

ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL NASON,

Petitioner/Appellee,

Supreme Court No. *142246*
Court of Appeals No.: 290431
Marquette Co. Circuit Court No. 08-45798-AA

V

STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent/Appellant.

**APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR
RESPONDENT/APPELLANT'S LEAVE TO APPEAL**

142246

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COUNTER-STATEMENT OF THE ORDER APPEALED FROM
AND THE RELIEF SOUGHT

Respondent-Appellant (hereinafter "Appellant"), State Employees' Retirement System filed an application for leave to appeal the decision of the Court of Appeals. Despite Appellant's repeated claim to the contrary, the decision of the Court of Appeals did not actually change the law but, rather, applied the proper law to cases involving state employees' requests for duty/non-duty related disability benefits. Simply put, the Court of Appeals recognized a prior misapplication of the law which it was not legally bound to follow and as such, the Court cured the defective decision by using the proper legal analysis required in such cases.

The Appellant argues that the holding in *Knauss v State Employees' Retirement Sys*, 143 Mich App 644; 372 NW2d 643 (1985), which was to a certain extent disavowed by the Court of Appeals' ruling in the present case, has been the law for twenty-five (25) years and thus, should not be corrected. While the Appellant has to show a substantial question as to the interpretation of a legislative act in order to get this Court's attention, there is simply no substantial question involved here. Rather, the Court of Appeals recognized that no matter how long it had been followed, *Knauss* had applied the wrong law to duty/non-duty disability cases and it needed to be cured, not by making new law but, by applying the correct law.

On October 28, 2010, the Court of Appeals determined that when faced with the question of a state employee's right to duty/non-duty disability benefits, the *Knauss* panel not only entirely ignored the language of MCL 38.21 and MCL 38.33, it then proceeded to rely on cases interpreting language from insurance policies that were all-encompassing

and which language was completely different and contradictory to the language of MCL 38.21. *Knauss* involved a case with rights specifically granted by state legislation and yet, the *Knauss* panel looked to language found in various insurance policies and never even considered the state law. Given this clear error in the application of the law, the Court of Appeals properly applied MCL 38.24 to this case involving a state employees' request for non-duty disability benefits. By analogy, the same would apply to duty disability claims pursuant to MCL 38.21.

The Appellant's position suggests that even if wrong, our courts should be bound to follow the ruling because it has been in existence for so many years. However, the Appellant failed to expound upon the law in this area. Fortunately, our court system has recognized that errors in published decisions are made and thus, pursuant to the court rules, after a certain period of time or under certain circumstances, the courts are not bound to follow ill-founded law. The opinion of the Court of Appeals has not created any new law or changed any of the existing laws or statutory interpretations. Rather, it has applied the proper law to cases involving requests for duty/non-duty disability benefits.

There is no reason for this Court to accept the Appellant's Application for Leave to Appeal and, therefore, the Appellee respectfully requests that this Honorable Court deny the relief sought by the Appellant.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS PROPERLY FOUND THAT WHEN FACED WITH A CASE BROUGHT PURSUANT TO RIGHTS PRESERVED UNDER MCL 38.21, THE *KNAUSS* PANEL ERRONEOUSLY IGNORED THE STATUTORY LANGUAGE AND IMPROPERLY PROCEEDED TO RELY ON CASES INTERPRETING LANGUAGE FROM VARIOUS INSURANCE POLICIES THAT WERE ALL ENCOMPASSING AND CONTAINED LANGUAGE COMPLETELY DIFFERENT AND CONTRADICTORY TO THE LANGUAGE OF MCL 38.21.

THE COURT OF APPEALS ANSWERS: "YES."

PETITIONER-APPELLEE ANSWERS: "YES."

RESPONDENT-APPELLANT ANSWERS: "NO."

II.

WHETHER THE COURT OF APPEALS PROPERLY DISAVOWED *KNAUSS* AND APPLIED THE ACTUAL STATUTORY RIGHTS AFFORDED A STATE EMPLOYEE SEEKING DUTY/NON-DUTY DISABILITY BENEFITS RATHER THAN LOOKING TO EXTRANEOUS INSURANCE POLICIES FOR GUIDANCE.

THE COURT OF APPEALS ANSWERS: "YES."

PETITIONER-APPELLEE ANSWERS: "YES."

RESPONDENT-APPELLANT ANSWERS: "NO."

III.

WHETHER THE COURT OF APPEALS PROPERLY REMANDED THE CASE TO THE BOARD FOR FURTHER REVIEW CONSISTENT WITH THE OPINION OF THE COURT WHERE THE EVIDENCE ON RECORD ESTABLISHED THAT THE SERB HAD BASED ITS DENIAL OF APPELLEE'S BENEFITS SOLELY ON THE MISGUIDED APPLICATION OF *KNAUSS*, AND FOR NO OTHER REASON.

THE COURT OF APPEALS ANSWERS: "YES."

PETITIONER-APPELLEE ANSWERS: "YES."

RESPONDENT-APPELLANT ANSWERS: "NO."

