms having established meaning at common law (a.k.a., legal terms of art) are to be given the meaning thus acquired. MCL 8.3a; *People v Covalesky*, 217 Mich 90, 100 (1921).

b) Remedial statutes are construed to further their remedial purpose. *Shannon v People*, *supra* at 5 Mich 48; *Deziel v Difco Laboratories*, 403 Mich 1, 33-35 (1978).

c) Penal provisions are to be narrowly construed. *Gilbert v Kennedy*, 22 Mich 5, 19 (1870).

d) Statutes in derogation of common-law remedies are to be narrowly construed. *Rusinek v Schultz*; *Snyder & Steele Lumber Co*, 411 Mich 502, 507 (1981).

3. Summary of Case Results

Analysis of each case in Table A1 of the appendix is summarized next:

| JUSTICE | CONSTRUCTIONAL RULES | | | | 6 Total | 7 Vote for individuals ⁹ | 8 Corpora- tion wins when rules favor it ¹⁰ | 9 Individual wins when rules favor him ¹¹ |
|---------------|------------------------|------------------------|------------------------|------------------------|------------|---|--|--|
| | APPLIED | | IGNORED | | | | | |
| | 2 To P's benefit | 3 To D's benefit | 4 To D's benefit | 5 To P's benefit | | | | |
| IF ADHERED TO | 55 | 17 | 0 | 0 | 72 | 76% | 100% | 100% |
| CORRIGAN | 14 | 17 | 41 | 0 | 72 | 19% | 100% | 25% |
| YOUNG | 14 | 17 | 40 | 0 | 71 | 20% | 100% | 26% |
| TAYLOR | 15 | 17 | 40 | 0 | 72 | 21% | 100% | 27% |
| MARKMAN | 15 | 15 | 40 | 1 | 71 | 23% | 94% | 27% |
| WEAVER | 16 | 14 | 31 | 1 | 62 | 27% | 93% | 34% |
| CAVANAGH | 32 | 9 | 8 | 7 | 56 | 70% | 56% | 80% |
| KELLY | 42 | 9 | 3 | 8 | 62 | 81% | 53% | 93% |

4. What the analysis shows

1. The *third* column (applying constructional rules to benefit corporation) discloses no bias, since application of constructional rules is what is supposed to occur, even when that causes a corporation to win.

2. What discloses bias is a comparison of the *fourth and fifth* columns: although the first four justices listed (i.e., the *Griffith* majority) have relaxed the rules of statutory construction *40-41 times* in favor of corporations, they have done so for an injured individual's benefit *only once*

⁹

The sum of columns 2 plus 5 divided by column 6.

¹⁰

Column 3 divided by the sum of columns 3 plus 5.

¹¹

Column 2 divided by the sum of columns 2 plus 4.

during the same period.

3. Considering percentages (see seventh column), had the rules of statutory construction been applied in an objective manner, the justices would have voted for the individual 76% of the time.¹² Instead, the *Griffith* majority voted for the individual only 19-23% of the time.

4. Another way of looking at it: Where the rules of construction favor the corporate party, the corporation can expect to win before the *Griffith* majority upwards of 94% of the time (eighth column). However, when rules of construction would compel a decision for an individual, he can expect to win before the *Griffith* majority only 25-27% of the time (last column).

5. Although some might challenge placing a given case in the fourth column, even if the classifications were assumed to be 50% wrong, that would still leave twenty cases in which the rules of construction were ignored to benefit corporations, versus once to benefit individuals.

6. To draw a more familiar analogy,¹³ the votes of the *Griffith* majority are equivalent to an employer advertising for college graduates who 1) hires nearly all the white college graduates who apply, 2) hires only one out of four of the black college grads who apply, and 3) then hires

12

Individuals ought to win statutory construction cases more often than not, if only because most statutes are remedial, hence properly construed in favor of the individual invoking the statutory remedy.

13

In which

- the decision is whom should be hired rather than who should win a lawsuit;
- the purported rule of decision is having a college degree rather than satisfying rules of statutory construction;
- white applicants are substituted for corporate litigants; and
- black applicants are substituted for individual litigants.

a number of whites who lack college degrees (over half of those hired). While the first two facts create a reasonable inference of discrimination, addition of the third fact proves discrimination beyond a reasonable doubt.

7. In short, *the only reasonable inference from those statistics is that the Griffith majority was biased in favor of corporations and against injured individuals.*

5. Public Versus Private Corporations

This 73 cases studied involve both public and private corporations. One might object to this on the grounds that

1. different rules apply to statutes governing public corporations,¹⁴ and/or
2. one biased in favor of a public corporation is not necessarily biased in favor of a private corporation.

To meet these objections, Tables A2 and A3 in the Appendix split the data between public and private corporations. The results are compared in the following table:

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There is indeed a rule applicable to public corporations not applicable to private ones: the rule that exceptions to governmental immunity are narrowly construed. As demonstrated elsewhere, this is a relatively recent invention which contradicts traditional rules of statutory construction. Braden, “(Mis)construing the Governmental Liability Act,” 84 MBJ #7 (July 2005), cached at www.michbar.org/publications (then click on “michigan bar journal,” then “archives,” then “July 2005”). Creating special rules that benefit one class of litigants is about the definition of discrimination.

But even if we conceded the legitimacy of narrowly construing the Governmental Liability Act, this section proves that the corporatist bias of the *Griffith* majority extends beyond cases governed by that rule.

| JUSTICE | Corporation wins when rules favor it | | Individual wins when rules favor him | |
|---------------|--------------------------------------|---------|--------------------------------------|---------|
| | PUBLIC | PRIVATE | PUBLIC | PRIVATE |
| IF ADHERED TO | 100% | 100% | 100% | 100% |
| CORRIGAN | 100% | 100% | 17% | 33% |
| YOUNG | 100% | 100% | 17% | 33% |
| TAYLOR | 100% | 100% | 17% | 37% |
| MARKMAN | 100% | 93% | 17% | 33% |
| WEAVER | 100% | 92% | 27% | 52% |
| CAVANAGH | 83% | 50% | 79% | 90% |
| KELLY | 83% | 36% | 88% | 92% |

This table reveals that the *Griffith* majority's corporatist bias was stronger with respect to public corporations: rules of construction favoring the injured individual were applied less often when the defendant was a public corporation than when the defendant was a private corporation. Although inclusion of public corporations thus pulled down the percentage of times constructional rules were applied to benefit the individual, even if one ignored public corporation cases, the disparity remains large enough to prove corporate bias: The *Griffith* majority applied constructional rules to benefit private corporations upwards of 92% of the time, while applying constructional rules to benefit the individual litigant no more than 37% of the time.

