

STATE OF MICHIGAN
IN THE SUPREME COURT

MYRIAM VELEZ,

Plaintiff/Appellee/Cross-Appellant,

-vs-

MARTIN TUMA, M.D.,

Defendant/Appellant/Cross-Appellee.

Supreme Court No. 138952

Court of Appeals No. 281136

Wayne County Circuit Court
No. 04-402161 NH

PLAINTIFF/CROSS APPELLANT'S SUPPLEMENTAL BRIEF
SUBMITTED PURSUANT TO THE COURT'S MARCH 23, 2012 ORDER

CERTIFICATE OF SERVICE

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In January 2008, a jury returned a verdict in favor of Myriam Velez in this medical malpractice action. The circuit court reduced that verdict on the basis of a common-law setoff that was adopted by a panel of the Michigan Court of Appeals in *Markley v Oak Health Investors of Coldwater, Inc.*, 255 Mich App 245; 660 NW2d 344 (2003).

The Michigan Court of Appeals affirmed the circuit court's judgment, including the circuit court's application of a common-law setoff. *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009). Both parties applied for leave to appeal in this Court. Ms. Velez's cross-application raised the question of whether the *Markley* Court erred in adopting a common-law setoff.

In October 2010, the Court issued an order denying leave to appeal. *Velez v Tuma*, 488 Mich 903; 789 NW2d 440 (2010). Dr. Tuma moved for reconsideration. On June 22, 2011, the Court issued an order granting his application for leave to appeal, limited to the issue of whether the common-law setoff was properly applied. *Velez v Tuma*, 489 Mich 956; 798 NW2d 512 (2011).

Following additional briefing and oral argument, the Court issued an order dated March 23, 2012, granting Ms. Velez's cross-application. The March 23, 2012 order invited the parties to submit supplemental briefs addressing the question of whether *Markley* was correctly decided.

ARGUMENT

I. MARKLEY WAS WRONGLY DECIDED.

In *Markley*, a panel of the Court of Appeals held that in a medical malpractice action governed by joint and several liability pursuant to MCL 600.6304(6)(a), a defendant against whom a verdict was rendered could claim a common-law setoff based on the amount of a prior settlement reached by the plaintiff with a co-tortfeasor. The reasoning employed by the Court of Appeals in *Markley* in imposing such a common-law setoff was seriously flawed.

Prior to 1996, Michigan law recognized that a defendant in a personal injury action had the right to a reduction of any jury damage award based on the amounts paid by another tortfeasor in settlement. The statutory basis for such a setoff was MCL 600.2925d(b), which prior to 1996 specified:

“When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death:

* * *

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

MCL 600.2925d(b) (emphasis added).

In 1996 the Legislature enacted sweeping changes in Michigan tort law. Among these changes was the amendment of MCL 600.2925d. The Michigan Legislature amended that statute by completely eliminating MCL 600.2925d(b) and its setoff provision. Thus, since 1996, a statutory provision for a setoff based on settlements reached with other co-tortfeasors no longer exists.

The abrogation of prior law with respect to setoffs is also reflected in another legislative action that took place in the 1996. The Michigan Legislature also amended MCL 600.6304 and its

acknowledgment of a setoff. Prior to 1996, that statute stated that after a jury award was rendered in a personal injury case, the court was to award the plaintiff the amount of the jury's verdict "subject to any reductions under sections 2925d and 6303 . . ." MCL 600.6304(5) (emphasis added). After 1996 and the elimination of all setoffs under MCL 600.2925d(b), MCL 600.6304 was amended to eliminate any reference to a reduction of a jury's verdict on the basis of a setoff. See MCL 600.6304(3).

The Court of Appeals in *Markley* acknowledged that the Legislature in 1996 eliminated the statutory setoff previously contained in MCL 600.2925d(b). The *Markley* Court noted, however, that prior to the adoption of §2925d(b), Michigan courts had recognized a common-law setoff based on settlements reached with other tortfeasors. *Markley*, 255 Mich App at 250-251. The *Markley* Court concluded that, despite the Michigan Legislature's complete abrogation of a statutory setoff, Michigan courts could, in the wake of the 1996 amendments of §2925d(b) and §6304(5), enforce a common-law setoff that would accomplish precisely the same result as would have been dictated by the now-repealed §2925d(b).

The *Markley* Court's decision to resuscitate a common-law setoff represents judicial action that is in direct conflict with what the Michigan Legislature did in 1996 when it amended §2925d and completely eliminated setoffs from Michigan law. In taking the action that it did in 1996, the Michigan Legislature made it clear that setoffs would no longer be applied in this state. Judicial adoption of a common-law setoff, therefore, is directly contrary to the Michigan Legislature's 1996 pronouncement that setoffs will no longer be recognized in this state.

In *Markley*, the Court of Appeals reached the result that it did based on the legal principle that "the repeal of a statute revives the common-law rule as it was before the statute was enacted."

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The *Markley* Court's decision to resuscitate a common-law setoff represents judicial action that is in direct conflict with what the Michigan Legislature did in 1996 when it amended §2925d and completely eliminated setoffs from Michigan law. In taking the action that it did in 1996, the Michigan Legislature made it clear that setoffs would no longer be applied in this state. Judicial adoption of a common-law setoff, therefore, is directly contrary to the Michigan Legislature's 1996 pronouncement that setoffs will no longer be recognized in this state.

In *Markley*, the Court of Appeals reached the result that it did based on the legal principle that "the repeal of a statute revives the common-law rule as it was before the statute was enacted."

255 Mich App at 256, citing *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995). Based on this principle, the *Markley* Court surmised that, with the repeal of §2925b(d), a court could engage in the judicial assumption that this legislative change resurrected the common-law with respect to setoffs as it had existed prior to the adoption of that statute.

There is, however, a serious error in the *Markley* Court's reliance on this principle. The rule of "common-law resurrection" recognized in *Reeves* presupposes one essential point: the statute which is first enacted and later repealed must be *contrary* to the common-law which preceded it.¹ Thus, where a statute at the time of its enactment *modifies* the common-law, a court is free to engage in the assumption that the later repeal of that statute serves to resuscitate the common-law as it existed before that statute's passage. See e.g. *In Re Spradlin*, 284 BR 830, 834-835 (ED Mich 2002).²

¹In his response to plaintiff's cross-application for leave, Dr. Tuma suggested that the Court's decision in *Reeves* undermined the principal argument that Ms. Velez raises. This is incorrect. In *Reeves* a Michigan statute passed in 1827 incorporated the common-law view of arson. That statute was amended in 1927, expanding the crime beyond the common law definition. That 1927 statute was itself amended in 1931 in a statute that did not specifically define arson. The Court held in *Reeves* that the 1931 act amending the 1927 statute's more expansive view of arson, required an application of the more narrow common-law definition of this crime. Thus, *Reeves* involved a statute that altered the common law that was itself later repealed.