STATEMENT REGARDING APPELLATE JURISDICTION

The Appellant's Application for Leave to Appeal does not satisfy the criteria set forth in MCR 7.302 and therefore, it must be denied in its entirety. Contrary to the Appellant's claim, there is no substantial question as to the interpretation of a legislative act. The Court of Appeals, in reviewing the present case, recognized that reliance by any party on the case of *Knauss v State Employees' Retirement Sys*, 143 Mich App 644; 372 NW2d 643 (1985), was misplaced as that case involved a clear misapplication of the law. The Court of Appeals did not change the law or create new law; rather, it applied the correct law.

The Appellant's Application for Leave to Appeal presents a second question for review, yet inexplicably fails to provide this Court with any grounds granting this Court jurisdiction over the issue. Moreover, while the Appellant has attempted to raise this second issue (i.e., its claim that medical evidence supported the SERB's denial of benefits) at all levels of appeal, it has been unnecessary for the lower courts to address the issue as a review of the SERB's opinion denying Appellee's request for benefits clearly states the denial was based upon the decision in *Knauss* and no mention of lack of medical evidence/certification is ever stated.

The Appellant's Application for Leave to Appeal fails to meet any of the necessary criteria for appeal and therefore, this Court must deny Appellant's Application for Leave to Appeal.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

A. NATURE OF THE ACTION.

This case involves a state employee's request for non-duty related disability retirement status and benefits pursuant to § 24 of the State Employees' Retirement Act (SERA). The Appellant is seeking Leave to Appeal the decision of the Court of Appeals which recognized that the prior ruling and legal analysis found in the case of *Knauss v State Employees' Retirement Sys*, 143 Mich App 644; 372 NW2d 643 (1985) was in error. The Court of Appeals cured the error by correctly analyzing and applying the actual statute affording retirement rights and benefits to state employees. While the Court of Appeals implemented the proper legal analysis that must be considered in these cases, it did not change the actual law.

B. THE CHARACTER OF THE PLEADINGS AND PROCEEDINGS.

In May of 2006, Mr. Nason applied for non-duty disability retirement benefits pursuant to the rights afforded under section 24 of the State Employees' Retirement Act. MCL 38.1, *et al.* By way of correspondence dated August 14, 2006, the Office of Retirement Services denied the application. On October 31, 2006, Mr. Nason filed a request for hearing to appeal his qualifications for benefits under Section 24 of the State Employees' Retirement Act. A hearing was held on June 6, 2007. On December 11, 2007, Administrative Law Judge Carmen Fahie issued a Proposal For Decision ("PFD") recommending that the SERB **reverse** the denial of benefits for Appellee/Petitioner. As such, it was the ALJ's position that Appellee should be awarded benefits.

Interestingly, the Appellant mentions in its Application that at this point in the administrative proceedings, it had filed "Exceptions" to the ALJ's PFD but it does not mention what those Exceptions encompassed or advised. A review of the Exceptions

establishes that the Appellant focused entirely on the application of *Knauss* and the allegation that the Appellant could perform other work. There is no mention that the medical evidence was misinterpreted nor is there mention of a failure to have obtained medical certification. The Exceptions to the Conclusions of Law were presented to the Board by the Appellant as follows:

1. In this proceeding, Petitioner has the burden of proving, by a preponderance of the evidence, that he is entitled to non-duty disability retirement benefits under Section 24 of the Act. **Petitioner must show that he is unable to engage in employment reasonably related to his past experience and training because of a disability that is likely to be permanent. *Knauss v State Employees Retirement System*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985).**
2. While the Petitioner presented documentation from his treating physician, Dr. Blotter, that he will not be able to run or walk effectively on uneven surfaces, **the Petitioner can still perform other jobs that he has performed in the past, as he possesses experience and training in a number of occupations that he was employed in prior to working for the state.**
3. As the Petitioner **has not established by a preponderance of the evidence that he cannot engage in employment reasonably related to his past experience and training, the Petitioner is not eligible for non-duty disability retirement benefits pursuant to MCL 38.24.**

(Respondent's Exceptions to the Proposal for Decision, pp. 4-5; Certified Record, pp. 29-30)(Emphasis added).

On appeal, the Appellee's/Petitioner's position and argument to the lower courts involved the fact that Appellant's Exceptions provided the SERB with an erroneous recitation of the law. Specifically, in its Exceptions, the Appellant erroneously informed the SERB that the law in Michigan allowed the SERB to look beyond the Appellee's seventeen (17) year career with the State and determine that because he had engaged in some odd jobs as a young man out of high school, he had "training" to perform other jobs, not for the State, and was therefore, not entitled to benefits. Ultimately, the SERB accepted

Appellant's Exceptions, **going against the ALJ's recommendation**, and **denied Mr. Nason benefits**.