6. Remedial Construction Rule

Those who oppose the remedial construction rule might object to including rulings that fail to apply that rule: rather than evidence of bias, they would argue, such rulings merely represent

good faith opposition to a constructional rule they consider illegitimate.

The foregoing is a dubious argument. The remedial construction rule is simply a corollary of the rule that the legislature's purpose should be effectuated. Those rejecting the remedial construction rule are necessarily saying that the legislature's purpose should *not* be effectuated when that purpose is to create or extend a remedy. Such a viewpoint is inexplicable, except as a manifestation of hostility toward statutory remedies. Why should anyone oppose statutory remedies, if not because they usually aid individuals and hurt corporations? In short, rejection of the remedial construction rule is itself evidence of bias against individuals. It is therefore fair to count rulings that fail to adhere to the remedial construction rule as evidence of bias.

Nevertheless, to obviate objections, Table A4 in the Appendix is an analysis that eliminates all rulings that turn on nonapplication of the remedial construction rule.¹⁵ The remaining cases reveal the following results:

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Cases thus excluded are *Morosini*, *DiBenedetto*, *Hatch*, *Robinson v Detroit*, *Nawrocki*, *Fane*, *Pobutski*, *Hesse*, *Veenstra*, *Stanton*, *deSanchez*, *Brunsell*, *Haynie*, *Maskery*, *Wood v Auto-Owners*, *Schmaltz*, *Peden*, *Corley* and *Jarrad*.

It might be argued that, rather than eliminating those cases, they should be included and counted as cases complying with rules of construction. However, given a decision that resolves an ambiguity against the remedy to the benefit of a corporation, it is fair to ask what constructional rule is being applied: that any ambiguities in a statute should be resolved in favor of the corporate party?

Rulings that violate *other* constructional rules were left in, even though they might *also* violate the remedial construction rule.

| JUSTICE | Corporation wins when rules favor it | Individual wins when rules favor him |
|----------|--------------------------------------|--------------------------------------|
| CORRIGAN | 100% | 37% |
| YOUNG | 100% | 38% |
| TAYLOR | 100% | 40% |
| MARKMAN | 94% | 37% |
| WEAVER | 93% | 45% |
| CAVANAGH | 57% | 83% |
| KELLY | 50% | 90% |

Comparing this to the table summarizing all the cases, we see that elimination of the remedial construction rule does indeed reduce cases where rules of construction were ignored (from 40-41 to 21-22). However, since the remaining cases where constructional rules were ignored still almost all favored the corporate party, elimination of the remedial construction cases still leaves us with convincing evidence of bias in favor of corporate litigants: when constructional rules (omitting the remedial construction rule) favor the corporate party, the *Griffith* majority applied them upwards of 93% of the time. By contrast, when constructional rules (other than the remedial construction rule) favor the individual, the *Griffith* majority applied them at best 40% of the time.

In short, however one carves up the pie, there is corporatist bias in every piece.

C. SPECIFIC CASES PROVE THAT THE *GRIFFITH* MAJORITY WAS BIASED IN FAVOR OF CORPORATIONS

The statutory construction cases disclose, not only *general patterns* of decision-making, but also inconsistent stances on *particular issues*. Such differing treatment of similarly-situated cases

creates a strong inference of bias.

1. The *Griffith* majority engaged in dictionary- and definition-shopping

While emphasizing the importance of dictionary definitions, the *Griffith* majority has been selective about which definitions are used:

In *Daniel v MDOC*, 468 Mich 34 (2003), the *Griffith* majority relied on a *legal* dictionary (to the corporate parties' benefit); which stands in contrast to their using *lay* dictionaries to define even legal terms, when it benefits the corporate party. See, e.g., *Sington v Chrysler Corp*, 467 Mich 144 (2002) (defining "earning capacity").

In *Chandler v Muskegon County*, 467 Mich 315 (2002), the *Griffith* majority quoted a rather tautological dictionary definition (defining "operation" as "the act of operating") while ignoring the more meaningful dictionary definition "exertion of power or influence" (which would have benefitted the injured individual).

In *Rakestraw v General Dynamic Land Systems, supra*, in implying that "injury" excludes pain, the *Griffith* majority quoted a rather vague definition of "injury" ("harm...especially bodily"). They chose not to go further *in the same dictionary*, which would have revealed what the dictionaries almost universally affirm: that "injury" is synonymous with "harm" and "hurt"; that "hurt" expressly includes "bodily or mental pain"; and that all three words encompass more than bodily injury.¹⁶

In *Kreiner v Fischer, supra*, the dictionary definition of "general" was no help to the corporate

¹⁶

An example of "injury" in the same dictionary cited by the *Griffith* majority was "injury to one's pride," while an example of "harm" was harm to "one's reputation."

party, so the *Griffith* majority applied the definition of a *different* word (“generally”) to hold that impairment must be over 50% to constitute an effect on a plaintiff’s “general ability” to lead a normal life.

2. The *Griffith* majority applied inconsistent constructional rules among different cases

In *Rakestraw v General Dynamic Land Systems, supra*, the *Griffith* majority said that whether a statute is liberally construed depends on whether the *particular portion* of a statute is remedial. Yet in *Robinson v Detroit, supra* at 462 Mich 455, the same justices ruled that *exceptions* to governmental immunity (though they are manifestly remedial portions of the Governmental Liability Act) are *narrowly* construed.

In *Hesse v Ashland Oil*, 466 Mich 21 (2002) and *Daniel v MDOC, supra*, the *Griffith* majority assumed that “by reason of” (as used in WDCA 305 and 131(2)) was *unambiguous*, and construed the term *broadly* (to include remote causes and nonderivative claims). Yet, in *Robinson v Detroit, supra* at 462 Mich 445, the same justices held that “resulting from” is *ambiguous*, construing the term *narrowly* to hold that remote causes are *excluded*. This is especially egregious, given that application of the remedial construction rule should have led to conclusions *opposite* those reached by the *Griffith* majority in these cases.

In *Sington v Chrysler Corp, supra*, the *Griffith* majority held that “work” as used in WDCA 301(4) means *all* work. However, in *Sweatt v MDOC*, 468 Mich 172 (2003), Justices Taylor, Markman and Corrigan would hold that “work” as used in WDCA 305 does *not* mean all work. This is particularly egregious, given that applicable rules of construction would have dictated

the *opposite* conclusion in both cases.