²There is no difficulty with the rule of construction reflected in *Reeves* when applied to the repeal of statutes in derogation of the common law. For example, at common law there was no cause of action against a party who furnished liquor to an adult. *Millross v Plumb Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). The Michigan Legislature, however, passed a statute creating such a cause of action - the dramshop act. If the Legislature were to repeal the dramshop act, it is logical to assume that the elimination of such a statute that served to modify the common law would reinstate the prior common law rule which prohibited a cause of action against a person furnishing alcohol to an adult. The legislative intent associated with repealing the dramshop act - elimination of liability - would coincide with the common law as it existed before the dramshop act was passed. The same thing cannot be said of the repeal of a statute that was *consistent* with the common law rule that preceded it.

But, this rule of construction with respect to the resurrection of common-law principles cannot be applied to §2925d(b) for a rather fundamental reason. As the *Markley* Court acknowledged, the language contained in §2925d(b) prior to its repeal in 1996 “*represented a codification of the common-law rule of setoff.*” 255 Mich App at 255, citing *Thick v Lapeer Metal Products*, 419 Mich 342, 348, n. 1; 353 NW2d 464 (1984) (emphasis added). Thus, the common-law doctrine related to setoffs that preceded the adoption of §2925d(b) was actually incorporated into that statute.

It makes no sense to suggest that, where a common-law principle predates a statute and the Michigan Legislature adopts a statute which is entirely *consistent* with the antecedent common-law, the subsequent repeal of that statute (which is consistent with the common-law) somehow revives the common-law rule (which is consistent with the statute that has just been repealed). Such a misinterpretation of the effect of the legislative repeal of a statute would directly defeat the will of the Legislature in enacting the repeal in the first place. Yet, that is precisely what the Court of Appeals did in *Markley*.

Markley's approach to the interrelationship between a common-law setoff and the 1996 acts of the Michigan Legislature should be contrasted with the Court of Appeals unpublished opinion in *Herteg v Summerset Collection GP, Inc.*, Court of Appeals No. 227936, a decision that exhibits far more respect for the will of the Legislature. A copy of the Court of Appeals decision in *Herteg* is attached hereto as Exhibit A.

Herteg was a premises liability action in which the plaintiff obtained a verdict in her favor after settling with other tortfeasors. The defendant who proceeded to trial requested that the jury's verdict be reduced by the amount of the settlement. The Court in *Herteg* properly rejected the

defendant's argument which was predicated on the common-law resuscitation principle adopted in

Reeves:

In support of their assertion, appellants rely on the common-law rule that a defendant is entitled to a *pro tanto* reduction of a judgment for amounts received by plaintiff in a prior settlement. This common-law principle was codified at M.C.L. § 600.2925d(b), which, until 1995, provided that a release or covenant not to sue 'reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.'

However, when the Legislature amended § 2925d in 1995, they deleted the above language from the statute. 1995 PA 161. Defendants argue that repeal of subsection 2925d(b) effectively revived the common-law rule as it existed before it was codified. *People v. Reeves*, 448 Mich. 1, 8; 528 NW2d 160 (1995); 2B Singer, Sutherland Statutory Construction (6th ed., 2000), § 50:01, pp 140-141. We disagree.

The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent."

Herteg (Exhibit A), **6-7.

Based on the Legislative intent reflected in the 1996 elimination of §2925d(b), the *Herteg* panel concluded, "[w]e will not apply the reversion rule of statutory construction to revive what has, by clear implication, been abolished." *Id.*, *7.³ Thus, the Court in *Herteg* acknowledged the obvious intent of the Legislature in 1996 when it eliminated setoffs in concluding that a setoff would not be enforced.

The appropriate approach to the common-law reversion principle found in *Reeves* is also

³In his response to Ms. Velez's cross-application, Dr. Tuma argued that *Herteg* was inapplicable here because it was not a medical malpractice action and, therefore, the liability of the defendant who proceeded to trial was several only. Defendant is correct in noting that liability in *Herteg* was several only. But, this argument overlooks the manner in which the Court of Appeals arrived at its decision in *Herteg*. It found that the resolution of the issue presented to it ultimately rested on legislative *intent* and that this *intent* was reflected in the Legislature's decision to eliminate setoffs. Precisely the same reasoning applies here.

demonstrated in the Court of Appeals decision in *Bristol Window and Door, Inc. v Hoogenstyn*, 250 Mich App 478; 650 670 (2002). In *Bristol Window*, the Court of Appeals considered a contractual noncompete clause that was being challenged as an illegal restraint of trade.

The noncompete clause in *Bristol Window* would have been enforceable under a common-law rule of reason first adopted by this Court in *Hubbard v Miller*, 27 Mich 15 (1873). However, in 1950, the Michigan Legislature passed a statute, the former MCL 445.761, that was inconsistent with the common-law, expressly prohibiting noncompete clauses. In 1985, this statute proscribing noncompete clauses was repealed when the Legislature enacted the Michigan Antitrust Reform Act (MARA), MCL 445.771, *et seq.* While the former statute prohibiting noncompete clauses was repealed when MARA was passed, as of the date of its enactment, MARA was silent on the validity of noncompete clauses.

The Court of Appeals in *Bristol Window* had to decide what law was applicable to the noncompete clause at issue therein. The Court ruled that the common law approach to noncompete clauses would govern:

As our review of the history of restraint of trade law in Michigan makes clear, the common-law in Michigan contemplated the enforceability of noncompetition agreements that qualified as reasonable. The Legislature's enactment of former M.C.L. §445.761 *altered the common-law rule from 1905 until 1985*, when the MARA replaced it. The Legislature's repeal of and decision not to reenact former M.C.L. §445.761, *which was in derogation of the common-law*, clearly demonstrates the Legislature's intent to revive the common-law rule set forth in *Hubbard, supra* at 19, that the enforceability of noncompetition agreements depends on their reasonableness.

250 Mich App at 495 (emphasis added).

What is significant about the Court of Appeals observations in *Bristol Windows* is that the Court quite properly confined the common-law resurrection holding in cases such as *Reeves* to those

situations in which the statute that is later repealed *was in derogation of the common-law*. It is only in that situation that a court may engage in the assumption that the Legislature, by eliminating a statute that *altered* the common-law, intended a return to the pre-statutory common-law rule. *See also* 5 Michigan Civil Jurisprudence, Common and Civil Law, §6 (“generally, where a statute *abrogates* a settled common-law rule, and that statute is later repealed, the effect of the repeal is to restore the former common-law rule.”) (emphasis added).⁴

The *Markley* panel was also convinced that it could reinvigorate the common-law setoff rule as it existed before the adoption of §2925d(b) because, in its view, following repeal of that statute in 1996 the “comprehensive tort reform legislation . . . simply no longer addressed the issue of setoff in any manner; *it is silent*.” 255 Mich App at 256 (emphasis added). Thus, the *Markley* Court was moved by what it construed as legislative *silence* on the subject of setoffs after 1996 as a basis for imposing a common-law set-off doctrine.