At this point, it is necessary for the Appellee to provide the Court with the exact language used by the Board in denying his application for non-duty disability retirement benefits as the Appellant has consistently attempted to raise other issues that were not relied upon by the Board and thus, not preserved for appeal¹. As the Court shall see, the Board simply adopted the Appellant's suggested law in its Exceptions and denied the Appellee's application in its Conclusions of Law as follows:

4. In this proceeding, Petitioner has the burden of proving, by a preponderance of the evidence, that he is entitled to non-duty disability retirement benefits under Section 24 of the Act. **Petitioner must show that he is unable to engage in employment reasonably related to his past experience and training because of a disability that is likely to be permanent. *Knauss v State Employees Retirement System*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985).**
5. While the Petitioner presented documentation from his treating physician, Dr. Blotter, that he will not be able to run or walk effectively on uneven surfaces, **the Petitioner can still perform other jobs that he has performed in the past, as he possesses experience and training in a number of occupations that he was employed in prior to working for the state.**
6. As the Petitioner **has not established by a preponderance of the evidence that he cannot engage in employment reasonably related to his past experience and training, the Petitioner is not eligible for non-duty disability retirement benefits pursuant to MCL 38.24.**

(Decision and Order, p. 11; Certified Record p. 13)(Emphasis added).

It is clear that the Board took the advice given in the "Exceptions" and based its decision solely on the grounds set forth in *Knauss*. To be clear, the Board does not once mention that its denial is based upon a lack of medical evidence or certification. Thus, the

¹ At all lower proceedings, the Appellant has tried to avoid the issue at hand, that being the misapplication of law found in *Knauss*, by arguing the Appellee was never medically certified. However, this was not the basis for the Board's denial of benefits. As such, the argument is moot.

Appellant's continuous attempt to avoid the errors of law surrounding *Knauss* by focusing on the medical evidence is improper and has been completely ignored by the lower courts.

Upon receipt of the SERB's denial of benefits, the Appellee appealed the decision of the SERB to the circuit court. The Appellee's appeal was based upon the SERB's erroneous application of the law involving the analysis of disability based upon an employee's ability to perform other jobs outside of the State position for which they were trained. Specifically, the Appellee argued that the SERB was provided erroneous legal guidance and therefore, incorrectly applied the holding of *Knauss v State Employees Retirement System*, 143 Mich App 644; 372 NW2d 643 (1985). At the circuit court level, the Appellant began what has become its continuous tactic to skirt the issue presented, and failed to respond to the legal argument presented by the Appellee. The Appellant has continuously tried to downplay the SERB's reliance on *Knauss* even though the entire decision was grounded in the presentation of *Knauss* as set forth by the Appellant, itself, in the Exceptions presented to the SERB. At the circuit court level, the Appellant failed to specifically respond to Appellee's appeal as presented and simply presented argument regarding the medical opinions in evidence. The circuit court issued its ruling from the bench on January 14, 2009, finding that the SERB had misinterpreted the decision in *Knauss* and, therefore, the SERB's decision was affected by an error of law requiring reversal.

On February 18, 2009, the Appellant sought leave to appeal the decision of the circuit court. However, the Appellant, once again, focused on the medical evidence trying to avoid the fact that the SERB's decision was based entirely upon *Knauss*. The Appellee opposed Appellant's Application for Leave to Appeal arguing that a review of the SERB's

decision and *Knauss* supported the circuit court's finding that an error of law occurred in this case.

On October 28, 2010, the Court of Appeals determined that when faced with the question of a state employee's right to duty disability benefits, the *Knauss* panel not only entirely ignored the language of MCL 38.21 and MCL 38.33, it then proceeded to rely on cases interpreting language from insurance policies that were all-encompassing and which language was completely different and contradictory to the language of MCL 38.21. *Knauss* involved a case with rights specifically granted by state legislation and yet, the *Knauss* panel looked to language found in various insurance policies and never even considered the state law. Given this clear error in the application of the law, the Court of Appeals properly applied MCL 38.24 to this case involving a state employees' request for nonduty disability benefits.

The Appellant now seeks Leave to Appeal the decision of the Court of Appeals.

C. EVIDENCE ON RECORD .

The Appellee, Mr. Nason, was 44 years old at the time of the hearing. (Hearing Transcript, TR, p. 9). He was a high school graduate who worked a few jobs before deciding to get a higher education to pursue his career goal of becoming a corrections officer. (TR, pp. 9-11). In recognizing these facts in its Finding of Facts, the SERB found:

2. **The Petitioner has a high school diploma with one (1) semester of the required criminal justice courses to obtain employment with the Michigan Department of Corrections (MDOC).** (Citations omitted).

3. When the Petitioner left high school, he went to work for the Marquette Bottling Works (MBW) as a truck driver and salesman of Pepsi products at the heavy level, lifting 60 to 80 pounds on a regular basis, in the fall of 1981 and ended in the spring of 1986.

4. After leaving the MBW, the Petitioner was employed as a car salesman for Nelson Chevy-Olds (NCO) for two and a half years

5. After leaving NCO, the Petitioner sold satellite dishes door to door.
6. The Petitioner was unemployed for one (1) year, but worked part-time in his parents' store.
7. In April of 1989, the Petitioner went to work for the State of Michigan, MDOC as a corrections officer.