In *Scarsella v Pollak*, 461 Mich 547 (2000), the *Griffith* majority held that an *injured individual's* failure to comply with the affidavit of merit requirement rendered his *complaint* lacking same a *nullity* (so that the statute of limitations continued to run). However, the same justices held in *Burton v Reed City Hospital Corp*, 471 Mich 745 (2005) that a *corporate defendant's* noncompliance with the affidavit of merit requirement did *not* render its *answer* ineffective to *preserve* a statute of limitations defense.

Finally, when a statute specifies no remedy for its violation, the *Griffith* majority was willing to amend the statute to specify punishment for an injured individual. *Burton v Reed City Hospital Corp*, *supra* (filing medical suit during a no-sue period was a nullity, requiring dismissal). By contrast, some of the same justices refused to fashion a remedy for statutory violations by *corporate parties*. *Bailey v Oakwood Hospital*, 472 Mich 685 (2005) (Justices Taylor, Corrigan and Young holding that, since the statute requiring employers to notify the Second Injury Fund of injuries to vocationally handicapped workers specifies no remedy, noncompliance with the statute will not eliminate the SIF's duty to reimburse employers for wage-loss benefits paid to such workers).

D. CONCLUSION

As noted, random inconsistent results might have an innocent (if not flattering) explanation: the judge is too intellectually challenged to remember or too lackadaisical to care whether his decisions are consistent with legal principles. But when the inconsistent results *invariably aid one*

party (in this case, the corporate defendant), the only¹⁷ reasonable inference is that the identity of the parties is influencing the outcome; that different rules of law are being applied, depending on which rule will aid the particular party; that, in short, the law is being manipulated to serve a particular class of litigant.

III. SUCH BIAS RENDERS *GRIFFITH* UNCONSTITUTIONAL

A. *GRIFFITH* VIOLATES DUE PROCESS

The government may not deny people of life, liberty or property without due process of law. 1963 Mich Const Art I, Sec. 17.

“Property” as used in the due process clause includes, not only what the common law considered property, but also rights conferred by statute. *Bundo v Walled Lake*, 395 Mich 679, 692 (1976) (due process applies to renewal of liquor license; “that an interest exists by the grace of government no longer precludes that interest from being treated as a ‘property’ right”). That is why workers compensation proceedings, though concerning purely statutory rights, are subject to due process limitations. *Dation v Ford Motor Co*, 314 Mich 152 (1946) (section of Workers Compensation Act struck down as violative of due process). Thus, although the rights created by the No-Fault Act are statutory, application of the Act nevertheless must comply with due process.

Under the Michigan Constitution, “a hearing before an impartial decisionmaker is a basic

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The results are too consistently lopsided to be explained by coincidence or by idiosyncrasies of particular cases. Indeed, it beggars the imagination to posit any explanation for these results other than bias.

requirement of due process.” *Crampton v Department of State*, 395 Mich 347, 351 (1975). Similarly, under the due process clause of the 14th Amendment, “petitioner is entitled to a neutral and detached judge.” *Ward v Monroeville*, 409 US 57, 61-62; 34 L Ed 2d 267; 93 S Ct 80 (1972). State Supreme Court justices are not exempt from this requirement. *Aetna Life Ins Co v LaVoie*, 475 US 813, 89 L Ed 2d 823, 106 S Ct 1580 (1986) (state supreme court justice ordered disqualified); *Caperton v Massey Coal Co*, ___ US ____; 173 L Ed 2d 1208; 129 S Ct 2252 (2009) (*Id.*).

Although most cases involving the constitutional right to a neutral decisionmaker have involved direct pecuniary interest, the interest need not be direct nor pecuniary. Rather, mere identification with one party or another is enough to render the decisionmaker unconstitutionally biased. *Crampton v Department of State*, *supra* (license appeal board included partisans for one party); *VanderToorn v Grand Rapids*, 132 Mich App 590 (1984), lv den 424 Mich 885 (1986) (board reviewing termination included one who disliked the employee).

Both statistics and particular rulings disclose that the *Griffith* majority had an affinity for corporate parties. Such bias in favor of one class of litigants cannot be squared with the due process right to an unbiased decisionmaker.

B. GRIFFITH VIOLATES EQUAL PROTECTION

1. Applicability to Privileges

The 14th Amendment to the Federal Constitution, and 1963 Mich Const Art I, Secs. 1 & 2, also guarantee equal protection of the law. In contrast to due process, guarantees of equal protection are not limited to life, liberty or property. Instead, unreasonable distinctions violate equal protection, even if applied with respect to a mere privilege. *Alan v Wayne County*, 388 Mich

210, 216 (1972) (voting rights); *Alexander v Detroit*, 392 Mich 30 (1974) (garbage collection); *Shapiro v Thompson*, 394 US 618, 627 n 6; 22 L Ed 2d 600; 89 S Ct 1322 (1969) (welfare benefits).

It follows that, in applying rules of construction to the No-Fault Act, the government (including the courts) may not engage in invidious discrimination.

2. Discriminatory Enforcement

As the statistics show, from 2000 through *Griffith*, injured individuals pitted against corporations have suffered discriminatory enforcement of the rules of statutory construction: while corporations have had such rules applied to their benefit almost all of the time, injured individuals have had such rules applied to their benefit only one-fourth of the time. Equal protection requires that laws be applied impartially. *Yick Wo v Hopkins*, 118 US 356, 30 L Ed 220, 6 S Ct 1064 (1886) (laundry regulations applied to Chinese only). Plainly, that was not done with respect to construing statutory remedies from 2000 through *Griffith*.

3. Suspect Classifications

Although *Yick Wo* involved a “suspect classification” (race or national origin), a law need not involve suspect classifications to violate equal protection. *Alexander v Detroit, supra* (discrimination among owners of multiple dwellings); *Rinaldi v Yeager*, 384 US 305, 16 L Ed 2d 577, 86 S Ct 1497 (1966) (treating prison inmates differently than other indigent appellants).

4. Motives of Discriminator

It might be wondered why any rational person would favor a corporation over a living human being. It may be that “corporation” is a proxy for “well-to-do individuals,” who are the true objects of the corporatist’s affection. But whether a result of irrational corporation-

worship, or a desire to aid their country-club buddies, the result is the same: the actions of corporatist judges relegate injured individuals to the status of second-class citizens, and are therefore unconstitutional.