This construction, however, completely overlooks the fact that the present legislative “silence” on the subject of setoffs, *i.e.* the lack of a statutory provision addressing setoffs, *is the product of a conscious legislative decision to remove all such setoffs from Michigan law*. And, by

⁴Plaintiff would further note that in an analogous setting, the Michigan Legislature has expressly held that no assumption of statutory “revival” is appropriate where a statute is twice changed. MCL 8.4 states:

Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute.

Thus, MCL 8.4 provides that, where a statute is repealed and the statute effectuating that repeal is itself later repealed, that second repeal does not revive the original statute. Thus, by express decree of the Michigan Legislature, a court is precluded from assuming that the Legislature, by repealing an act that repealed a prior statute, intends to resurrect the earliest of these statutes.

imposing a common-law setoff rule in the face of this conscious legislative decision removing setoffs, the *Markley* Court has reached a result directly at odds with what the Legislature did in 1996.

Further undermining the *Markley* Court's reliance on purported legislative silence are this Court's decisions expressing dissatisfaction with the doctrine of legislative acquiescence. That doctrine seeks to give meaning to statutory provisions previously construed by a court on the ground that the Legislature has not taken steps to reverse a prior judicial construction. *See e.g. Donajkowski v Alpena Power Co*, 460 Mich 243, 256-262; 596 NW2d 574 (1999); *Paige v City of Sterling Heights*, 476 Mich 495, 516; 720 NW2d 219 (2006). As expressed by this Court in *Donajewski*, "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence. 460 Mich at 261 (emphasis in original). Here, contrary to *Markley*, this Court must find the Legislature's intent not from the *silence* of present Michigan statutory law on the subject of setoffs, but from the *acts* of the Legislature in completely eliminating that concept from Michigan law by amending both §2925d(b) and §6304(5).⁵

Taken to its extreme, this reasoning by the *Markley* Court with respect to the present statutory "silence" on the subject of setoffs, would lead to the conclusion that a court would be free to give no weight to the repeal of *any* statute. Since the repeal of a Michigan statute results in its removal from the Michigan Compiled Laws, the *Markley* Court's analysis would dictate that in every case in which a statute is repealed, Michigan law would be "silent" on the subject and a court could on

⁵The discredited concept of legislative acquiescence might come into play in this case if plaintiff attempted to argue that the Legislature's failure to *reestablish* a statutory setoff in the years since 1996 offers insight into its intent not to impose such setoffs. But, that is not plaintiff's argument here. What plaintiff is arguing is that the Legislature in 1996 intended to abolish all setoffs, and that the courts of this state are compelled to honor this clear expression of legislative intent.

its own fill that silence. The fallacy behind this reasoning is that a legislature *speaks* both when it puts words onto paper in the form of a law *and* when it removes an existing legislative act. Both represent *action* taken by the Legislature, not silence, and both reflect the expression of legislative intent.

In his response to plaintiff's cross-application for leave, the defendant has also offered an argument based on the theme of silence. The defendant criticized Ms. Velez's position with respect to the propriety of *Markley*'s approach by proclaiming, "plaintiff asserts, without citation to any authority, that the Legislature has somehow silently abolished the common-law settlement set-off rule." Defendant's Response, p. 5. Whether the Michigan Legislature has "abolished" the common-law, either loudly or silently, is completely irrelevant to the issue here. What is relevant is that *the Legislature has abolished all setoffs*. In the face of that unambiguous legislative action, it is improper for a court to revitalize a common-law rule recognizing setoffs.

The *Markley* Court's resurrection of a common-law setoff doctrine was also premised on its conclusion that application of the common-law rule in these circumstances would be "logical." 255 Mich App 256. As discussed in *Markley*, the Michigan Legislature in 1996 enacted numerous changes in the civil justice system. Among these changes was the general abrogation of the concept of joint and several liability. *See* MCL 600.2956. In its place, the Legislature imposed a doctrine of distributive fault under which a tortfeasor will only be responsible for the percentage of fault attributable to him. *See* MCL 600.6304(2)(4).

Under the several liability system imposed by the Michigan Legislature in 1996, it is for the jury to apportion the relative fault of all tortfeasors responsible for the plaintiff's injuries, including the percentage of responsibility of a party who previously entered into a settlement with the plaintiff.

Thus, under a several liability system, the Michigan Legislature had to eliminate the setoff previously provided in §2925d(b) applicable to prior settlements. But, according to the *Markley* Court, the logic behind the elimination of setoffs in cases governed by several liability does not extend to those rare post-1996 Michigan cases that are subject to joint and several liability.⁶ In such cases, the non-settling defendant against whom a judgment is entered is responsible for all of the plaintiff's injuries. In his response to plaintiff's cross-application for leave, Dr. Tuma expressed a similar view, asserting that it "makes sense" to conclude that the Legislature intended to abrogate setoffs only with respect to cases involving several liability. Defendant's Response, p. 7.⁷

The essence of the *Markley* ruling as well as the position taken by defendant in response to Ms. Velez's cross-application is that the Michigan Legislature made a mistake in 1996 when it abrogated setoffs in *all* personal injury actions. According to them, what the Legislature should have done is to eliminate setoffs only in those personal injury actions subject to several liability. To correct this perceived legislative oversight, the *Markley* Court assumed that it had the authority to adopt a common-law setoff applicable to those cases governed by joint and several liability, regardless of what the Michigan Legislature intended to when it repealed §2925d(b).

⁶The largest percentage of such cases are those such as *Markley* and the instant case - medical malpractice actions in which the plaintiff has not been assessed any degree of comparative fault. See MCL 600.6304(6)(a).

⁷In his response to Ms. Velez's cross-application, defendant went even further than his appeal to common sense in interpreting what the Legislature did in 1996. He also contended that "the Legislature intended that there would be no setoffs in cases with only several liability." Defendant's Response, at 7. If that represented the actual intent of the Michigan Legislature in 1996 when it repealed §2925d(b), one would certainly expect that the Legislature would have said so. The Legislature could easily have accomplished what defendant now divines as the Legislature's intent by simply *modifying*, not *repealing* §2925d(b). But, that is not what the Legislature did in 1996.