* * *

(Order of the Board, p. 3). A reading of the SERB's interpretation of the facts insinuates that Mr. Nason graduated from high school, got his higher education and worked at various odd jobs before using his higher education to work for the State. However, as Mr. Nason testified, he left high school and worked odd jobs before making a "career" move. Mr. Nason testified:

THE PETITIONER:	When I graduated from high school I went to work for Marquette Bottling Works as a truck driver, salesman of Pepsi products. From there I went to selling cars.
JUDGE FAHIE:	What were your duties?
THE PETITIONER:	Physical duties, delivering sodas, and stuff like that.
JUDGE FAHIE:	How much weight did you have to lift?
THE PETITIONER:	At that point about 60 to 80 pounds on a regular basis.
JUDGE FAHIE:	Full time?
THE PETITIONER:	Full time.
JUDGE FAHIE:	When did that job start and end?
THE PETITIONER:	It started in the fall of '81 and ended '86. It would be the spring of '86, roughly, give or take a few weeks.

JUDGE FAHIE: Okay.

THE PETITIONER: From that point on I went to - - I sold cars for approximately two and a half years.

JUDGE FAHIE: What company?

THE PETITIONER: It was Nelson Chevy-Olds at the time. It since changed hands. And then I sold satellite dishes door to door. They since went out of business.

JUDGE FAHIE: How much weight did you have to lift?

THE PETITIONER: Very little there, papers. **Then I was kind of without a job. And I made a decision to go back to school.**

JUDGE FAHIE: How long were you without a job?

THE PETITIONER: About a year.

JUDGE FAHIE: Okay.

THE PETITIONER: There were odd jobs. My parents owned a store so, I would fill in there. It was enough to make the bills. **I made the decision to go to school, get the 16 credits, apply for a job at the Department of Corrections.**

JUDGE FAHIE: When did you start school?

THE PETITIONER: I started in September. It was the fall semester. I took 16 credits.

JUDGE FAHIE: September of ?

THE PETITIONER: '88, because I was hired in April of '89. I obtained the 16 credits, took the civil service test, was hired by the Department in April of '89.

JUDGE FAHIE: What position?

THE PETITIONER: As a corrections officer.

(TR, pp. 12-13)(Emphasis added). Mr. Nason's testimony portrays a young man just out of high school who tries a few different jobs and eventually determines that he wants to be

a corrections officer. He actually chooses this position for his long-term career which is evidenced by the fact that he worked in the position for seventeen (17) years.

The record does correctly reflect the fact that Mr. Nason served the State for seventeen (17) years, and would still be working as a correction officer had he not been injured. Specifically, Mr. Nason suffered a non-duty injury wherein he broke his calcaneus. There is no dispute that Mr. Nason could not return to work as a corrections officer following this injury.

ARGUMENT I

THIS COURT SHOULD NOT GRANT LEAVE TO APPEAL AS THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE *KNAUSS* PANEL ENTIRELY IGNORED THE LANGUAGE OF MCL 38.21 AND 38.33 AND THEN ERRONEOUSLY PROCEEDED TO RELY ON CASES INTERPRETING LANGUAGE FROM INSURANCE POLICIES THAT WERE ALL-ENCOMPASSING AND WHICH LANGUAGE WAS COMPLETELY DIFFERENT AND CONTRADICTORY TO THE LANGUAGE OF MCL 38.21.

A. STANDARD OF REVIEW.

The Appellee accepts the Standard of Review set forth by Appellant.

B. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT *KNAUSS* MISAPPLIED THE LAW AND THEREFORE, HAD TO BE CURED. DESPITE THE APPELLANT'S ARGUMENT "TITLE," IT FAILED TO PROVIDE ANY LEGAL ANALYSIS SUPPORTING ITS POSITION THAT THE COURT OF APPEALS ERRED IN DISAVOWING *KNAUSS*.

The Appellant has come to this Court seeking Leave to Appeal the decision of the Court of Appeals which disavowed the portion of *Knauss* relied upon by the Appellant in denying Appellee's request for non-duty disability benefits. While the Appellant presents the Court with the argument, "[t]he Court of Appeals erred in overturning *Knauss*," the Appellant never explains, exactly, how the Court of Appeals erred. Instead, the Appellant attempts to establish that the Court of Appeals erred in its application of MCL 38.24 to the

present case wherein the Appellee sought benefits/rights specifically provided by MCL 38.24. The Appellant has misread and/or misinterpreted the decision of the Court of Appeals and has failed to provide this Court with any persuasive argument that the Court of Appeals erred in disavowing a portion of *Knauss*. In failing to actually address the argument presented (how the Court of Appeals erred in disavowing *Knauss*) the Appellant has failed to establish any grounds under which this Court has jurisdiction to grant its Application and therefore, Appellant's Application for Leave to Appeal must be denied.