For instance, suppose a deputy sheriff, using tie-wearing as a proxy for well-to-do, had a practice of stopping tie-wearing motorists only for egregious violations, while stopping non-tie-wearers for every infraction, including some imaginary ones. Whether the deputy likes ties, or likes what they represent, such discriminatory enforcement by an agent of the executive branch would be unconstitutional. Discriminatory enforcement is no less unconstitutional when it is committed by an agent of the judicial branch.

5. Discrimination against subset of Class

That injured Plaintiffs did not always lose before the *Griffith* majority, but were granted the benefit of statutory construction rules 25% of the time does not change the fact that they were treated differently than corporate litigants. Discrimination need not touch all members of a class to be unconstitutional. *El Souri v DSS*, 429 Mich 203, 211-212 (1987) (different welfare eligibility standards for certain aliens).

Suppose the legislature amended MCL 8.3a by adding, “the foregoing rules shall be applied whenever they benefit corporate litigants. However, when the foregoing rules benefit injured individuals, they shall be applied only if the injured individual wins two successive coin tosses.” Such an amendment would plainly violate equal protection. Yet that is in effect the rule of decision applied by the *Griffith* majority. Such discrimination is no more constitutional when committed by a court rather than by the legislature.

C. STATE PURPOSES

That the *Griffith* majority's biased, discriminatory enforcement of statutory constructional rules violates due process and equal protection is enough to render their decisions unconstitutional, without regard to the governmental interests served by its acts. *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 426; 73 L Ed 2d 868; 102 S Ct 3164 (1982) (uncompensated taking violates constitution "without regard to the public interest that it may serve"); *Stock v Jefferson Twp*, 114 Mich 357, 362 (1897); *Attorney General v Grand Rapids*, 175 Mich 503, 538 (1913); *Park v Detroit Free Press*, 72 Mich 560 (1888) (striking down a statute without addressing the state interests sought to be served by the statute).

There are, to be sure, other cases holding that, in analyzing the constitutionality of a statute, one weighs the interference with constitutional rights against the governmental interests served by the statute. Apart from contradicting the cases cited in the previous paragraph, such cases cannot be squared with the plain language, let alone a liberal construction, of the Constitution. The Bill of Rights is stated in peremptory terms: it says citizens have these rights; it does *not* say that citizens have these rights *unless the government posits a good reason to take them away*. Reading the latter limitation into the Constitution amounts to judicial legislation.

But even cases allowing a public purpose to dilute constitutional rights do not uphold government action where the action does not in fact serve a public purpose, but instead serves the private purpose of benefitting a class that happens to have the government's ear. *Chaddock v Day*, 75 Mich 527, 531-532 (1889) (striking down ordinance that discriminated against nonresident businesses). Thus, laws benefitting only private parties are unconstitutional. *Wayne*

County v Hathcock, 471 Mich 445 (2004) (taking benefitting only private developers not a “public purpose”); *Tolsdorf v Griffith*, 464 Mich 1, 9 (2001) (opening a private road doesn’t serve a public purpose); *Novi v Adell Trust*, 473 Mich 242 (2005) (providing street access to a neighbor is a private purpose).¹⁸ Indeed, since the people delegated powers to the government to serve public purposes, not private ones, government actions that serve only private interests are *ultra vires*; a usurpation of power. *Park v Detroit Free Press*, *supra* at 72 Mich 567 (“It is *not competent* for the Legislature... to authorize any person, natural or artificial, to do wrong to others, without answering fully for the wrong”; emphasis added).¹⁹

There is no public purpose served by the *Griffith* majority’s creation of two sets of statutory construction law, one for corporations, another for individual litigants. Discriminatory enforcement/ rules of decision to benefit a class merely because the *Griffith* majority is sympathetic to that class is misuse of government power to serve a private, not public interest. Perforce, overweening public purposes cannot be used to justify the *Griffith* majority’s violations of due process and equal protection.

D. CONCLUSION

An unconstitutional *statute* is not law, and may not be followed by the courts. Similarly, an

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Although these “taking” cases were construing “public purpose” as used in the taking clause, they are useful precedent in defining what constitutes a public purpose as used in the *ultra vires* doctrine as well.

¹⁹

See also p. 36 of the May 17, 2010 *National Review*, where Matthew J. Franck asserts that laws benefitting only private entities are unconstitutional, because they do not serve a public purpose.

unconstitutional *court decision* is not law, and is not binding under the rule of stare decisis. *Griffith* applied a rule of decision that a) violated due process (because the product of biased judges) and b) violated equal protection (by applying different statutory construction rules, based on the identity of the litigant). Having applied an unconstitutional rule of decision, *Griffith* is entitled to no precedential effect.

It may seem that hauling out the Constitution to oppose *Griffith* is like using a sledge hammer to swat a fly. But, as the study of cases shows, *Griffith* is not an isolated decision, but rather one in a series of decisions rendered in an era when many injured Michigan citizens were kicked when they were down by biased and ultimately lawless decisions. Given that history, merely ignoring the bad precedents is not enough: they need to be demolished and thrown upon the scrap heap of history, where they may join similarly infamous decisions such as *Plessy v Ferguson* and *Dred Scott*.

“What’s mine is mine, what’s yours is negotiable”²⁰ is not a constitutionally valid rule of decision. The Court should so hold.

IV. THE NO-FAULT ACT NOWHERE AUTHORIZES APPORTIONING BENEFITS BETWEEN INJURY AND NON-INJURY CAUSES

STANDARD OF REVIEW: Construction of the No-Fault Act is a legal question, reviewable de novo. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187 (2007).

Even if we pretended that the No-Fault Act requires that allowable expenses be related to

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Which sums up the *Griffith* majority’s rule of decision, with “mine” meaning corporate litigants, and “yours” referring to injured individuals.

the injury and/or automobile accident, that leaves the question of whether a given benefit is properly reduced because *part of it* was not caused by the auto accident.

In common-law tort cases, one apportions damages if there is a reasonable basis for doing so, but not otherwise. *McNabb v Green Real Estate Co*, 62 Mich App 500, 518 (1975), lv den 395 Mich 774 (1975); *Richman v Berkeley*, 84 Mich App 258, 263 (1978), lv den 405 Mich 804 (1979).