Whatever the logic behind the *Markley* Court's holding reinvigorating common-law setoffs in those post 1996 cases governed by joint and several liability, the simple fact is that this ruling was beyond the power of a court in exercising its common-law authority. The *Markley* Court ruled, in essence, that the Michigan Legislature, in repealing §2925d(b) in its entirety, blundered in failing to take into consideration those rare cases still subject to joint and several liability.

This Court has previously rejected any interpretation of statutes that is premised on legislative inadvertence in drafting such a statute. The Court has held that Michigan courts "may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). As indicated in *Robinson*, no Michigan court may engage in the assumption that the Michigan Legislature inadvertently did one thing, when it actually meant to do something else. See also *People v Crucible Steel Co. of America*, 150 Mich 563, 566; 114 NW 350 (1907) ("We cannot assume that the Legislature made a mistake and used one word when it in fact intended to use another"); *Chaney v Department of Transportation*, 447 Mich 145, 165; 523 NW2d 762 (1994). Since the rule expressed in these cases is ultimately grounded in a search for legislative intent, this aversion to legislative inadvertence must apply equally to the Legislature's intent as reflected in the repeal of a statute. *Robinson* teaches that no Michigan court may engage in the assumption, however rational, that the Michigan Legislature inadvertently abrogated setoffs in all Michigan personal injury actions, including those still governed by joint and several liability. The simple fact is that the Michigan Legislature took steps in 1996 to end setoffs in *all* cases, including this one.⁸

⁸Further support for this conclusion can be found in a significant legislative change in §6304, the very statute that provides for joint and several liability in medical malpractice cases. As noted previously, in 1996 the Michigan Legislature not only repealed §2925d(b)'s setoff

This Court need look no farther than one of the cases decided last term to reject the *Markley* Court's view that the Legislature erred in 1996 when it completely eliminated §2925d(b). In *Driver v Naini*, 490 Mich 239; 802 NW2d 211 (2011), the plaintiff filed a medical malpractice action that was timely under the six month discovery rule of MCL 600.5838a. Subsequently, one of the defendants named in that case identified a potential nonparty tortfeasor. Normally, the identification of a tortfeasor who is not yet named in the case is not particularly prejudicial to the plaintiff since he/she can choose to amend the complaint to add that tortfeasor as a party. The Michigan Legislature has facilitated this process to some extent by enacting a statute, MCL 600.2957(2), which provides that a tortfeasor added to a case in this way would be able to claim a statute of limitations defense only if "the cause of action would have been barred by a period of limitation at the time of the filing of the original action."

In *Driver*, the plaintiff pointed out that the mandatory 182 day waiting period applicable to medical malpractice actions under MCL 600.2912b meant that neither he nor any other plaintiff whose case was governed by the six month discovery rule could *ever* file such a case within the statute of limitations. Thus, plaintiff noted in *Driver* that the plaintiff in such a case that was timely filed as against the original defendant,⁹ could never add a nonparty tortfeasor later identified because

provision, it also amended §6304(5), taking out of that statute the language specifying that a personal injury verdict had to be reduced by the amount of any settlement reached with another tortfeasor. Thus, the Legislature in 1996 amended the statute that now provides for joint and several liability in medical malpractice cases while at the same time adjusting that statute to reflect the elimination of set-offs.

⁹The timeliness of the *Driver* complaint filed against the original defendants was the product of the tolling provision in MCL 600.5856(e). Thus, at least as to the original defendants named in that case, the six month limitations period of MCL 600.5838a was tolled during the 182 day mandatory waiting period. However, by the time the case was filed, the six month statute of limitations would necessarily have expired.

the provision of MCL 600.2957(2) “saving” such an amendment from a statute of limitations could never be satisfied.

The plaintiff argued in *Driver*, much like Dr. Tuma has argued in response to Ms. Velez’s cross-application, that it “makes sense” to extend §2957(2)’s savings provision to a malpractice action filed in conformity with the six month discovery limitations period. The plaintiff in *Driver* further suggested that the conundrum created by the language of §2957(2) was the result of the Michigan Legislature’s failure to take into account how that statute would interact with a medical malpractice action filed under the six month discovery rule.

Whatever sense plaintiff’s argument in *Driver* made, the majority of this Court rejected it out of hand:

Moreover, we presume the Legislature was aware of the nuance between adding a nonparty at fault under MCL 600.2957(2) and the notice waiting period under MCL 600.2912b (*i.e.*, that the 182 day waiting period virtually engulfs the discovery rule’s six-month limitations period) when it enacted MCL 600.2957 in 1995 PA 161 as part of the 1995 tort reform legislation.

490 Mich at 262.

In reaching this result, the *Driver* Court further cited its opinion in *Whalen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 522 (1993), for the proposition that “the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.”¹⁰

¹⁰What this Court’s decision in *Driver* signifies is that the remedy available to a party in the same position as the plaintiff in that case is to seek a slightly more nuanced approach to the interrelationship between §2957(2) and §5838a from the Legislature.. Exactly the same recourse is available to the defendant in this case. If Dr. Tuma wants a declaration that setoffs are still available in cases in which joint and several liability exists, he and his medical brethren should petition the Legislature to do so. They should not be asking this Court to undo what the Michigan Legislature did in 1996.

The Court's holding in *Driver* applies with equal force here. Dr. Tuma's assertion that it "makes sense" to conclude that the Legislature "intended" to abrogate setoffs only with respect to cases involving several liability area overlooks the presumption reinforced in *Driver* - this Court must assume that the Michigan Legislature was completely aware of the "nuance" between its elimination of all setoffs and the retention of joint and several liability in a limited number of cases. Thus, just as the plaintiff in *Driver* was not able to claim a judge-made rule of equity, the defendant here is precluded from claiming a common-law principle that, in his view, "makes sense."

This Court has noted that, "[i]t is not for the courts to add or subtract from the balance struck by citizens of this state, as expressed by their elected representatives in the Legislature." *Alex v Wildfong*, 460 Mich 10, 20; 594 NW2d 469 (1999). By eliminating the former §2925d(b) and putting an end to any right to a setoff, the Michigan Legislature has expressed the law in this state as it applies to setoffs. As *Alex* notes, now that the Michigan Legislature has spoken on this subject, it is not within the province of the courts to add to or subtract from what the Legislature has decreed.