It is interesting to note that the Appellant was the one who originally instructed the SERB to ignore the ALJ's findings and order denial of Appellee's benefits based upon *Knauss* which ultimately led to the Court of Appeals taking a good look at *Knauss*; thus, bringing to light the error made by the *Knauss* panel. In reviewing *Knauss*, the Court of Appeals recognized that in analyzing which "view" the court should follow, the *Knauss* Court got caught up in the insurance cases that had already reviewed the issue and ultimately lost sight of the fact that *Knauss* involved a state employee seeking duty disability benefits pursuant to MCL 38.21 – not insurance benefits. As such, after choosing the "intermediate view," the court went on to erroneously analyze the allowance of benefits under the language found in various insurance policies and not under the state mandated duty disability statute, MCL 38.21. Upon recognizing the error in *Knauss*, the Court of Appeals held:

Therefore, the *Knauss* panel not only entirely ignored the language of MCL 38.21 and 38.33 despite agreeing with the circuit court's interpretation of those provisions, it then proceeded to rely on cases interpreting language from **insurance policies that were all-encompassing, i.e., any gainful employment based on past experience and training, and which language is completely different and contradictory to the language of MCL 38.21.** *Knauss* is not binding on us, MCR 7.215(J)(1), and we disavow it with respect to the issue presented, given that it did not honor the plain language of MCL 38.21, and by analogy MCL 38.24.

(Slip Op)(Emphasis added).

While the Appellant has presented this Court with the stated argument that the Court of Appeals has erred in overturning *Knauss*, it has failed to provide this Court with any legal analysis supporting its claim. It appears that the Appellant feels the Court of Appeals erred in its construction of the actual statute, MCL 38.24. However, the finding of error with respect to disavowing *Knauss* and the statutory construction of MCL 38.24 are two (2) separate issues. The Appellant's only presentation of argument regarding its claim of misconstruction of the statute does not establish any grounds in support of its position that the Court of Appeals erred with respect to disavowing a portion of *Knauss*.

Pursuant to the Michigan Court Rules, MCR 7.215(J)(1), the Court of Appeals was not bound by the holding in *Knauss* and the Appellant has failed to establish and/or present any error on this issue. Therefore, without a showing of proper grounds for this Court to consider an appeal, the Appellant's claim with respect to the Court of Appeals' decision to disavow *Knauss* must be denied.

C. THE COURT OF APPEALS PROPERLY CONSTRUED AND APPLIED MCL 38.24 IN THE CASE OF A STATE EMPLOYEE SEEKING NON-DUTY DISABILITY RETIREMENT BENEFITS OFFERED PURSUANT TO THE STATUTE.

The Appellant has attempted to create a substantial question in this case by skewing the lines between the erroneous holding in *Knauss* wherein the court did not properly consider the language found in the state mandated duty disability statute, MCL 38.21, and the present Court of Appeal's actual construction of the statute in a case wherein the rights of a state employee are being sought. In other words, the Appellant likes the principles set forth in *Knauss* even though the actual statute granting the rights/benefits requested was not properly analyzed or construed. Now that the Court of

Appeals has recognized this colossal error, the Appellant doesn't like the outcome when the actual language of the presiding statute is analyzed and applied. The Appellant has shown no "real" error in the Court of Appeals' construction, analysis, and application of MCL 38.24 and as such, the Appellant's Application for Leave to Appeal must be denied.

1. Statutory Construction.

This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275, 279 - 280 (2004) citing *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent....'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 SCt 2524, 69; LEd2d 246 (1981). In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute...." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley supra* at 237; 596 NW2d 119, quoting *Bailey v United States*, 516 US 137, 145; 116 SCt 501; 133 LEd2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley, supra* at 237; 596 NW2d 119. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id* at 236; 596 NW2d 119.

As expressed previously, the Appellant proclaims that the Court of Appeals erred in overturning *Knauss*, yet, the sole focus of Appellant's argument is an attempt to find error in the Court of Appeals' statutory construction of MCL 38.24. While the Appellant

suggests some interesting theories, the Court will see that they all fail given the fact that the statute is unambiguous and the Court of Appeals enforced it as written.

2. A Review Of MCL 38.24 Pursuant To The Principles Enunciated In *Knauss*, Is Irrelevant Given The Fact That *Knauss*, Did Not Review Or Apply MCL 38.21.

The Appellant first argues that the Court of Appeals erred in actually looking at the language of MCL 38.24 where *Knauss* had already made a determination as to the meaning of "total disability." The Appellant actually argues that because *Knauss*, had settled on what was meant by "total disability," its definition must be followed in cases seeking duty disability benefits. However, *Knauss* never analyzed or conducted a complete statutory construction of the actual language found in MCL 38.21. While *Knauss* began an analysis of the statute, it was quickly sidetracked by the issue of which "view" to follow with respect to the term "total disability." As such, once the court turned its focus to the intermediate view and the language found in insurance policies, the general definition of "total disability" in the insurance context was adopted rather than the specific language set forth in the duty disability statute MCL 38.24. This was in error and the past reliance placed on *Knauss* does not support a claim that the Court of Appeals has now erred in its construction of the plain, unambiguous language found in MCL 38.24/MCL 38.21.