But the rule is otherwise where we are dealing with a statutory compensation system. In such cases, it is assumed that, if the Legislature intended to apportion, it would have said so, as it has done on occasion:

Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any wise contributed to by an occupational disease, the compensation payable shall be such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bearing to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number or weekly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interests of the claimant or claimants. 1948 CL 417.8 as amended by 1962 PA 189.²¹

Absent such an apportionment statute, the rule is that full benefits are payable, even if the compensable incident contributed only 1% to the necessity for them. *Kingery v Ford Motor Co*, 116 Mich App 606 (1982) (disability caused by smoking and atmospheric pollutants at work); *Clarkson v Lufkin Rule Co*, 367 Mich 19, 22 (1962) (disability from work-related silicosis and

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repealed by 1980 PA 357, amending 1970 CL 418.431.

non-work-related lung condition); *Hills v Oval Wood Dish Co*, 191 Mich 411, 415 (1916) (venereal disease retarded healing of work-related injury); *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 119, 126 (1979); *Scott v Meridian Automotive Composites*, 2004 WCACO No. 303, 18 MIWCLR 303 (Oct. 19) (wage loss caused by both nonoccupational carpal tunnel syndrome and occupational back); *Ford v Delphi Corp*, 2006 WCACO No. 136 (Dec. 27) (immaterial that a doctor cannot apportion the occupational and nonoccupational causes); *Schooler v Northwest Airlines*, 2009 WCACO No. 178 (Oct. 5) (no authority for apportioning attendant care between that caused by a nonoccupational seizure versus that caused by a work-related fractured vertebra); *LeTourneau v Davidson*, 218 Mich 334, 340 (1922) (disability due to aging and work-related injury). As said in the last case (at 218 Mich 340),

So long as the disability continues, the payment must continue...Any attempt to determine that a part of the disability is due to an injury from which there has not been a recovery and a part to conditions which are incident to old age would be entering upon a field of speculation which we think neither the board nor this court should be at liberty to explore.

One will search the No-Fault Act in vain for any provision (like 1948 CL 417.8) that authorizes apportionment between allowable expenses caused by the auto accident and those not. Since the Legislature knows how to apportion when it wants to, the lack of such a provision proves that no apportionment was intended. Thus, if the auto accident contributes 1% to the need for housing, *all* the housing is an allowable expense.²²

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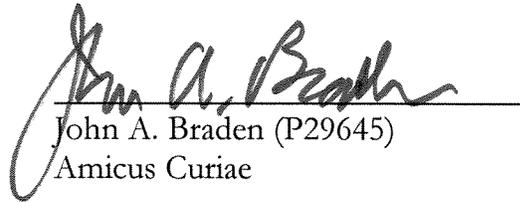
Although it is not our place to question the wisdom of the statute, the Legislature had good reasons to preclude enquiry into the relative causal role of accident and non-accident factors:

1. As the *LeTourneau* quotation states, making the apportionment is always more or less

Griffith itself conceded this point when it said that food received in a hospital is an allowable expense (at 472 Mich 537). Since an uninjured person would need food, this conclusion makes sense only if the *Griffith* majority was saying that, so long as the auto injury creates a need for *part* of a benefit (i.e., special food provided by a hospital), *all* of it is an allowable expense (e.g., even the green beans the injured insured would otherwise be eating outside the hospital).

Respectfully submitted,

DATED: June 1, 2010


John A. Braden (P29645)
Amicus Curiae

speculative.

2. It adds time and expense to litigate the causation question, thus contradicting the No-Fault Act's purpose to provide faster and surer compensation for automobile injuries at less cost than the tort system.

3. Since many benefits are due to multiple causes, awarding only the portion due to the auto accident will result in many partial awards which, in practice, may be as good as no award at all. Take, for instance, an award for a handicap-accessible van to accommodate an insured rendered a paraplegic by an automobile collision. It is no consolation that 10% of the cost of the van will be reimbursed by the no-fault carrier when, because the automobile collision disabled him, the insured cannot afford to pay the other 90%.

4. Finally, the claims not paid (because availability of only partial benefits made it noneconomical to pursue) represent a windfall for insurance companies and a cost shifted onto the taxpayers from those who are supposed to pay for auto accidents.

APPENDIX

TABLE A1: ANALYSIS OF ALL CASES WITHIN STUDY'S PARAMETERS

| CASE | CONSTRUCTIONAL RULES ²³ | | | | Adherence to or departure from rules by the Griffith majority |
|---|------------------------------------|----------------|----------------|----------------|---|
| | APPLIED | | IGNORED | | |
| | To P's benefit | To D's benefit | To D's benefit | To P's benefit | |
| <i>Morosini v Citizens Ins Co</i> , 461 Mich 303 (1999) | K | Ca | TCoY MW | | <i>Ignored Rule 3b</i> ("arising out of" use of an automobile construed narrowly) |
| <i>DiBenedetto v West Shore Hospital</i> , 461 Mich 394 (2000) | | | TCoY MW | CaK | <i>Ignored Rule 1 and 3b</i> (WDCA 301(5) applied, though it gutted stepped-up comp mandated by WDCA 356(1)) |
| <i>Hatch v Grand Haven Twp</i> , 461 Mich 457 (2000) | | | TCoY MW | | <i>Ignored Rule 3b</i> ("sidewalk" narrowly construed to exclude a path used for both bikes and walking) |
| <i>Hardy v Oakland County</i> , 461 Mich 561 (2000) | | TCoY MW CaK | | | <i>Applied Rule 2</i> (threshold requirements apply to governmental auto liability) |
| <i>Omelenchuk v Warren</i> , 461 Mich 567 (2000) | TCoY MW CaK | | | | <i>Unclear what rules of construction were being applied</i> (no-sue period construed to toll S/L for full 182 days) |
| <i>Russell v Whirlpool Financial Corp</i> , 461 Mich 579 (2000) | TCoY MW CaK | | | | <i>Applied Rule 2b</i> (case-made termination defense abolished by failure to mention same in WDCA 301(5)) |
| <i>McJunkin v Cellasto Plastic Co</i> , 461 Mich 590 (2000) | TCoY MW CaK | | | | <i>Applied Rules 2 and 2b</i> (disqualification ends when refusal ends, even if job disappears in meantime) |
| <i>Perez v Keeler Brass Co</i> , 461 Mich 602 (2000) | | TCoY MW CaK | | | <i>Applied Rule 2c</i> (construed WDCA 301(5) to continue disqualification even after offer of favored work is taken off the table) |

²³

T= Taylor; Co= Corrigan; Y= Young; M= Markman; W=Weaver; Ca= Cavanagh; K= Kelly. Not every justice is listed for every case because, even when a justice participated, he or she might not have addressed the constructional issue.