Nor is this Court in the position to question the wisdom of the Legislature's decision to eliminate setoffs in all post-1996 Michigan cases. See *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999) (holding "[i]n our democracy, a legislature is free to make inefficacious or unwise policy choices . . ."); *Decker v Flood*, 248 Mich App 75, 84; 638 NW2d 163 (2002) ("It is not within our authority to second-guess the wisdom or reasonableness of unambiguous legislative enactments . . ."). Whether the complete elimination of setoffs was the wisest course for the Legislature to follow is not an appropriate consideration for the courts. What is important is that the Legislature has through its repeal of §2925d(b) repudiated the use of setoffs in *all* Michigan cases. This Court

should follow the course chosen by the Legislature when it repealed §2925d(b) and recognize that setoffs have been abrogated in all cases.

Analytically, the issue presented in this appeal is indistinguishable from a number of cases that this Court has decided in recent years addressing the intersection of legislative will and judge-made law. In such cases as *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007); *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 640 (2005), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), the Court has considered the impact of a common-law principle that it found to be in conflict with the will of the Michigan Legislature as expressed in a statute. In each of these cases, the results were the same; the majority of this Court emphatically held that the common-law had to give way in the face of a statute that contradicted it.

Precisely the same conflict that existed in *Trentadue*, *Garg* and *Devillers* comes into play in this case. Here, there exists a clear statement of the intent of the Legislature in the repeal of §2925d(b). Ultimately, it is the intent of the Legislature as embodied in the repeal of that setoff statute that must control this case. This Court has long recognized that “[w]e have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act.” *McKibbin v Corporation & Securities Commission*, 369 Mich 69, 81; 119 NW2d 557 (1963); *Nummer v Treasury Department*, 448 Mich 534, 553, n. 22; 533 NW2d 250 (1995). Here, that legislative will with respect to setoffs is clearly reflected in the Michigan Legislature’s 1996 decision to repeal §2925d(b).

The idea that the courts of this state have the ability to improve on that legislative will or alternatively the right to ignore that will should be anathema to this Court. The condemnation of “judicial supremacy” expressed in this Court’s decision in *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006), should apply with equal force to the Court of Appeals ruling in *Markley*:

Much more can be said negatively of this “judicial supremacist” approach, and we have, but at root it gives to judges, not to the people through the Legislature, control of public policy. Our constitutions have never authorized such a usurpation, and the cultivation and seizure of such power, we believe, itself invites history’s reproach.

Id. at 519.

For all of these reasons, *Markley* was wrongly decided.

II. THE IMPLICATION OF THE LEGISLATURE’S REPEAL OF §2925d(b) ON THE LEGAL ISSUE THAT DEFENDANT PRESENTS IN THIS CASE.

When this case was originally briefed in this Court, the sole question presented was the sequencing of two reductions called for in this medical malpractice action, the limitation on noneconomic damages found in §1483 and the common-law setoff rule adopted in *Markley*. As this second round of briefing will undoubtedly confirm, the parties vigorously dispute the present effect of the Michigan Legislature’s 1996 elimination of setoffs. However, in light of what the Michigan Legislature did in 1996, there is one critical point on which there can be no dispute: the Michigan Legislature never intended that the sequencing issue on which this Court originally granted leave to appeal would ever have to be resolved by a court since a scenario creating this sequencing question *was never supposed to arise*. Based on what the Legislature did in 1996, there was *never* supposed to be a case in which a verdict would be subject to a dual reduction based on both §1483 and a setoff.

This Court, therefore, will search in vain for any resolution of this sequencing question in the Michigan Compiled Laws since the Michigan Legislature intended to eliminate this question from Michigan law. Thus, in analyzing the sequencing issue that defendant has raised, this Court is on its own. The Court will find no legislative insight into the resolution of this question. Instead, if it adopts the arguments defendant raises in this Court, it will be *creating* law and it will be creating law that the Legislature clearly intended to eliminate. The Court should vigorously resist such an exercise of judicial supremacy.

RELIEF REQUESTED

Based on the foregoing, plaintiff/cross-appellant, Myriam Velez, requests that, the Court affirm the Court of Appeals April 16, 2009 opinion.

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Dated: April 10, 2012

A

STATE OF MICHIGAN
COURT OF APPEALS

JEAN HERTEG,

Plaintiff-Appellee,

v

SOMERSET COLLECTION GP, INC., and
FORBES/COHEN PROPERTIES,

Defendants-Appellants,

and

PERINI BUILDING COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 20, 2002

No. 227936
Oakland Circuit Court
LC No. 98-011207-NO

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In this premises liability negligence action, defendants appeal as of right from a judgment entered following a jury trial awarding plaintiff \$100,781.34. We affirm.

Defendants Somerset Collection GP, Inc., and Forbes/Cohen Properties, are the owners and operators of the Somerset Collection Mall. In the early morning of January 7, 1998, plaintiff, then 72 years old and a mall walker, slipped and fell in a puddle of water that had accumulated in an access area located before the entrance to a skywalk that connects old and new sections of the mall. The skywalk was built by defendant Perini Building Company and opened in October 1996. The puddle was created when rainwater leaked through the roof of the mall just above the skywalk access. It had been raining for three or four days prior to the accident. Intermittent leaks in the same area had caused the operators of the mall to effectuate repairs to the roof in June and July of 1997, and again in October and November of 1997. Plaintiff broke her left wrist and forearm in the fall.

Appellants first argue that the trial court erred in denying their motion for a directed verdict because the evidence did not establish that appellants had actual or constructive notice of the puddle, nor did it show that appellants had created the dangerous condition. We review de novo a trial court's ruling on a motion for a directed verdict. *Meagher v Wayne State Univ*, 222 Mich-App 700, 708; 565 NW2d 401 (1997).

In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. [*Wickens v Oakwood Healthcare System*, 242 Mich App 385, 388-389; 619 NW2d 7 (2000), vacated in part on other grounds 465 Mich 53 (2001).]

"In premises liability cases, the duty owed by the landowner is determined by the plaintiff's status at the time of injury." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Accord *Stanley v Town Square Coop*, 203 Mich App 143; 512 NW2d 51 (1993). ("The duty a possessor of land owes to those who come upon the land turns on the status of the visitor."). It is a long established principle of the common law that a storekeeper has a duty to provide a reasonably safe environment for its invitees. See *Clark v K Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937). This includes the responsibility of providing reasonably safe aisles for the customers to traverse while shopping. *Carpenter, supra* at 698. This duty also applies to the owners of shopping malls, who as possessors of the land have the affirmative duty to see that the hallways and passageways of the retail complex are safe for use by patrons of the retail stores located in the mall. See 2 Restatement Torts, 2d, § 344.

The question we are presented with is whether in these circumstances, plaintiff, who was at the mall on the day of the accident as a mall walker, was an invitee or a licensee of the mall. Answering this question is essential to the resolution of this appeal because of the differing duties owed by a landowner to invitees and licensees. To both invitees and licensees, the landowner owes a duty to warn of any hidden dangers the landowner either knows of or has reason to know of. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). However, a landowner also owes its invitees a duty to "make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law" *Id.* at 597 (citation omitted).