The Appellant next argues the principle that statutory interpretation must follow judicial interpretation. Yet, again, the language in question found in MCL 38.24/MCL 38.21 was not properly interpreted or statutorily construed. *Knauss* did not analyze the statutory construction of MCL 38.24/MCL 38.21 and thus, there is no judicial interpretation to be followed. The only applicable judicial interpretation would involve the term "total disability" as it relates to insurance benefits. This is not even the language found in the duty/non-duty disability statutes.

For the Appellant to be afforded Leave to Appeal, it is required to show an error or substantial question in the Court of Appeals' statutory construction and such a showing cannot be premised on the erroneous determination made in *Knauss* where the panel failed to consider the actual language of the statute. *Knauss* did not properly analyze the statute in question and, thus, *Knauss* cannot support Appellant's claim that somehow based on *Knauss*, the Court of Appeals improperly interpreted the statute.

3. There Is Nothing Improper With The Court Of Appeals Finding Support For Its Holding In Section 33 Of The Duty Disability Statute.

While the Appellant claims the Court of Appeals erred in "relying" upon MCL 38.33(a)&(b) in support of its determination, a review of the Court's opinion establishes that the Court did not "rely" upon those statutory sections but merely found support for its determination therein. Again, this does not support a claim that the Court of Appeals misconstrued the statute.

Michigan case law establishes that a court should give great deference to an agency's interpretation of a statute; however, the court still has the duty to determine and apply the Legislature's intent in passing the statute. In ascertaining the Legislature's intent in enacting a statute, the entire statutory scheme should be considered. *Michigan Life Ins Co v Comm'r of Ins*, 120 Mich App 552; 328 NW2d 82 (1982). While it is clear that the Court of Appeals in the present case had every right to look to the entire statutory scheme in making its determination, MCL 38.24 also specifically references MCL 38.33. MCL 38.24 states:

(1) **Except as may otherwise be provided in sections 33 and 34 [FN1]**, a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:

(a) The member, the member's personal representative or guardian, the

member's department head, or the state personnel director files an application on behalf of the member with the retirement board no later than 1 year after termination of the member's state employment.

(b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.

(c) The member has been a state employee for at least 10 years.

(2) Upon appeal to the retirement board, the retirement board, for good cause, may accept an application for a disability retirement allowance not later than 2 years after termination of the member's state employment.

MCL 38.24 (Emphasis added). In turn, MCL 38.33 references Section 24 as follows:

(a) The retirement board may, and upon the application of anyone retired pursuant to section **21, 24**, or 67a [FN1] shall, require anyone retired under section **21, 24**, or 67a who has not attained age 60 years to undergo a medical examination. The retirement board shall not require a person retired under section **21, 24**, or 67a to undergo more than 1 medical examination in any calendar year. The examination is to be made by or under the direction of the medical advisor at the retirant's place of residence or other place mutually agreed upon. Should anyone retired under section **21, 24**, or 67a who has not attained age 60 years refuse to submit to the medical examination, his or her disability retirement allowance or supplemental benefit provided for in section 67a may be discontinued until his or her withdrawal of the refusal. If the refusal continues for 1 year, all rights in and to his or her disability retirement allowance or supplemental benefit provided for in section 67a may be revoked by the retirement board. **If upon the medical examination of a person retired under section 21, 24, or 67a, the medical advisor reports and his or her report is concurred in by the retirement board, that the person retired under section 21, 24, or 67a is physically capable of resuming employment, he or she shall be restored to active service with the state and his or her disability retirement allowance or supplemental benefit provided for in section 67a shall cease.**

If the secretary reports and certifies to the retirement board that a person retired under section 21, 24, or 67a is engaged in a gainful occupation paying more than the difference between his or her disability retirement allowance and his or her final compensation, and if the retirement board concurs in the report, then his or her retirement allowance shall be reduced to an amount which together with the amount earned by him or her shall equal his or her final compensation. Should the earnings of the person retired under section 21, 24, or 67a

be later changed, the amount of his or her retirement allowance shall be further modified in like manner.

MCL 38.33 (Emphasis added).

While MCL 38.24 references MCL 38.33 and vice versa, the Appellant alleges that the language of MCL 38.24 is clear and unambiguous when read in the context of *Knauss*. Again, "in the context of *Knauss*" is inapplicable! Regardless, the Court of Appeals simply and correctly found support for its construction in the "entire scheme" of the statute. The Court of Appeals did not rely on Section 33 but harmonized its findings with the language therein. There is no basis¹ for the Appellant's claim that the Court of Appeals improperly relied upon MCL 38.33.

4. The Appellant's Argument That The Court Of Appeals Erred in Failing To Consider Relevant Board Rules Is Without Merit And Nonetheless Was Not Properly Preserved On Appeal.