| | | | | | |
|--|-------------------|--|-------------------|--|--|
| <i>Calovecchi v MSP</i> , 461 Mich 616 (2000) | TCoY MW CaK | | | | <i>Applied Rule 1f</i> (construed “arising out of” employment in accord with plain language) |
| <i>Robinson v Detroit</i> , 462 Mich 439 (2000) | CaK | | TCoY MW | | <i>Ignored Rule 3b</i> (construed “resulting from” as excluding remote causes, contrary to <i>Daniel, infra</i>) |
| <i>Mudel v A&P</i> , 462 Mich 691 (2000) and progeny | CaK | | TCoY MW | | <i>Ignored Rule 2e</i> (rendered WDCA 861a(3) a dead letter by eliminating any meaningful judicial review of violations of same) |
| <i>Eversman v Concrete Cutting & Breaking</i> , 463 Mich 86 (2000) | K | | TCoY MW | | <i>Ignored Rules 2b, 3b and 3c</i> (crossing street on way home <i>after</i> visiting bar held within “recreational” exclusion from workers compensation coverage) |
| <i>Nawrocki v Macomb CRC</i> , 463 Mich 143 (2000) | CaK | | TCoY MW | | <i>Ignored Rule 3b</i> (traveled portion of highway construed to exclude signs) |
| <i>Chambers v Trettco, Inc.</i> , 463 Mich 297 (2000) | K | | TCoY MW | | <i>Ignored Rules 2b and 3b</i> (by creating a “tangible employment action” requirement not expressed in Civil Rights statute) |
| <i>DeBrow v Century 21</i> , 463 Mich 534 (2001) | TCo WCa | | | | <i>Consistent with Rule 2b</i> (burden-shifting inapplicable where direct evidence of age discrimination) |
| <i>Haliw v Sterling Heights</i> , 464 Mich 297 (2001) | | | TCoY MW CaK | | <i>Ignored Rules 2b and 2d</i> (applying “natural accumulation” defense stated nowhere in defective highway statute) |
| <i>Brown v Genesee County</i> , 464 Mich 430 (2001) | CaK | | CoYM W | | <i>Ignored Rule 2b</i> (Corrigan and Young by adding requirement that plaintiff be a member of the public; Markman by adding requirement that injury occur in area open to the public) |
| <i>Hazle v Ford Motor Co.</i> , 464 Mich 456 (2001) | | | TCoY MW CaK | | <i>Ignored Rule 2b</i> (by adding burden-shifting requirement expressed nowhere in anti-discrimination statute) |
| <i>Sharp v Lansing</i> , 464 Mich 792 (2002) | | | TCoY MW CaK | | <i>Applied Rule 2</i> (discrimination pursuant to approved affirmative action plan not actionable) |
| <i>Wickens v Oakwood Healthcare System</i> , 465 Mich 53 (2001) | CaK W | | TCoY M | | <i>Ignored Rule 2</i> (no action for lost opportunity, even though over 50% opportunity for improvement dropped to under 50%) |

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| <i>Fane v Detroit Library Comm'n</i> , 465 Mich 68 (2001) | TCoY MW CaK | | TCoY MW CaK | | <i>Ignored Rule 3b</i> (“building” construed to include porch but exclude entrance ramp) |
| <i>Hanson v Mecosta CRC</i> , 465 Mich 492 (2002) | CaK | | TCoY MW | | <i>Ignored Rule 2e</i> (language requiring that highways be kept safe for travel treated as surplusage) |
| <i>Cain v Waste Management</i> , 465 Mich 509 (2002) | | | TCoY MW Ca | | <i>Ignored Rules 2, 2a and 3b</i> (amputee held not to have lost use “of” his leg) |
| <i>Pobutski v Allen Park</i> , 465 Mich 675 (2002) | CaK | | TCoY MW | | <i>Ignored Rule 3b</i> (though recognized as early as 1889, no liability for nuisance under GLA) |
| <i>Robertson v Daimlerchrysler Corp</i> , 465 Mich 732 (2002) | | TCoY MW | | CaK | <i>Applied Rule 2e</i> (worker’s perceptions must be “founded” for a neurosis to be compensable under WDCA 301(2)) |
| <i>Hesse v Ashland Oil</i> , 466 Mich 21 (2002) | K | | TCoY MW | | <i>Ignored Rules 1, 3b and 3c</i> (in workers compensation exclusive remedy provision, “by reason of” worker’s death assumed to “plainly” bar nonderivative claims). |
| <i>Roberts v Mecosta County GH</i> , 466 Mich 57 (2002) | | TCoY MW | | | <i>Applied Rule 2</i> (statute not tolled where malpractice notice did not satisfy statute) |
| <i>Lesner v Liquid Disposal</i> , 466 Mich 95 (2002) | Unclear who benefitted by the ruling | | | | <i>Applied Rule 2b</i> (dependent’s income irrelevant to calculation of death benefits, but decedent’s contributions are) <i>and 2e to exclusion of rule 3b</i> (applying 500-week limit to partial dependents) |
| <i>Veenstra v Washtenaw Country Club</i> , 466 Mich 155 (2002) | CaK | | TCoY MW | | <i>Ignored Rule 3b</i> (“because of... marital status” construed narrowly to exclude discrimination because of adultery) |
| <i>Miller v Mercy Mem Hosp</i> , 466 Mich 196 (2002) | TCoY MW CaK | | | | <i>Applied Rule 2</i> (personal representative tolling provos apply to medmapl S/L) |
| <i>Omelenchuk v Warren</i> , 466 Mich 524 (2002) | | TCoY MW CaK | | | <i>Applied Rule 2</i> (Because of exclusion, city not liable for EMT’s gross negligence) |
| <i>Stanton v Battle Creek</i> , 466 Mich 611 (2002) | K | | TCoY MW Ca | | <i>Ignored Rule 3b</i> (“motor vehicles” for which government is liable construed narrowly) |