In *Stitt*, our Supreme Court held that "[i]n order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose." *Id.* at 604 (emphasis omitted). In reaching this conclusion, the *Stitt* Court reasoned, in part, "that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests." *Id.* at 604.

The issue before the *Stitt* Court was "whether invitee status should be extended to an individual who enters upon church property for a noncommercial purpose." *Id.* at 595.¹

¹ See also *Stitt, supra* at 597 ("In this case, we are called upon to determine whether invitee status should extend to individuals entering upon church property for noncommercial purposes." [emphasis in original]), and at 607 ("[W]e hold that persons on church premises for other than commercial purposes are licensees and not invitees.").

Examining three cases in which invitee status had been found with respect to persons injured on church property,² the Court concluded that the three cases showed that “invitee status has traditionally been conferred in our cases only on persons injured on church premises who were there for a commercial purpose.” *Id.* at 602. However, the Court noted that Michigan appellate courts had never directly addressed the issue of whether a churchgoer who fell into the category “public invitee” was also due a heightened standard of care. *Id.* at 600-601.

The Court concluded that the “invitee” designation should not be attached to “persons on church premises for other than commercial purposes.” *Id.* at 607. In reaching this conclusion, the Court examined the common-law meaning of the term “invitation.” *Id.* at 597-598. The Court observed that its “prior decisions have proven to be less than clear in defining the precise circumstances under which a sufficient invitation has been extended to confer ‘invitee’ status.” *Id.* at 598. Indeed, in conclusion that “Michigan has historically . . . recognized a commercial business purpose as a precondition for establishing invitee status,” the Court also acknowledged that the handling of the issue had not been uniform throughout Michigan appellate court decisions. *Id.* at 600.

“Given the divergence” of the prior Supreme Court cases, the *Stitt* Court further recognized the need to “provide some form of reconciliation in this case.” *Id.* at 603. In “harmonizing” the case law, the *Stitt* Court decided that the basis for the imposition of a heightened standard of care was the potential of commercial benefits accruing to the landowner. *Id.* at 604. In the words of the Court, “the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees.” *Id.* at 604.³

Section 332 of the Second Restatement Torts defines an invitee as being “either a public invitee or a business visitor.” 2 Restatement Torts, 2d, § 332. In *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 507-508; 582 NW2d 849 (1998), rev’d 462 Mich 591 (2000), this Court had concluded, based on its reading of *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970), that § 332 of the Restatement applied in Michigan. The Supreme Court concluded, however, that the issue of whether to adopt the “public invitee” definition of § 332 was not before the *Preston* Court, and thus it was doubtful that *Preston* was binding on this point. *Stitt, supra*, 462 Mich at 603. Nevertheless, the *Stitt* Court overruled *Preston* to the extent that it could be considered as binding precedent on the issue. *Id.*

The *Stitt* Court then specifically declined to adopt § 332 of the Restatement. *Id.* The Court concluded that limiting invitee status to those situations where “the premises were held open for a commercial purpose,” *id.* at 604 (emphasis in original), “best serve[s] the interests of

² *Manning v Bishop of Marquette*, 345 Mich 130; 76 NW2d 75 (1956); *Kendzorek v Guardian Angel Catholic Parish*, 178 Mich App 562; 444 NW2d 213 (1989), overruled on other grounds in *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997); *Bruce v Central Methodist Episcopal Church*, 147 Mich 230; 110 NW 951 (1907).

³ According to William L. Prosser, Reporter of the Second Restatement of Torts, this commercial benefit test “seems to have originated in the mind of the writer of a forgotten treatise on the law of negligence, Robert Campbell, whose first edition appeared in 1871.” 26 Minn L Rev 573, 583 (1942) (footnote omitted).

Michigan citizens.” *Id.* at 607. In support of this formulation of the common-law rule, the Court looked to the reasoning of a Florida case, *McNulty v Hurley*, 97 So 2d 185 (Fla, 1957), overruled in part by *Post v Lunney*, 261 So 2d 146 (Fla, 1972): *McNulty* involved a churchgoer injured on church property. See *Stitt, supra* at 604. “With regard to church visitors,” the *Stitt* Court declared, “we agree with the court in *McNulty* . . . that such persons are licensees.” *Id.*

As framed by the *Stitt* Court, the question before it was narrow: “[W]hether invitee status should be extended to an individual who enters upon church property for a noncommercial purpose.” However, in answering this question, the Court examined a broad area of law involving invitee status in general. While arguably judicial dicta, we do not believe we can ignore the *Stitt* Court’s broad statements simply because they do not technically qualify as the holding of the Court. Unlike obiter dicta,⁴ judicial dicta is integral to the Court’s reasoning.⁵ *Luhman v Beechler*, 424 NW2d 753, 755 (Wis App, 1988). Given the relatively few number of cases granted certiorari, our Supreme Court frequently uses judicial dicta to guide the judiciary on particular areas of law, and to signal future development of the law. See Schauer, *Opinions as rules*, 53 U Chi L Rev 682, 683 (1986). Such judicial dicta is arguably as binding as the precise holding of the case. Am Jur 2d, § 603, p 299. Cf. *Johnson v White*, 430 Mich 47, 55, n 2; 420 NW2d 87 (1988) (observing that “unlike obiter dicta, judicial dicta are not excluded from applicability of the doctrine of the law of the case”).

Accordingly, given the *Stitt* Court’s refusal to adopt § 332 of the Restatement, as well as its conclusions regarding the connection of invitee status to potential pecuniary gain, we conclude that under *Stitt*, a mall walker is not entitled to invitee status unless the invitation to enter upon the land is tied to the landowner’s business interests. *Stitt, supra*.

Thomas Bird, general manager of the Somerset Collection Mall, testified that a primary reason the mall had instituted an organized mall walkers program was to “increase sales for [the mall’s] stores.” While we agree with Bird’s contention that the mall walker phenomenon would likely exist even in the absence of such facility supervised programs, it is also clear from his testimony that this mall took particular steps to attract walkers to the Somerset Mall.⁶ In other words, the invitation extended to plaintiff was not for the mere benefit of plaintiff, but for the mutual advantage of both plaintiff and the mall. *Stitt, supra* at 600.

Bird testified that as part of the program, the walkers sign up to get a free tee shirt, and each is given a card that can be used to track “how many times they walk.” The mall even produced a newsletter for the mall walkers. In addition to these organizational steps, the mall

⁴ Cf. *Sebring v City of Berkley*, 247 Mich App 666, 681-682; 637 NW2d 552 (2001) (declining to follow obiter dicta set forth in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 171, n 27; 615 NW2d 702 (2000).