Finally, the Appellant attempts to argue that the Court of Appeals erred in its construction of MCL 38.24 because it failed to consider relevant Board rules. However, the Appellant outright admits that the Board rule upon which it relies was not even in effect at the time of Appellee's application. The whole issue is technically stopped on the basis of those facts. With that said, the Appellant does not and cannot cite to any law requiring that the Court of Appeals consider a Board rule which was not in effect at the time of Appellee's denial of rights. Moreover, the Board, itself, did not rely upon the rule when making its decision. Finally, the Appellant was aware at the time of appeal that the rule had been enacted and if it wanted to preserve the issue, it was required to raise the issue on appeal. Yet, it did not raise the issue on appeal to either the Circuit Court or the Court of Appeals and as such, the issue has not been properly preserved for appeal herein.

¹ Interestingly, when *Knauss*, began its initial but, short-lived analysis of MCL 38.21, it agreed with the comparison with MCL 38.33.

Higher courts are only obligated to review issues that are properly preserved. *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997) citing *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734. Issues not raised and addressed in the trial court are not properly preserved for appellate review. *Phinney supra*; *Fast Air Inc, v Knight*, 235 Mich App 541; 599 NW2d 489 (1999).

For the foregoing reasons, the Appellant's argument is meritless and cannot be considered by this Court.

CONCLUSION

The Appellant has failed to establish any grounds supporting its claim that the Court of Appeals erred in disavowing *Knauss*. While the Appellant focused solely on allegations that the Court of Appeals erred in its statutory construction of MCL 38.24, a review of the allegations proves they are meritless and there are no grounds requiring this Court to accept the Appellant's Application.

ARGUMENT II

THE RECORD CLEARLY ESTABLISHES THAT THE SERB'S DECISION TO DENY APPELLEE'S APPLICATION FOR NON-DUTY DISABILITY BENEFITS WAS BASED SOLELY ON THE APPELLANT'S EXCEPTIONS WHICH MISAPPLIED *KNAUSS*. AN ARGUMENT THAT THERE WAS NO MEDICAL EVIDENCE/CERTIFICATION WAS NOT THE BASIS FOR THE SERB'S DECISION AND HAS ALWAYS BEEN IRRELEVANT. MORE IMPORTANTLY, THE APPELLANT HAS NOT SET FORTH ANY GROUNDS PROVIDING THIS COURT WITH JURISDICTION OVER THE CLAIM.

A. STANDARD OF REVIEW.

The Appellee accepts the standard of review set for by Appellants.

B. THE SERB DENIED THE APPELLEE'S APPLICATION FOR NON-DUTY DISABILITY BENEFITS BASED SOLELY UPON THE EXCEPTIONS PREPARED BY APPELLANT WHICH DID NOT INCLUDE A FAILURE TO OBTAIN MEDICAL CERTIFICATION.

1. This Court Cannot Accept The Appellant's Argument That The Medical Evidence Supported A Denial Of Appellee's Application For Non-Duty Disability Benefits As The Appellant Has Not Provided Any Grounds Suggesting This Court Has Jurisdiction.

On page 1 of Appellant's Application for Leave to Appeal, the Appellant claims that this case presents a substantial question as to the interpretation of a legislative act and supports the claim with reference to the Court of Appeals' decision disavowing *Knauss*. The Appellant does not mention a second claim that the SERB properly denied the Appellee's Application for benefits based upon other reasons. Most importantly, the Appellant does not present any grounds under which this Court can obtain jurisdiction to entertain such a claim. Without any grounds even presented, this Court cannot retain jurisdiction over the claim and the Appellant's Application for Leave to Appeal must be denied.

2. The SERB's Denial of Appellee's Request For Benefits Was Based Solely Upon The *Knauss* Opinion And Did Not Even Reference A Lack of Medical Support.

Section 24 of the State Employees Retirement Act, MCLA § 38.24, provides that a state employee may receive non-duty disability retirement benefits if the employee is **totally incapacitated** from further performance of duty as a result of a personal injury or disease that is not natural and proximate result of the member's performance of duty. Specifically, MCL § 38.24 provides:

- (1) Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply: (a) The member, the member's personal representative or guardian, the member's department head, or the state personnel director files an application on behalf of the member with the retirement board no later than 1 year after termination of the member's state employment. (b) A medical advisor conducts a medical examination of the member and certifies in writing that the

member is mentally or **physically totally incapacitated for further performance of duty**, that the **incapacitation is likely to be permanent**, and that the member should be retired. (c) The member has been a state employee for at least 10 years.

- (2) Upon appeal to the retirement board, the retirement board, for good cause, may accept an application for a disability retirement allowance not later than 2 years after termination of the member's state employment.

MCLA § 38.24(Emphasis added).

Pursuant to the statute, the member must be physically totally incapacitated for **further performance of duty**. Although the record establishes that the Appellee is physically totally incapacitated¹ for further performance of duty, the SERB erroneously interpreted the case of *Knauss v State Employees Retirement System*, 143 Mich App 644; 372 NW2d 643 (1985) as allowing denial of benefits if the Petitioner can still perform other jobs, outside of state employment, that he had performed in the past. While the Appellant continuously attempts to divert attention away from the *Knauss* issue, this case hinged on the application of *Knauss* because the ALJ and the Board both agreed there was no medical issue – medically the Appellee could not perform his duty.