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| <i>Cox v Flint Bd of Hosp Mgrs</i> , 467 Mich 1 (2002) | Unclear who benefitted by the ruling | | | <i>Ignored Rule 2b</i> (narrowly construed “general practitioner” to exclude nurses) |
| <i>Sington v Chrysler Corp</i> , 467 Mich 144 (2002) | CaK | | TCoY MW | <i>Ignored Rules 3a and 3b</i> (construed “earning capacity” (a legal term of art) in a narrow manner, and construed “work” as <i>all</i> work, contrary to <i>Sweatt, infra</i>) |
| <i>Mack v Detroit</i> , 467 Mich 186 (2002) | | | TCoY M | <i>Ignored Rule 2e</i> (holding that governmental immunity cannot be waived rendered provision banning waiver by purchase of insurance surplusage) |
| <i>deSanchez v MDMH</i> , 467 Mich 231 (2002) | K | | TCoY MW | <i>Ignored Rule 3b</i> (“dangerous” construed without reference to who will use building) |
| <i>Brunsell v Zeeland</i> , 467 Mich 293 (2002) | | | TCoY MW | <i>Ignored Rule 3b</i> (narrowly construed third-party beneficiary statute) |
| <i>Chandler v Muskegon County</i> , 467 Mich 315 (2002) | K | | TCoY MW Ca | <i>Ignored Rules 2a, 2b, 3a and 3b</i> (limited “operation” of a vehicle (for which government is liable) to driving, contrary to statutory and dictionary definitions that include “exertion of power or influence”) |
| <i>Weakland v Toledo Engineering Co</i> , 467 Mich 344 (2003) | K | | TCoY M | <i>Ignored Rules 1, 2a and 3b</i> (“appliances” compensable under WDCA construed narrowly; dictionary definition ignored) |
| <i>Eggleston v Bio-Medical Applications</i> , 468 Mich 29 (2003) | TCoY MW CaK | | | <i>Applied Rules 2 and 2b</i> (claim filed within two years after issuance of second set of letters of authority is timely) |
| <i>Daniel v MDOC</i> , 468 Mich 34 (2003) | CaK | | TCoY MW | <i>Ignored Rules 2a and 3b</i> (“by reason of” held to include remote causes; contradicts <i>Robinson</i>) |
| <i>Sweatt v MDOC</i> , 468 Mich 172 (2003) | CaK W | | TCoM | <i>Ignored Rules 1, 3b and 3c</i> (contrary to <i>Sington</i> , held that “work” in WDCA 305 means <i>any</i> work) |
| <i>Rednour v Hastings Mut Ins Co</i> , 468 Mich 241 (2003) | | TCoY MW | | <i>Applied Rule 2</i> (one not in or upon a vehicle not an “occupant” under No-Fault Act) |
| <i>Haynie v DSP</i> , 468 Mich 302 (2003) | CaK | | TCoY MW | <i>Ignored Rule 3b</i> (“Sexual” harassment narrowly construed to exclude conduct directed at employee because she was a woman) |

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|--|-------------------|-------------------|-------------------|-----|---|
| <i>Gladych v New Family Homes</i> , 468 Mich 594 (2003) | | TCoY MW CaK | | | <i>Applied Rule 2</i> (mere filing of complaint does not toll statute) |
| <i>Maskery v UM Regents</i> , 468 Mich 609 (2003) | K | | TCoY MW | | <i>Ignored Rule 3b</i> (“public” narrowly construed to exclude residents; “open” narrowly construed to exclude open entrance steps) |
| <i>Anderson v Pine Knob</i> , 469 Mich 20 (2003) | CaK W | | TCoY M | | <i>Ignored Rules 1 and 3d</i> (“necessary danger” for which there is ski slope immunity construed broadly to include a danger that could have been easily eliminated) |
| <i>Slobin v Henry Ford Health Care</i> , 469 Mich 211 (2003) | K | TCoY M Ca | | | <i>Applied Rule 2</i> (records obtained for litigation not for “personal” use) |
| <i>Rakestraw v General Dynamics</i> , 469 Mich 220 (2003) | CaK W | | TCoY M | | <i>Ignored Rules 1, 2b and 3b</i> (invented “medically distinguishable” requirement for WDCA 301(1)) |
| <i>Wood v Auto-Owners Ins Co</i> , 469 Mich 401 (2003) | | TCoY MW | | | <i>Ignored rule 3b</i> (selectively applied maximum benefit limitation to maximize no-fault carrier’s ability to coordinate) |
| <i>Schmaltz v Troy Metal Concepts</i> , 469 Mich 467 (2003) | | | TCoY MW | | <i>Ignored Rule 3b</i> (resolved ambiguous term “average weekly wage” against worker) |
| <i>Proudfoot v State Farm</i> , 469 Mich 476 (2003) | | TCoY MW CaK | | | <i>Applied Rule 2</i> (no prejudgment interest on damages not yet incurred) |
| <i>Morales v Auto-Owners</i> , 469 Mich 487 (2003) | TCoY MW CaK | | | | <i>Applied Rule 2</i> (judgment interest not tolled pending appeal) |
| <i>Twichel v MIC Gen’l Ins</i> , 469 Mich 524 (2004) | | | TCoY MW CaK | | <i>Ignored Rule 2b</i> (construed “having the use” of a vehicle as “having <i>the right</i> to use”) |
| <i>Waltz v Wyse</i> , 469 Mich 642 (2004)* ²⁴ | | TCoY MW | | CaK | <i>Applied Rule 2c</i> (construed tolling provision to shorten applicable limitations period) |

An asterisk means that a corporation was another defendant.

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|---|-------------------|-------------------|------------|-----------|---|
| <i>Warren v K Byte-Repton</i> , 469 Mich 988 (2004) | TCoY MW CaK | | | | <i>Applied Rule 2</i> (statute forbidding WCAC from deciding issues not raised) |
| <i>Am Alternative Ins Co v York</i> , 470 Mich 28 (2004) | TCoY MW CaK | | | | <i>Applied Rule 2</i> (unintended consequences of intentional acts not intended) |
| <i>Peden v Detroit</i> , 470 Mich 195 (2004) | CaK W | | TCoY M | | <i>Ignored Rule 3b</i> (defined essential job duties narrowly) |
| <i>Lind v Battle Creek</i> , 470 Mich 230 (2004) | TCoY MW | | | CaK | <i>Applied Rule 2b</i> (refused to add “unusual employer” limitation) |
| <i>Corley v Detroit Bd of Ed</i> , 470 Mich 274 (2004) | | | TCoY MW | | <i>Ignored Rule 3b</i> (defined “sexual nature” narrowly) |
| <i>Mann v Shusteric Ent</i> , 470 Mich 320 (2004) | TYM CaK | | | | <i>Applied Rule 2</i> (Dramshop Act not exclusive remedy for nonserving liability) |
| <i>Halloran v Bhan</i> , 470 Mich 572 (2004)* | | TCoY M | | K | <i>Applied Rules 2 and 2a</i> (expert witness must have same board certification) |
| <i>Grossman v Brown</i> , 470 Mich 593 (2004)* | TCoY M | | | | <i>Applied Rule 2</i> (reasonable belief excuses affidavit of merit signed by incompetent witness) |
| <i>Roberts v Mecosta GH</i> , 470 Mich 679 (2004) | CaK W | | TCoY M | | <i>Ignored Rule 2b</i> (“specific” added to requirement that standard of care be stated in notice of claim) |
| <i>Jenkins v Patel</i> , 471 Mich 158 (2004) | | TCoY MW | | CaK | <i>Applied Rule 2e</i> (Medmapl damage cap applies in death action) |
| <i>Shinbolster v Annapolis Hosp</i> , 471 Mich 540 (2004) | | TCoY | | CaK MW | <i>Applied Rule 2c</i> (higher damage cap inapplicable where enumerated condition no longer exists) |
| <i>Burton v Reed City Hosp</i> , 471 Mich 745 (2005) | | | TCoY MW | | <i>Ignored Rule 2b</i> (created Draconian extrastatutory penalty for violation of no-sue statute). |
| <i>Hyland v Belrose Co</i> , 471 Mich 938 (2004) | | TCoY MW CaK | | | <i>Applied Rule 2</i> (need to prevail on all counts to be prevailing party under SRCA) |