⁵ We note that often the distinction between judicial and obiter dicta is easier to define than it is to implement. Compare *Stitt, supra* at 602-603 (majority opinion) with *Stitt, supra* at 616 (Kelly, J., dissenting). In any event, we believe the general discussion by the *Stitt* majority on invitee status is integral to its holding.

⁶ The success of this program is evidenced by Bird’s testimony that at the time of the accident the mall had approximately 3,000 members “signed up” for the mall walker program.

also instituted a routine for passing out complimentary gifts to the mall walkers. For example, after every ten visits, each mall walker would receive a small gift that the mall "purchase[d] specifically" for the program. Once a month, the mall would have a free breakfast for the mall walkers. Bird indicated that the mall also tried to institute an educational program for the mall walkers. Further, the evidence established that the mall was open for use by mall walkers hours before the individual retailers opened for business. This evidence is not simply a willingness to have mall walkers enter the mall, but the desire that they do so. We believe it is reasonable to infer from this evidence that the mall's primary consideration for inviting mall walkers to use the facility was commercial. The program held out the "prospect of pecuniary gain" to the landowner, and thus was "tied to the owner's business interests." *Id.* at 604.

Further, plaintiff testified that mall walking was not always the only reason she would visit the mall. She indicated that while walking, she would sometimes see an item in a store that she would purchase later. In other words, the mall's goal of promoting sales by instituting what is essentially an organized ability to window shop within the facility itself was, at least in this instance, successful. A visitor of the mall need not have entered the facility with the immediate intention of making a purchase in order to be considered an invitee.

Given the above testimony, we believe it is reasonable to conclude that in the circumstances of this case, plaintiff's presence on the day of the accident was directly tied to the mall's commercial business interests. Therefore, plaintiff was an invitee and thus was owed a heightened standard of care.

A landowner, including the owner of a shopping mall,

is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*id.* at 597.]

We believe that when viewed in the appropriate light, reasonable jurors could have concluded from the evidence adduced at the time the motion for a directed verdict was brought, that defendants were liable. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998).

The evidence showed that the roof in this area had leaked in October and November of 2001, just months prior to the accident. The later 2001 leaks were a recurrence of an earlier leaking problem that occurred during the summer of 2001. Despite this recent history, there was no evidence that the mall regularly inspected this area for leaks, or that they would inspect the area during periods of heavy rain, as occurred just prior to plaintiff's accident. We believe that it is reasonable to infer from this evidence that given the advance warning of leaking problems, the mall's failure to inspect and maintain this area constituted active negligence that caused the dangerous condition, i.e., the puddle of water. *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 474 NW2d 425 (1991).

Additionally, we believe that this evidence supports the conclusion that appellants had constructive knowledge of the condition. "If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact." Black's Law Dictionary (6th ed), p 314. We believe that given the history of leaking in the area, a jury could reasonably find that the mall, by exercising reasonable care, could have discovered the puddle in time to prevent this accident. There is no direct evidence establishing how long the puddle was there. However, the puddle obviously had to have been accumulating sometime before the accident, which occurred at approximately 7:30 a.m. There was testimony estimating the size of the puddle to be somewhere between twelve and fifteen inches. There is no evidence that the flow of water leaking from the skywalk was heavy. A reasonable jury could infer from this evidence that the puddle had taken a sufficient length of time to accumulate, that the mall could have discovered the puddle in enough time to either remedy it or to warn its invitees of the hidden danger had it used ordinary care to inspect an area where previous leaks had been discovered during periods of heavy rain. Accordingly, appellants are deemed to have constructive knowledge of the danger.

Further, a reasonable jury could conclude that the mall's failure to inspect this area constituted a failure to exercise reasonable care under the circumstances. We want to make clear that precise time limits cannot be established for when liability attaches in such a situation. See *Louie v Hagstrom's Food Stores, Inc*, 81 Cal App 2d 601, 608 (1947) ("The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances."). Each accident must be viewed in light of its own unique circumstances, and the question of whether a dangerous condition existed for a long enough time to be discovered by a reasonably prudent landowner is a question of fact that should be left to the jury. *Id.* See also *Ortega v K-Mart Corp*, 26 Cal 4th 1200, 1209; 114 Cal Rptr 2d 470 (2001). Under these circumstances, a reasonable jury could have found appellants negligent.

We also believe a reasonable jury could conclude that the mall should have expected that its mall walkers would not discover the puddle or would fail to protect themselves against it. Testimony at trial established that the puddle was so transparent as to be virtually undetectable by casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). Plaintiff testified that she did not see the puddle before she fell. Another mall walker who witnessed the fall testified that the floor in the area was made of a shiny marble that would have made it difficult to see the puddle unless you were looking for it. Additionally, the estimated diameter of the puddle was not so large as to make it an openly visible hazard. Cf *Munoz v Applebaum's Food Market, Inc*, 293 Minn 433, 196 NW2d 921 (1972) (concluding that a puddle measuring twenty square feet and one-quarter of an inch deep was open and obvious). We do not believe that this evidence establishes that the puddle was readily detectable by a reasonable person in plaintiff's position. *Riddle v McLouth Steel Products Co*, 440 Mich 85, 96; 485 NW2d 676 (1992).

Next, appellants argue that the trial court erred in refusing to reduce the judgment by the \$22,000 mediation settlement plaintiff received from Perini. We disagree. In support of their assertion, appellants rely on the common-law rule that a defendant is entitled to a *pro tanto* reduction of a judgment for amounts received by plaintiff in a prior settlement. See *Thick v Lapeer Metal Products*, 419 Mich 342, 348-349; 353 NW2d 464 (1984); *Larabell v Schuknecht*,

308 Mich 419; 14 NW2d 50 (1940). This common-law principle was codified at MCL 600.2925d(b), which, until 1995, provided that a release or covenant not to sue “reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.”

However, when the Legislature amended § 2925d in 1995, they deleted the above language from the statute. 1995 PA 161. Defendants argue that repeal of subsection 2925d(b) effectively revived the common-law rule as it existed before it was codified. *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995); 2B Singer, *Sutherland Statutory Construction* (6th ed., 2000), § 50:01, pp 140-141. We disagree.

“The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent.” *Bio-Magnetic Resonance, Inc v Dep't of Public Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999). While courts often turn to the rules of statutory construction to assist in this endeavor, it must be remembered that these rules are merely aids to statutory interpretation, “not inflexible mandates for construction contrary to evident intent.” *New Jersey v Daquino*, 56 N J Super 230, 241; 152 A 2d 377 (1959). See also *Arlandson v Humphrey*, 224 Minn 49, 55; 27 NW2d 819 (1947) (“Statutes must be construed as to give effect to the obvious legislative intent, though construction is contrary to such rules.” [quoting 6 Durnell, Dig & Supp § 8937]).