In the present case, the ALJ presented the SERB with a Proposal for Decision (“PFD”) which contained Conclusions of Law wherein the ALJ recognized *Knauss* and correctly found that under *Knauss*, the Petitioner (Appellee) had to show that he was unable to engage in employment reasonably related to past experience and training because of a disability that is likely to be permanent. (PFD, p. 12). Applying the facts to the law, the ALJ concluded:

¹ In response to the Appellee’s argument to the circuit court, the Appellant attempted to argue that the necessary medical evidence was not on record. However, the record actually establishes the Appellee’s inability to perform the duties of a corrections officer has never been in question. Dr. Blotter opined that the Appellee could not run or walk on uneven ground and the State recognized that for safety of the inmates, as well as the Appellee, he could not perform the duties of a corrections officer. This takes care of the medical issue and brings us to the issue that has always been at hand - the proper application of *Knauss*.

Petitioner's (sic) submitted substantive and material evidence that he has a total and permanent disability, which shows that he has met the criteria for non-duty disability retirement benefits pursuant to Section 24 of the Act. The **Petitioner (sic) employment history with the State of Michigan has been only as a corrections officer.** With his current impairment, the Petitioner would not be able to guarantee the safety and security of the prison inmates and his fellow corrections officer. He walks with a limp and sometimes uses a cane when necessary, which makes his impairment apparent and obvious. The Petitioner is unable to stand for long periods of time, run, and walk on uneven surfaces. He could be a target or weak point for the inmates, which would put the other prison inmates and corrections officers at increased risk if he was to return to his job. Finally, the Petitioner's employer did not make any reasonable accommodations so that he could return to his correction officer position with limitations.

(PFD, pp. 17-18)(Emphasis added).

The Appellant (Respondent) filed Exceptions to the PFD with the SERB arguing the ALJ had improperly ruled that under *Knauss* only the last position held by the Petitioner could be looked at to determine whether or not the Petitioner was totally incapacitated. Specifically, the ALJ provided the SERB with the following Conclusions of Law which the SERB adopted as its own:

1. In this proceeding, Petitioner has the burden of proving, by a preponderance of the evidence, that he is entitled to non-duty disability retirement benefits under Section 24 of the Act. **Petitioner must show that he is unable to engage in employment reasonably related to his past experience and training because of a disability that is likely to be permanent. *Knauss v State Employees Retirement System*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985).**
2. While the Petitioner presented documentation from his treating physician, Dr. Blotter, that he will not be able to run or walk effectively on uneven surfaces, **the Petitioner can still perform other jobs that he has performed in the past, as he possesses experience and training in a number of occupations that he was employed in prior to working for the state.**
3. As the Petitioner **has not established by a preponderance of the evidence that he cannot engage in employment reasonably related to his past experience and training**, the Petitioner is not eligible for non-duty disability retirement benefits pursuant to MCL 38.24.

(Decision and Order, p. 11; Certified Record p. 13)(Emphasis added).

It is clear that the Board's decision was based solely on the grounds set forth in *Knauss*. To be clear, the Board does not once mention that its denial is based upon a lack of medical evidence or certification. Moreover, as established earlier, it was the Appellant who drafted the exact language adopted by the SERB. The Appellant is well aware that the decision was not based upon a lack of medical evidence.

The Appellee began the appeal process by specifically appealing the Board's decision and its misguided application of *Knauss*. While the Appellant essentially wrote the SERB's opinion and filed Exceptions arguing the ALJ had incorrectly applied *Knauss*, at all levels of appeal, the Appellant has attempted to divert attention away from *Knauss* (the issue on appeal) and claim it should all just go away because the medical evidence supported the SERB's decision. However, the decision of the SERB was made in error based upon the application of *Knauss*. The evidence establishes that the medical evidence/certification was never an issue and therefore, the Appellant's position is moot.

CONCLUSION

The Appellant has failed to even specify any grounds for this Court to take jurisdiction over this issue. Moreover, the evidence establishes that the Appellant's position is moot. For the reasons set forth herein, the Appellant's Application for Leave to Appeal must be denied.

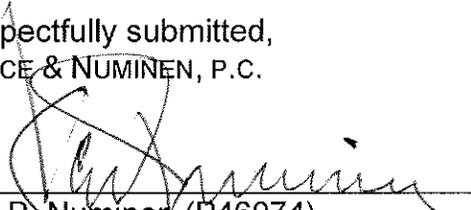
RELIEF REQUESTED

WHEREFORE, Petitioner-Appellee, Michael Nason, respectfully requests that this Court deny Respondent's-Appellant's Application for Leave to Appeal.

Respectfully submitted,
PENCE & NUMINEN, P.C.

Dated: 12/28, 2010

By: _____


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