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|---|-------------------|------------|------------|-----|---|
| <i>Gerling Konzern v Lawson</i> , 472 Mich 44 (2005) | | TCoY MW | | KCa | <i>Applied Rule 2e</i> (construing “common liability” to preserve contribution right) |
| <i>Jarrad v Integon Nat’l Ins</i> , 472 Mich 207 (2005) | KCa | | TCoY MW | | <i>Ignored Rules 2a, 3a, 3b</i> (construing “coverage” broadly in coordination of benefits statute) |
| <i>Cain v Waste Mgmt</i> , 472 Mich 236 (2005) | TCoY MW CaK | | | | <i>Applied Rule 2a</i> (construing “loss” as broader than anatomic loss in work comp case) |
| <i>Garg v Macomb Co</i> , 472 Mich 263 (2005) | CaK W | | TCoY M | | <i>Ignored Rule 2b</i> (creating rule that time-barred events are inadmissible) |
| <i>Griffith v State Farm Mut</i> , 472 Mich 521 (2005) | CaK W | | TCoY M | | <i>Ignored Rules 1, 2a, 2c, 3b</i> (construing “provision” in no-fault act as excluding food) |

TABLE A2: PUBLIC CORPORATIONS ONLY

| JUSTICE | CONSTRUCTIONAL RULES | | | | Total | Vote for individuals | Corporation wins when rules favor it | Individual wins when rules favor him |
|---------------|----------------------|----------------|----------------|----------------|-------|----------------------|--------------------------------------|--------------------------------------|
| | APPLIED | | IGNORED | | | | | |
| | To P’s benefit | To D’s benefit | To D’s benefit | To P’s benefit | | | | |
| IF ADHERED TO | 24 | 5 | 0 | 0 | 29 | 82% | 100% | 100% |
| CORRIGAN | 4 | 3 | 20 | 0 | 27 | 15% | 100% | 17% |
| YOUNG | 4 | 3 | 19 | 0 | 26 | 15% | 100% | 17% |
| TAYLOR | 4 | 3 | 19 | 0 | 26 | 15% | 100% | 17% |
| MARKMAN | 4 | 3 | 20 | 0 | 27 | 15% | 100% | 17% |
| WEAVER | 6 | 3 | 16 | 0 | 25 | 24% | 100% | 27% |
| CAVANAGH | 11 | 5 | 3 | 1 | 20 | 80% | 83% | 79% |
| KELLY | 15 | 5 | 2 | 1 | 23 | 70% | 83% | 88% |

TABLE A3: PRIVATE CORPORATIONS ONLY

| JUSTICE | CONSTRUCTIONAL RULES | | | | Total | Vote for individuals | Corporation wins when rules favor it | Individual wins when rules favor him |
|---------------|----------------------|----------------|----------------|----------------|-------|----------------------|--------------------------------------|--------------------------------------|
| | APPLIED | | IGNORED | | | | | |
| | To P's benefit | To D's benefit | To D's benefit | To P's benefit | | | | |
| IF ADHERED TO | 31 | 14 | 0 | 0 | 45 | 69% | 100% | 100% |
| CORRIGAN | 10 | 14 | 20 | 0 | 44 | 23% | 100% | 33% |
| YOUNG | 10 | 14 | 20 | 0 | 44 | 23% | 100% | 33% |
| TAYLOR | 11 | 14 | 20 | 0 | 45 | 24% | 100% | 37% |
| MARKMAN | 10 | 13 | 20 | 1 | 44 | 25% | 93% | 33% |
| WEAVER | 14 | 11 | 13 | 1 | 39 | 38% | 92% | 52% |
| CAVANAGH | 19 | 6 | 2 | 6 | 33 | 76% | 50% | 90% |
| KELLY | 23 | 4 | 2 | 7 | 36 | 83% | 36% | 92% |

TABLE A4: DECISIONS NOT TURNING ON REMEDIAL CONSTRUCTION RULE

| JUSTICE | CONSTRUCTIONAL RULES | | | | Total | Vote for individuals | Corporation wins when rules favor it | Individual wins when rules favor him |
|-------------|----------------------|----------------|----------------|----------------|-------|----------------------|--------------------------------------|--------------------------------------|
| | APPLIED | | IGNORED | | | | | |
| | To P's benefit | To D's benefit | To D's benefit | To P's benefit | | | | |
| IF FOLLOWED | 35 | 16 | 0 | 0 | 51 | 69% | 100% | 100% |
| CORRIGAN | 13 | 16 | 22 | 0 | 51 | 25% | 100% | 37% |
| YOUNG | 13 | 16 | 21 | 0 | 50 | 26% | 100% | 38% |
| TAYLOR | 14 | 16 | 21 | 0 | 51 | 27% | 100% | 40% |
| MARKMAN | 13 | 15 | 22 | 1 | 41 | 34% | 94% | 37% |
| WEAVER | 19 | 13 | 13 | 1 | 46 | 43% | 93% | 45% |
| CAVANAGH | 24 | 8 | 5 | 6 | 43 | 70% | 57% | 83% |
| KELLY | 28 | 7 | 3 | 7 | 43 | 81% | 50% | 90% |