Our analysis of this issue is also guided by the understanding that where tort law was once solely a creature of common law, extensive legislative action in the area of tort reform has transformed the nature of the law. See Weiss, *Reforming tort reform*, 38 Cath U L Rev 737, 753 (1989). In Michigan, tort law is now a synthesis of statutory and common law.

The elimination of the language at issue from the statute was a part of a legislative tort reform package that “replaced the common-law doctrine of joint and several liability among multiple tortfeasors with the doctrine of several liability.” *Smiley v Corrigan* 248 Mich App 51, 53; 638 NW2d 151 (2002). Under the new system, “defendants now are only accountable for damages in proportion to their percentage of fault.”⁷ Trial courts are now required to instruct juries to answer special interrogatories and apportion the percentage of fault of all persons that contributed to the injury, including any individual released from liability. MCL 600.6304(1).⁸

⁷ MCL 600.2957(1) provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304] in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

⁸ MCL 600.6304(1) provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than

(continued...)

We believe that this statutory scheme reflects a clear Legislative intent to abolish the rule requiring offset and replace it with a several liability system to apportion damages. Therefore, the common-law rule is abrogated. *Bak v Citizens Ins Co of America*, 199 Mich App 730, 738; 503 NW2d 94 (1993). We will not apply the reversion rule of statutory construction to revive what has, by clear implication, been abolished.

Finally, defendants argue that they should be granted a new trial because of an apparent inconsistency regarding plaintiff's potential contributory negligence. Specifically, defendants point to the verdict form, in which the jury in one section affirmatively indicated that plaintiff was not negligent, and then in another section indicated that the percentage of negligence attributable to plaintiff was five percent. Defendants argue this inconsistency requires a new trial. We disagree for several reasons.

Initially, we note that defendants did not bring a motion for new trial based on the alleged inconsistency before the trial court. The matter was first raised at a hearing on defendants' motion for set off. Defendants' failure to tie their argument to the grounds set forth in MCR 2.611(A)(1), which "provide[] the only bases upon which a jury verdict may be set aside" on a motion for new trial, *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001), would preclude the trial court from granting such relief. *Id.* at 39.⁹

Further, when the matter was brought before the court, defendants indicated that they did not believe that the circumstance constituted reversible error. Instead, defendants suggested that it was simply "a flip of the coin" on which party would get the benefit of any ambiguity, i.e., if

(...continued)

1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d] regardless of whether the person was or could have been named as a party to the action.

⁹ In *Kelly*, our Supreme Court stated, "MCR 2.611(A)(1) does not identify inconsistency or incongruity as a ground for granting a new trial." *Kelly, supra* at 39. We do not read *Kelly* as stating that inconsistency and incongruity could never be argued in support of a motion for new trial. Rather, we believe *Kelly* stands for the proposition that such an argument must be made in context of the grounds set forth in the court rule. *Id.* at 41 (declining to construe the ground set forth in MCR 2.611(A)(1)(e) not because the sub rule does not use the words "inconsistent" or "incongruous," but because the trial court did not rely on the sub rule when granting a new trial). Indeed, we believe the *Kelly* majority specifically left open the door to an argument that inconsistency may serve as the basis for a new trial when it wrote, "But even if a jury verdict may be set aside on the basis of inconsistency under our current court rule, the trial court did not apply the standard . . . for reviewing inconsistent verdicts." *Id.* (emphasis added).

the full damage award would stand or be reduced by five percent. We believe that this position impliedly recognizes, and indeed invokes, the court's authority to somehow reconcile the two positions taken by the jury. Defendants may not now be heard to complain simply because the trial court did not decide the ambiguity in their favor. Their waiver of their right to argue that any irregularity required a new trial effectively extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, "a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 543; 564 NW2d 532 (1997).

In any event, we do not believe that the verdict rendered is logically inconsistent or irreconcilable. "[T]he obligation to remedy an inconsistent verdict . . . lies with the court, with or without objection of counsel." *Farm Bureau Mut Ins Co v Sears, Roebuck & Co*, 99 Mich App 763, 766; 298 NW2d 634 (1980). An allegedly inconsistent verdict should be upheld if "there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). Accord *Kelly*, *supra* at 41. "A court must look beyond the legal principles underlying the plaintiff's causes of action and carefully examine how those principles were argued and applied in the context of the case." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 399; 628 NW2d 86 (2001).

After reviewing the record, we believe the court's jury instructions provide a logical explanation for this apparent inconsistency. *Id.* In instructing the jury, the court began with a series of proper instructions on the elements of negligence. It then instructed the jury that if plaintiff proved each element of the tort, then the jury "must determine the percentage of fault for each party or non-party whose negligence was a proximate cause of plaintiff's injuries." The court continued, "In determining the percentage of fault, you should consider the nature of the conduct and the extent to which each person's conduct caused or contributed to the plaintiff's injuries." The court then turned to the duties owed by a landowner to an invitee. After that, the court returned to the issue of apportioning fault:

If you find that more than one of the parties [sic] are at fault, then you must allocate the total fault among those parties.

In determining the percentage of fault of each party, you must consider the nature of the conduct of each party and the extent to which each party's conduct caused or contributed to the plaintiff's injury. The total must add up to one hundred percent.

We believe it is plausible that the apparent inconsistency was the result of a misconception by the jury on its charge. Again, we emphasize that we find no fault with the instructions given. However, we are mindful of our Supreme Court's admonition in *McCormick v Hawkins*, 169 Mich 641, 649; 135 NW 1066 (1912): "Jurors are not learned in the law, and very frequently misapprehend the scope of their powers and duties."

When first giving the instruction on "considering the nature of the conduct of each party," the court specifically linked it to the legal concepts of negligence and proximate cause. The jury was told it needed to determine the percentage of fault for all those "whose negligence was a proximate cause of plaintiff's injuries." The court then left the subject. When it returned;

the concepts of negligence and proximate causation were missing from the preface. The jury was then told that if they found "that more than one of the parties are at fault, then you must allocate the total fault among those parties." Further, only at this point were the jurors instructed that the total "fault" must add up to one hundred percent. We believe it is possible that the jury simply disconnected the legal concept of negligence from the calculation of fault percentages, relying more on an everyday understanding of personal responsibility. In other words, the jury could have marked the verdict form as it did based on the conclusion that even though defendant had not established that plaintiff was negligent, she nonetheless bore some level of fault for the accident. We believe that in these circumstances, the trial court's determination that the specific finding of no negligence on plaintiff's part should govern was a reasonable remedy.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin