STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

MYRIAM VELEZ,

Plaintiff-Appellee,

vs.

MARTIN TUMA, M.D.,

Defendant-Appellant.

Supreme Court Docket No. 138952

Court of Appeals No. 281136

Wayne County Circuit Court
No. 04-402161-NH

SUPPLEMENTAL BRIEF OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION (CROSS APPEAL ISSUE)

PROOF OF SERVICE

KERR RUSSELL AND WEBER PLC
Daniel J. Schulte (P46929)
Joanne Geha Swanson (P33594)
Attorneys for Amici Curiae
Michigan State Medical Society and
American Medical Association
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly decided in *Markley v Oak Health Care Investors of Coldwater Inc*, 255 Mich App 245; 660 NW2d 344 (2003), that the common law setoff rule applies in medical malpractice actions where joint and several liability is imposed?

The Court of Appeals did not directly decide this issue.

Plaintiff-Appellee says "no."

Defendant-Appellant says "yes."

Amici Curiae MSMS and AMA say "yes."

STATEMENT OF INTEREST OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

By order dated December 2, 2011, this Court granted the motion of Amici Curiae Michigan State Medical Society ("MSMS") and American Medical Association ("AMA")[1] for leave to file an amici curiae brief in the above-captioned case. Subsequently, on March 23, 2012, and on its own motion, this Court reconsidered and granted Plaintiff Myriam Velez's cross-application for leave to appeal and invited the parties to file supplemental briefs on the question of whether the Court of Appeals correctly decided in *Markley*, that the common law setoff rule applies in medical malpractice actions where joint and several liability is imposed.

The continuing applicability of common law setoff in medical malpractice cases is an issue of immense importance to MSMS and the AMA. The setoff doctrine has been embedded in the law of joint and several liability for many years. Although tort reform eliminated joint and several liability in other contexts, it remains the rule in medical malpractice cases. Thus, despite

[1] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

the repeal of statutory setoff, common law setoff continues to exist in the medical malpractice context to ensure that a plaintiff does not recover twice for a single injury. MSMS and AMA appreciate the opportunity to more fully explain their views in support of the *Markley* decision.

STATEMENT OF FACTS

MSMS and AMA rely upon the Statement of Pertinent Facts contained within the Brief on Cross-Appeal of Defendant-Appellant Martin Tuma, M.D.

ARGUMENT

I. *Markley* Correctly Held That the Legislative Repeal of Statutory Setoff Did Not Abrogate the Common Law Setoff Rule in Medical Malpractice Cases Where Joint and Several Liability Continues to Exist.

The issue this Court will decide on cross-appeal is of monumental significance to the jurisprudence of this State. For nearly a century, setoff has been properly embedded in the principles of joint and several liability, which renders "each tortfeasor ... liable for the full amount of damages." *Markley*, 255 Mich App at 253. Because a plaintiff can elect to fully recover from multiple potentially liable defendants, plaintiff could conceivably recover many times over by settling her claim with one or more defendants and/or proceeding to judgment in different actions against others. Setoff exists to ensure that despite such machinations, the plaintiff can only recover once for a single injury.

In 1995, the Michigan Legislature abolished joint and several liability in most instances and replaced it with an allocation of fault system by which each defendant pays that portion of the judgment which correlates to the defendant's percentage of fault (as determined by the jury). See MCL 600.2956 and MCL 600.6304. However, allocation of fault only applies where "liability ... is several only and not joint," MCL 600.6304(4), and the Legislature ***expressly preserved joint and several liability*** in medical malpractice cases where the plaintiff is without fault. See MCL 600.6304(6), which states in pertinent part:

> (6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:
>
> (a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several ...

Further, medical malpractice actions are expressly carved out of the allocation of fault provisions. See MCL 600.6304(4), which states in pertinent part that "[e]xcept as otherwise provided in subsection (6) [the provision which preserves joint and several liability in medical malpractice cases], a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1)."

The question raised by Ms. Velez' cross-application arises from the elimination of the statutory setoff rule, formerly MCL 600.2925d(b), and a reference to it in MCL 600.6304(5), which occurred in conjunction with the Legislative abolition of joint and several liability in most instances. Prior to its amendment in 1995, MCL 600.2925d provided, in part, that a settlement and release "reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater." *Markley* held that the common law setoff rule survived the statutory amendments.

Markley recognized that the common law setoff rule effectuates the principle that "a plaintiff is entitled to only one recovery for his injury" (citing *Great Northern Packaging, Inc v Gen Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986)). *Markley* noted that the rule is rooted in this Court's opinion in *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928), which explained that an injured party may elect to pursue joint tortfeasors jointly or severally "but, the injury being single, he may recover but one compensation." 255 Mich App at 251, quoting *Verhoeks*, 244 Mich at 371. See also, *Thick v Lapeer Metal Products Co*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984), reciting the common law rule "that where a negligence

action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount." *Markley* noted that the setoff language in MCL 600.2925d represented a codification of the common-law rule of setoff and "was apparently deleted because the tort reform legislation, for the most part, abolished joint and several liability in favor of allocation of fault or several liability." As *Markley* explained:

> There would be no need for a setoff because the tortfeasor-defendant not involved in the settlement would necessarily be responsible for an amount of damages distinct from the settling defendant on the basis of allocation of fault. Therefore, a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the nonsettling tortfeasor. There exists little danger, in cases of several liability, that a plaintiff will receive recovery beyond the actual loss.

255 Mich App at 255.

But *Markley* recognized that joint and several liability had not been abolished in all instances. In determining "whether the common-law rule of setoff survived 1995 tort reform legislation in situations still requiring the application of joint and several liability," 255 Mich App at 249, *Markley* observed that two competing principles were at work. The first is the general rule that repeal of a statute revives the common law rule as it existed before enactment of the statute. *Id.* at 256, citing *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995). The second is the principle that comprehensive legislation which prescribes a course of conduct to pursue and the parties and things affected, and which likewise designates limitations and exceptions, will be found to supersede and replace the common law. *Id.* at 256, citing *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). *Markley* concluded that the latter principle did not apply because the 1995 legislation "simply no longer addressed the issue of setoff in any manner" but was "silent." *Markley* further explained:

> With tort reform and the switch to several liability, ***it is logical to conclude that common-law setoff in joint and several liability cases remained the law, where the new legislation was silent, where application of the common-law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied.*** Considering the general nature and tone of tort reform legislation, we conclude that the Legislature ***did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of §2925d, but instead intended that common-law principles limiting a recovery to the actual loss would remain intact.***

Id. at 256-257 (emphasis added). *See also*, *Salter v Patton*, 261 Mich App 559, 566; 682 NW2d 537 (2004) (relying on *Markley* and stating that "plaintiffs are not entitled to double recovery from settling and nonsettling defendants ...")

Markley correctly resolved the issue, in keeping with this Court's recent decision in *Kaiser v Allen*, 480 Mich 31; 746 NW2d 92 (2008), and with long-standing jurisprudential principles that are bed-rock law. These principles counsel that, in cases of joint and several liability, setoff must be applied to ensure that a plaintiff will only recover once.[2] Further, Michigan courts have long recognized that the repeal of a statute revives the common law and abrogation of well-established rules cannot be implied by legislative silence. Ms. Velez is now seeking to change the law under the guise of statutory construction. That request should be soundly rejected.

A. Common Law Setoff Properly Ensures That in Cases of Joint and Several Liability a Plaintiff Will Only Recover Once.

Markley effectuates the principle that a plaintiff is only entitled to one recovery. This Court applied that principle in *Kaiser v Allen*, when it held that a settlement payment made by a vehicle owner in an auto negligence case was properly set off from a jury verdict against the

---

[2] *See also*, *Mayhew v Berrien Co Rd Comm*, 414 Mich 399; 326 NW2d 366 (1982), where this Court concluded that the verdict should be reduced by the amount of a jointly liable defendant's settlement, not the percentage of fault, because it was consistent "with the ever-important policies of (1) encouraging settlements and (2) assuring that a plaintiff is fully compensated for injuries sustained." *Id.* at 411-412.

driver. To the extent joint and several liability principles were not abrogated by statute, this Court said, they remained intact ***and the common law setoff rule applied.*** In other words, this Court has already unanimously held that common law setoff survives the legislative repeal of statutory setoff. Nothing warrants a retreat from that position.

The issue in *Kaiser* was nearly the same as that here, albeit in a different context. As described by this Court:

> At issue in this case is whether the 1995 tort-reform amendments of MCL 600.2957(1) and MCL 600.6304(1) abrogate the common-law setoff rule in automobile accident cases in which the owner of the vehicle is vicariously liable for the operator's negligence.

Id. at 33. The Court of Appeals had held that the common law setoff provision had not survived the tort reform statutory scheme. This Court disagreed, opining that because MCL 600.2957(1) and MCL 600.6304 do not apply to vehicle-owner vicarious-liability cases, the common-law setoff rule remains the operable rule of law to determine the plaintiff's recovery of damages. This Court stated:

> The common-law setoff rule is based on the principle that a plaintiff is only entitled to one full recovery for the same injury. An injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments; however, a single injury can lead to only a single compensation. See *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928).
>
> ... Allowing plaintiff to recover the entire verdict ... and to retain all the proceeds from the settlement ... would allow the plaintiff to recover four times more than the jury determined plaintiff should be awarded for his injuries. The Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery. ***The common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation for the whole injury.***

Id. at 40 (emphasis added). In a concurring opinion, Justice Marilyn Kelly explained:

> The common-law setoff rule is based on the premise that a plaintiff is entitled to no more than full recovery for his or her injuries. ***Importantly, tort reform did nothing to overrule the common-law setoff rule.*** It simply makes it unnecessary to apply the rule in most situations.

Id. at 43 (emphasis added).

The majority and concurring opinions in *Kaiser* unequivocally and unanimously establish two points: first, that the common law setoff rule survives tort reform, and second, that its application is necessary to avoid double recovery. It is inconceivable that a contrary conclusion could now be reached here. As in *Kaiser*, the allocation of fault provisions of MCL 600.2957(1) and MCL 600.6304 expressly ***do not*** apply to medical malpractice cases, where joint and several liability has been preserved. Per *Kaiser*, the common law setoff rule is therefore concomitantly preserved to prevent duplicative recovery. Would Ms. Velez assert that this common law one-recovery rule has likewise been abrogated by the Legislature's repeal of statutory setoff? One would never know from Ms. Velez's brief as she fails to address the one recovery rule. Nor does she address *Kaiser*.

Kaiser directly contradicts Ms. Velez's assertion that the Legislature made a "conscious legislative decision to remove all such setoffs from Michigan law," [Velez Supp Br. at 8], that "[t]he simple fact is that the Michigan Legislature took steps in 1996 to end setoffs in all cases ..." [Velez Supp Br. at 12], and that "the Legislature has through its repeal of §2925d(b) repudiated the use of setoffs in *all* Michigan cases" [Velez Supp Br. at 15] (among other such proclamations). *Kaiser* likewise disputes the proposition that "it is the intent of the Legislature as embodied in the repeal of that setoff statute that must control this case" [Velez Supp Br. at 16]. This Court did not agree to be confined to the repeal when it decided *Kaiser*; to the contrary, this Court concluded that "[t]he Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery." 480 Mich at 40.

Ignoring *Kaiser*, Ms. Velez proffers *Herteg v Somerset Collection GP, Inc*, unpublished opinion per curiam of the Court of Appeals, decided September 20, 2002 (Docket No. 227936); 2002 Mich App LEXIS 2355, as a decision that properly respects the intent of the Legislature in refusing to apply common law setoff [Velez Supp Br at 5-6]. As a premises liability action, *Herteg* has no corollary to the present case because joint and several liability no longer exists in the premises context. ***This is the reason for the Court's refusal to apply common law set-off in Herteg***. Although Ms. Velez omits this part of the *Herteg* analysis from the extensive quotes she cites, the *Herteg* Court explained:

> 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 N.W.2d 151 (2002). Under the new system, "defendants now are only accountable for damages in proportion to their percentage of fault." 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). 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 N.W.2d 94 (1993). We will not apply the reversion rule of statutory construction to revive what has, by clear implication, been abolished.

Id. at *20-21 (emphasis added). This same analysis does not apply to a joint and several liability system.

Absent application of setoff, nothing would prevent a plaintiff from obtaining duplicative recovery against jointly liable defendants through judgment and settlement. Such a result is not in keeping with the purpose of the 1995 tort reform legislation which was to ameliorate the litigious climate of this state and to reduce damages awards. Where joint and several liability was eliminated, it was in part for the very purpose of discouraging litigation and excessive judgments against minimally-liable deep pocket defendants. Imputing to the Legislature any

intent to encourage duplicative litigation and recovery through repeal of the common law setoff rule is inconsistent with this avowed purpose.

B. Repeal of Statutory Setoff Does Not Impliedly Abrogate, Preempt or Repeal the Common Law Setoff Rule.

In 1892, this Court recognized the general rule that the repeal of a statute revives the common law. *People v Hodgkin,* 94 Mich 27, 29; 53 NW 794 (1892). This Court continued to observe that rule over one hundred years later in the widely-cited *People v Reeves*, 448 Mich 1; 528 NW2d 160 (1995) (superseded by statute on other grounds, *People v Nowack*, 462 Mich 392; 614 NW2d 78 (2000)). In *Reeves*, the question was whether "arson", within the meaning of the felony murder statute, included the burning of property other than a dwelling house. This Court concluded that "the construction of the word 'arson' in the felony murder statute refers to the common-law crime of arson, that is, the malicious and voluntary or willful burning of a dwelling house of another." *Id.* at 3-4. In reaching that conclusion, this Court recited various principles of statutory construction, including the rule – relevant to this proceeding – that "[t]he repeal of a statute revives the common-law rule as it was before the statute was enacted." *Id.* at 7. *Reeves* has since been widely cited for that proposition. *See e.g., Cook v Dep't of Social Services,* 225 Mich App 318, 324; 570 NW2d 684 (1997) (citing *Reeves* for the proposition that "[g]enerally, the repeal of a statute revives the common law"). In *Bristol Window and Door, Inc v Hoogenstyn*, 250 Mich App 478; 650 NW2d 670 (2002), a case extensively relied upon by Ms. Velez, the Court went even further, essentially concluding that the common law co-existed with a concomitant statute. *Bristol* soundly supports the result in *Markley*.

In *Bristol*, the Court was asked to decide whether non-compete agreements outside the employer-employee relationship were lawful. Reasonable non-compete agreements had been held valid under the common law since at least 1873. *See Hubbard v Miller*, 27 Mich 15, 16-17

(1873). In 1905, the Legislature adopted a general rule rendering non-compete covenants illegal except in the context of business transfers or employer/employee relationships. *See* 1905 PA 329. In 1985, the Legislature enacted the Michigan Antitrust Reform Act, which repealed the statutory non-compete provisions and did not specifically address them. Two years later, the Legislature enacted Section 4a which, at subsection (1), explicitly allows reasonable non-competition agreements between employers and employees. The question posed to the Court was whether non-compete covenants "may be lawfully exacted of independent contractors" although not expressly allowed by statute. 250 Mich App at 482. The trial court concluded that the Legislature's failure to explicitly authorize non-compete agreements in other contexts evidenced the Legislature's intent that other noncompetition agreements were unlawful. The *Bristol* court disagreed, explaining:

> The Legislature's repeal of former MCL 445.761 and the commentary accompanying § 2 of the Uniform State Antitrust Act, with which the Legislature replaced the prior act, plainly indicate the Legislature's intent to return to the common-law rule of reason with respect to noncompetition agreements. We emphasize that absolutely nothing within the legislative history of §4a or within the language of that section itself suggests that the Legislature intended to prohibit, as it had in 1905, the application of the common-law rule of reason to noncompetition agreements. We are convinced that had the Legislature intended its enactment of §4a to generally prohibit all noncompetition agreements other than those between employers and employees, only two years after having repealed such a general prohibition against noncompetition agreements with the enactment of the MARA, the Legislature would have done so expressly ...
>
> . . .
>
> We conclude that the trial court erred in construing §§ 2 and 4a of the MARA as a prohibition against all noncompetition agreements except those between employers and employees and in failing to apply the common-law rule of reason embodied within §2 of the MARA when ruling with respect to the enforceability of the noncompetition agreements ...

250 Mich App at 496-497.

The common law remains in force until amended or repealed, and legislative amendment of the common law is not to be lightly presumed. *Wold Architects and Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006); Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed"). Well-settled common law principles are not abolished by implication. *B&B Investment v Gitler,* 229 Mich App 1; 581 NW2d 17 (1998). In *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898), this Court explained:

> In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; ***for statutes are not presumed to make any alteration in the common law, rather or otherwise than the act expressly declares.*** Therefore, in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act.

Id. (quoting, 9 Bac. Abr. Tit., "Statutes," I (4), 245) (emphasis added).

The effect of a statute requires an examination of legislative intent as revealed by the words of the statute itself. *Wold,* 474 Mich at 233. In *Wold*, this Court found that common law arbitration and statutory arbitration co-existed, explaining that nothing in the statute indicated any intent to change existing law:

> The Legislature is presumed to know of the existence of the common law when it acts. *Bennett v Weitz*, 220 Mich. App. 295, 299; 559 N.W.2d 354 (1996). When wording the MAA, the Legislature could easily have stated an intent to abrogate common-law arbitration.

Id. at 234. This Court similarly concluded that the statute did not evidence any intent "to occupy the entire area of arbitration law," unlike *Hoerstman Gen'l Contracting, Inc v Hahn*, 474 Mich 66; 711 NW2d 340 (2006), where this Court found that the "language of the statute shows that the Legislature covered the entire area of accord and satisfactions involving negotiable

instruments" and "clearly intended that the statute would abrogate the common law on this subject." *Id.* at 75.

In *Rusinek v Schultz, Snyder & Steele Lumber Co.*, 411 Mich 502; 309 NW2d 163 (1981), this Court held that Michigan's No-Fault Act did not abolish the common-law action for loss of consortium. Observing that statutes in derogation of common law must be strictly construed and are not to be extended by implication to abrogate established common law rules, the Court explained:

> Applying these principles to the question presented in this case, we conclude that the no-fault act must be construed as retaining the common-law action for loss of consortium. The common-law action for loss of consortium in Michigan is not expressly abolished by the language of § 3135. ***If this section abolishes this common-law right it must be found to do so by implication. There is nothing, however, in the language of the act or its legislative purposes that requires such a construction***. Since it is derived from the injured spouse's action, a claim of loss of consortium does not create a new case nor does it contribute significantly to the problems the act was intended to alleviate.

Id. at 508 (emphasis added).

The Legislature will be deemed to have acted with an understanding of the common law as it existed before the legislation was enacted, and where there is doubt regarding its meaning, it is to be "given the effect which makes the least rather than the most change in the common law." *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). *See also, Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994) (holding that the right to work-loss benefits provided by §3107(1)(b) of the No-Fault Act is subject to the common-law obligation to mitigate damages and stating that "in the absence of a contrary expression by the Legislature, well-settled common-law principles are not be abolished by implication in the guise of statutory construction").

This Court most recently addressed the issue in *People v Moreno*, - Mich - ; - NW2d - ; 2012 Mich LEXIS 463 (April 20, 2012), where this Court held that MCL 750.81d did not

abrogate the common-law right to resist illegal police conduct. Observing that this Court "must...adhere to the traditional rules concerning abrogation of the common law," this Court described those rules as follows:

> The common law remains in force unless it is modified. We must presume that the Legislature "know[s] of the existence of the common law when it acts." Accordingly, this Court has explained that "[t]he abrogative effect of a statutory scheme is a question of legislative intent" and that "legislative amendment of the common law is not lightly presumed." While the Legislature has the authority to modify the common law, it must do so by speaking in "'no uncertain terms.'" Moreover, this Court has held that "statutes in derogation of the common law must be strictly construed" and shall "not be extended by implication to abrogate established rules of common law."

Id. at *8 (footnotes omitted). Applying those rules, this Court observed that the prior resisting-arrest statute prohibited obstructing or resisting a person "authorized by law to maintain and preserve the peace, in their lawful acts...", while the current statute prohibits obstructing or resisting an "individual" who is "performing his or her duties." But contrary to the conclusion Ms. Velez urges this Court to draw from the legislative elimination of setoff language in MCL 600.2925d and MCL 600.6304(5), ***this Court refused to read the repeal of the common law into the Legislature's elimination of the word*** "lawful." This Court stated that it could not "conclude that the common-law right to resist an unlawful act by an officer ceased to exist merely because the Legislature did not include the word "lawful" in this phrase from MCL 750.81d." *Id.* at *13-14. The Court further explained:

> The Legislature is aware of how to draft statutes when it is abrogating common-law principles. For example, in the context of self-defense, the Legislature changed the common-law duty to retreat by enacting MCL 780.972, which specifically explains that there is no longer a duty to retreat under certain enumerated circumstances. The Legislature also enacted MCL 780.973 and MCL 780.974, which explicitly clarify that certain other aspects of the common law relating to self-defense were not abrogated. In enacting MCL 750.81d, the Legislature could have easily abrogated the right to resist an unlawful act by an officer by simply stating that the provision could be violated regardless of whether an officer's actions are lawful. The Legislature chose not to include such language.

> ... [T]he Legislature must speak in no uncertain terms when it intends to abrogate the common law, and *Reed* does not support the dissent's position that the mere *absence* of language is somehow the same as the *presence* of "no uncertain terms."

Id. at 12-13, n 25 (emphasis in original). *See also, Dawe v Bar-Levav & Assoc*, 485 Mich 20, 32; 780 NW2d 272 (2010) ("Nothing in the statute indicates that the Legislature intended to completely abrogate a mental health professional's common-law special relationship duty to his or her patients"); *Nation*, 454 Mich at 497 ("In light of the Legislature's rejection of an explicit provision requiring compound interest, we presume the Legislature's silence evidences an intent that courts continue to use simple interest"); *Ambs v Kalamazoo County Road Commission*, 255 Mich App 637, 649; 662 NW2d 424 (2003) (relying upon these principles to find that a statute prescribing the procedure for governmental abandonment of a road did not abrogate common law abandonment by nonuse); *Fournier v Demeniuk*, unpublished opinion per curiam of the Court of Appeals, decided July 6, 2011 (Docket No. 267625); 2006 Mich App LEXIS 2111 at *4 ("[B]ecause nothing in the tort reform legislation here at issue specifically addresses the question of a social host's liability for an adult guest's intoxication, the common-law principle recognizing zero liability in such instances must stand").[3]

It is inconceivable that this Court could apply the rules described in *Moreno* and *Rusinek*, among other cases, and reach a different conclusion here. Nothing in the repeal of the codified setoff provisions evidences a legislative intent to abrogate the common law setoff rule and to so drastically alter the law governing jointly liable defendants and the one recovery rule. The Legislature's omission of any reference to setoff despite its express preservation of joint and several liability in medical malpractice cases demonstrates that the Legislature: (1) did not intend to "occupy" the waterfront of liability issues; (2) did not in fact "occupy" the field; and (3) did

[3] *Fournier* is attached for the Court's convenience.

not abrogate the common law setoff rule. Such a drastic departure from well-established jurisprudential principles cannot be inferred from silence. In *Paige v City of Sterling Heights*, 476 Mich 495, 516; 720 NW2d 219 (2006), this Court recognized that "'sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence'", quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999).

In light of these well-established rules, there is no basis for Ms. Velez's characterization of *Markley* as "judicial action." *Markley* did not revive or adopt common law setoff. Common law setoff in cases where defendants are jointly and severally liable has never been in need of "resuscitation;" setoff was "adopted" by the appellate courts of this state many decades before *Markley* came up for review. Abolition of this well-established component of joint and several liability is what Ms. Velez seeks in the present case under the guise of judicial construction. But quite frankly, there is nothing for this Court to construe. Despite Ms. Velez's insistence that "the Michigan Legislature made it ***clear*** that setoffs would no longer be applied in this state" and that "*Markley's* adoption of a common-law setoff ... is directly contrary to the Michigan Legislature's 1996 ***pronouncement*** that setoffs will no longer recognized in this state" [Velez Supp. Br. at 2], the Legislature has said nothing – not one word – about common law setoff. In repealing statutory setoff, the Legislature is presumed to have known that common law setoff would continue unless expressly – not inferentially, not through silence, nor by implication – abrogated. The Legislature could have easily eliminated common law setoff in cases where defendants are jointly and severally liable (and allowed multiple recoveries for the same injury) with just a few words. It did not do so.

Consequently, if this Court is at all concerned that *Markley* represents "judicial action," it should first identify how, using the principles this Court recited and applied in *Moreno* and *Rusinek*, common law setoff was abrogated. With all due respect, this simply cannot be done. Ms. Velez certainly makes no attempt to apply the *Moreno* and *Rusinek* rules, opting instead to elevate above all others a new rule of her own creation: that "common-law resurrection" presupposes that "the statute which is first enacted and later repealed must be *contrary* to the common-law which preceded it." [Velez Supp Br. at 4].

Ms. Velez cites *In Re Spradlin*, 284 BR 830, 834-835 (ED Mich 2002), in supposed support of this rule, but *Spradlin* does not make that distinction. *Spradlin* does not say that repeal of a statute only revives the common law if the statute being repealed was contrary to or modified the common law. *Spradlin* relies on *Bristol, supra,* which cites to *Reeves*. Further, contrary to Ms. Velez's characterization of *Bristol*, the Court there did not "confine" the "common-law resurrection holding" to cases in which the repealed statute was in derogation of the common-law. [Velez Supp Br. at 7-8]. That was not even the context for the issue *Bristol* was asked to decide.

As explained above, the question posed in *Bristol* was whether non-compete covenants could be lawfully exacted of independent contractors when the statute only expressly allowed such covenants in the context of employer-employee relationships. 250 Mich App at 482. The Court concluded that the trial court erred in construing the statute as a prohibition against all noncompetition agreements except those specified in the statute and in failing to apply the common-law rule of reason when deciding the enforceability of other noncompetition agreements. 250 Mich App at 496-497. *Bristol* did not articulate as the test for reversion to the

common-law the requirement that the statute be in derogation of the common law. To the contrary, the statute and the common law co-existed in *Bristol*.

The most poignant rejection of Ms. Velez's repeal principle is illustrated in Dr. Tuma's Supplemental Brief: if the Legislature chose to repeal MCL 750.316, 750.317, 750.317a and 750. 318, which codify the common law crime of murder, would this Court truly be required to hold that the common law crime of murder has been abolished? That result would be required if the ascertainment of the Legislature's intent is confined, as Ms. Velez argues, to the repeal.

Ms. Velez argues that *Markley's* reliance on the Legislature's silence on the subject of setoff somehow conflicts with this Court's decisions "expressing dissatisfaction with the doctrine of legislative acquiescence" [Velez Supp Br. at 9]. Legislative acquiescence has not been argued by the parties in this case and is not relevant to the issue before this Court. Legislative silence, however, in the face of its presumed knowledge of the common law (and the revival doctrine) is relevant by this Court's own analysis in *Moreno*.[4]

Consequently, *Markley* did not "serious[ly] err[]" in relying upon the common law revival principle, as Ms. Velez asserts. *Markley* did not err at all. *Markley* applied the law as it presently exists. So did this Court in *Kaiser*. Although *Kaiser* was issued over three years ago and decided nearly the very same issue presently pending before this Court, Ms. Velez ***does not address or even mention it.*** Ms. Velez instead offers as "relevan[t]" to this case a bill introduced in the Legislature on May 3, 2012 – Senate Bill 1115 – which expressly requires that the total judgment be reduced "by the amount of all settlements paid by all joint tortfeasors" [Velez Reply Br. at 1-2]. Ms. Velez argues that this Senate Bill would "for the first time since

[4] Ms. Velez also asserts that the "essence of the *Markley* ruling" is that the Legislature "made a mistake," "erred," or acted "inadvertently" [Velez Supp Br. at 11-15], so she can then argue that such an assumption is an improper basis for the Court' ruling. *Markley* did not rely upon mistake, inadvertence or legislative oversight. Ms. Velez's argument on this issue is not relevant.

1996, call for a statutory setoff to be applied in a personal injury action" and that the Bill makes it "obvious for purposes of this case...that this proposed recognition of a setoff based on a prior settlement *is not to be found in the legislation that exists at the present time*" [Velez Reply Br. at 3].

Ms. Velez highlights a non-issue. Both parties agree that the 1995 tort reform amendments eliminated the ***statutory*** setoff provisions that previously existed. The question is not whether setoff is to be found "in the legislation that exists at the present time" but whether ***common law setoff*** applies. Senate Bill 1115 has no relevance whatsoever to that issue. Further, to the extent Senate Bill 1115 has any import at all, it is to clarify that the Legislature's intent was not to remove setoff from the jurisprudence of this state. See, e.g., *Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994), where this Court explained "[i]t is well settled by this Court that when an amendment is enacted soon after controversies arise regarding the meaning of the original act, 'it is logical to regard the amendment as a legislative interpretation of the original act....'" *Id.*, quoting *Detroit Edison Co v Revenue Dep't,* 320 Mich 506, 519-521; 31 NW2d 809 (1948), quoting 1 Sutherland, Statutory Construction (3d ed), § 1931, p 418. In other words, the Legislature is clarifying its intent that setoff continue to exist in cases of joint and several liability. In *Walker*, the issue was the meaning of a Detroit City Charter provision (charters are considered the equivalent of statutes for purposes of construction). That provision was amended to specifically allow a personal action against a delinquent property taxpayer. It was argued that before the amendment, the charter didn't allow such actions, and case law from

the Court of Appeals agreed. This Court, however, held that "the amendment of the Detroit City Charter clarifies what the drafters' and ratifiers' intent had been all along." *Walker* at 697.[5]

RELIEF REQUESTED

For these reasons, Amici Curiae Michigan State Medical Society and the American Medical Association respectfully urge this Court to hold that the common law setoff rule applies in medical malpractice cases where joint and several liability is imposed. Amici Curiae further support Dr. Tuma's request for reversal of the Court of Appeals decision and urge this Court to hold that the noneconomic damages cap must be applied to the jury's verdict before setoff is applied.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: Joanne Geha Swanson

Joanne Geha Swanson (P33594)
Daniel J. Schulte (P46929)
Attorneys for Amici Curiae
Michigan State Medical Society
and American Medical Association
500 Woodward Avenue. Suite 2500
Detroit, MI 48226
(313) 961-0200
(313) 961-0388 (Facsimile)

Dated: May 18, 2012

[5] Ms. Velez takes the liberty of supplementing her argument on the fully briefed and argued issue relating to Defendant's Application for Leave to Appeal, i.e., whether the amount a plaintiff receives from a settling joint tortfeasor should be set off against the jury verdict before or after application of the noneconomic damages cap. She argues that Senate Bill 1115, if adopted, would support Dr. Tuma's position that setoff should occur after the noneconomic damages cap reduction and that there is "nothing in Michigan law at present addressing this subject" [Velez Reply Br. at 3]. Amici do not agree that the sequencing issue has been left completely unaddressed by the Legislature. As MSMS and AMA have argued in their amici curiae brief on this issue, the statutory framework for applying the noneconomic damages cap logically contemplates that the cap be applied before setoff. See MSMS/AMA Br. at 9-16. Further, as above, this Court would consider the Senate Bill to be a clarification of the law as interpreted by the Legislature, not a change in the law.

CONNIE FOURNIER, Personal Representative of the ESTATE OF STELLA DEMENIUK, Plaintiff-Appellant, v LUCIA V. MORETTI, Defendant-Appellee.

No. 267625

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 2111

July 6, 2006, Decided

PRIOR HISTORY: Oakland Circuit Court. LC No. 05-067290-NO.

DISPOSITION: Affirmed.

JUDGES: Before: Davis, P.J., and Sawyer and Schuette, JJ.

OPINION

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. We decide this case without oral argument pursuant to *MCR 7.214(E)*.

I. FACTS

According to plaintiff, defendant brought a highly alcoholic concoction to an office party and provided some of it to Eugene Wright, who was visibly intoxicated. Shortly thereafter, Wright and plaintiff's decedent were involved in a traffic accident which claimed the latter's life.

Plaintiff filed suit, pressing theories of negligence, gross negligence, and battery. The trial court granted defendant's motion for summary disposition, holding that Michigan does not impose liability on a social host for providing alcohol to a guest who then injures a third party.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition [*2] de novo as a question of law. *Ardt v Titan Ins Co, 233 Mich. App. 685, 688; 593 N.W.2d 215 (1999)*. "A motion for summary disposition under *MCR 2.116(C)(8)* tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under *MCR 2.116(C)(8)* to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg, 231 Mich. App. 256, 258; 586 N.W.2d 103 (1998)*.

III. ANALYSIS

A. Negligence

"As part of its tort reform legislation, the Michigan Legislature abolished joint and several liability and replaced [it] with 'fair share liability.' The significance of the change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault." *Smiley v Corrigan, 248 Mich. App. 51, 55; 638 N.W.2d 151 (2001)* (footnote omitted). See *MCL 600.2956* and *MCL 600.6304* [*3] .

Plaintiff argues that the adoption of comparative fault overturned the common-law principles shielding a social provider of alcohol to an adult from liability for that adult's subsequent behavior in connection with third parties. We disagree.

According to the common law, "a third party has no cause of action against a social host who furnishes alcohol to a guest who is visibly intoxicated." *Leszczynski v*

Johnston, 155 Mich. App 392, 398; 399 N.W.2d 70 (1986). The reasoning behind the rule is that "it is the drinking rather than the furnishing of the liquor which is the proximate cause of the injury to a third party." *Id. at 397*. In arguing that the adopting of comparative liability has changed this situation, plaintiff attempts to make something out of nothing.

Under traditional principles of joint and several liability, all tortfeasors were fully liable for a victim's injuries. See *Markley v Oak Health Care Investors of Coldwater, Inc, 255 Mich. App 245, 253; 660 N.W.2d 344 (2003)*. The common law did not extend any liability to social hosts serving alcohol to adults who then committed torts, because the common [*4] law did not consider the social host to be a tortfeasor at all. The social host bears zero percent of the responsibly because a social host is not among those who could be found to have proximately caused the injury, and thus principles of comparative negligence do nothing to expose such a social host to liability.

Insofar as legislation derogates the common law, it should be interpreted narrowly. See *Sotelo v Twp of Grant, 470 Mich. 95, 100; 680 N.W.2d 381 (2004)*; *Ambs v Kalamazoo Co Rd Comm, 255 Mich. App. 637, 645 n 9; 662 N.W.2d 424 (2003)*. Accordingly, because nothing in the tort reform legislation here at issue specifically addresses the question of a social host's liability for an adult guest's intoxication, the common-law principle recognizing zero liability in such instances must stand. The trial court correctly dismissed plaintiff's negligence claim.

B. Gross negligence

Concerning plaintiff's gross negligence claim, the trial court stated that there was no legal support for the proposition that a claim of gross negligence could pierce the social host's immunity for liability for serving alcohol to an adult. [*5] Arguing to the contrary, plaintiff cites *Hollerud v Malamis, 20 Mich. App. 748; 174 N.W.2d 626 (1969)*. In that case, this Court cited sister-state authority for the proposition that liability "has been recognized in a few unusual cases where the consumer could be said to have lost his free will, *e.g.*, where he was addicted to alcohol or intoxicated to the point of helplessness and such addiction or incapacity was known to the vendor or should have been." *Id. at 760*. However, this Court went on to declare that it need not decide if any such rule applied in this state, because the case at bar concerned only ordinary negligence. *Id. at 760-761*. This case likewise does not call for a decision in this regard, because plaintiff alleges no more than simple beverage sharing at a party, not that plaintiff Walker was for some reason helpless to resist the ingestion of additional intoxicants.

C. Battery

Finally, plaintiff complains that the trial court dismissed the battery claim without explanation. This is true, but we need no guidance from the trial court to affirm that result. See *Zimmerman v Owens, 221 Mich. App. 259, 264; 561 N.W.2d 475 (1997)* [*6] (this Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed). Plaintiff asserts that defendant battered Wright by offering him a drink of unexpected potency, and that the doctrine of transferred intent should thus come into play to impute liability to defendant for Wright's alleged subsequent injury to plaintiff's decedent. We disagree.

There is no suggestion that defendant in some way forced the additional alcohol on Walker, and he or anyone else could only expect that a beverage offered at a drinking party is apt to contain alcohol. Social hosts are not obliged to announce what concentrations of alcohol their offerings contain; social guests must instead inquire, or gauge the matter for themselves as they consume them. An adult who accepts another drink at a social occasion can hardly call him- or herself a victim of a battery only because the drink was a strong one.

Affirmed.

/s/ Alton T. Davis

/s/ David H. Sawyer

/s/ Bill Schuette

JEAN HERTEG, Plaintiff-Appellee, v SOMERSET COLLECTION GP, INC., and FORBES/COHEN PROPERTIES, Defendants-Appellants, and PERINI BUILDING COMPANY, Defendant-Appellee.

No. 227936

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 2355

September 20, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 98-011207-NO.

DISPOSITION: Affirmed.

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

OPINION

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 [*2] 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 N.W.2d 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, 388389; 619 N.W.2d 7 (2000)*, vacated in part on other grounds *465 Mich. 53 (2001).]* [*3] "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 N.W.2d 773 (2001).* Accord *Stanley v Town Square Coop, 203 Mich. App. 143; 512 N.W.2d 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 Kmart Corp, 465 Mich. 416, 419; 634 N.W.2d 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* [*4] .

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 N.W.2d 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 "in 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* [*5] 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] 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*.

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 ("We hold that persons on church premises for other than commercial purposes are licensees and not invitees.").

[*6]

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

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 [*7] 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]

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).

Section 332 of the Second Restatement Torts [*8] 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 N.W.2d 849 (1998), rev'd *462 Mich. 591 (2000)*, this Court had concluded, based on its reading of *Preston v Sleziak, 383 Mich. 442; 175 N.W.2d 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 serves [*9] the interests of 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: "Whether 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 Beecher, 144 Wis. 2d 781, 424 N.W.2d 753, 755* [*10] *(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 N.W.2d 87 (1988)* (observing that "unlike obiter dicta, judicial dicta are not excluded from applicability of the doctrine of the law of the case").

> 4 Cf *Sebring v City of Berkley, 247 Mich. App. 666, 681-682; 637 N.W.2d 552 (2001)* (declining to follow obiter dicta set forth in *Nawrocki v Macomb Co Rd Comm, 463 Mich. 143, 171, n 27; 615 N.W.2d 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.

[*11] 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.*

> 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.

[*12] 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 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 "purchased 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 evidences 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. [*13] " *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 [*14] 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 N.W.2d 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 reoccurrence 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 [*15] 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; 477 N.W.2d 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 [*16] 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 [*17] *Ortega v KMart 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 N.W.2d 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 shinny 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 N.W.2d 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 [*18] 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 N.W.2d 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 N.W.2d 464 (1984)*; *Larabell v Schuknecht, 308 Mich. 419; 14 N.W.2d 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 [*19] 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 N.W.2d 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 N.W.2d 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 N.W.2d 819 (1947)* ("'Statutes must be construed as to give effect to the obvious legislative intent, though construction is contrary to such rules. [*20] '" [quoting 6 Dunnell, 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 N.W.2d 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] We believe that this statutory scheme reflects a clear Legislative [*21] 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 N.W.2d 94 (1993)*. We will not apply the reversion rule of statutory construction to revive what has, by clear implication, been abolished.

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 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.

[*22] 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 N.W.2d 912 (2001)*, would preclude the trial court from granting such relief. *Id. at 39.* [9]

> 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).

[*23] 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 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 N.W.2d 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 N.W.2d 532 (1997)*.

In any event, we do not believe that the verdict rendered is logically inconsistent [*24] or irreconcilable. "The 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 N.W.2d 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 N.W.2d 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 N.W.2d 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 [*25] 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)*: [*26] "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 [*27] 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

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANGEL MORENO, JR., Defendant-Appellant.

No. 141837

SUPREME COURT OF MICHIGAN

2012 Mich. LEXIS 463

April 20, 2012, Filed

PRIOR HISTORY: *People of the Mich. v. Angel Moreno, 2010 Mich. App. LEXIS 1055 (Mich. Ct. App., June 10, 2010)*

JUDGES: [*1] Chief Justice: Robert P. Young, Jr. Justices: Michael F. Cavanagh, Marilyn Kelly, Stephen J. Markman, Diane M. Hathaway, Mary Beth Kelly, Brian K. Zahra. MARKMAN, J. (dissenting).

OPINION BY: Diane M. Hathaway

OPINION

BEFORE THE ENTIRE BENCH

HATHAWAY, J.

In this case, we review whether defendant was properly charged with resisting and obstructing a police officer under *MCL 750.81d* after defendant struggled with officers who had entered his home unlawfully. To resolve this issue, we must address whether *MCL 750.81d* abrogates the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas. We conclude that the statute did not abrogate this right.

While the Legislature has the authority to modify the common law, it must do so by speaking in "no uncertain terms."[1] Neither the language of *MCL 750.81d* nor the legislative history of this statute indicates with certainty that the Legislature intended to abrogate the common-law right to resist unlawful arrests or other invasions of private rights. We cannot presume that the Legislature intended to abrogate this right. Therefore, we overrule *People v Ventura, 262 Moich App 370; 686 NW2d 748 (2004),* [*2] to the extent that it held that the Legislature affirmatively chose to modify the traditional common-law rule that a person may resist an unlawful arrest. Because the Court of Appeals in this case relied on *Ventura* and extended its holding to the context of illegal entries of the home, we reverse the judgment of the Court of Appeals and remand this matter to the trial court. On remand, we instruct the trial court to grant defendant's motion to quash the charges on the basis of its ruling that the officers' conduct was unlawful.

1 *Hoerstman Gen Contracting, Inc v Hahn, 474 Mich 66, 74; 711 NW2d 340 (2006).*

I. FACTS AND PROCEDURAL HISTORY

This case arises from a physical struggle that occurred between defendant and two Holland police officers when the officers sought to enter defendant's home without a warrant. As a result of the struggle, defendant was charged with resisting and obstructing a police officer and resisting and obstructing a police officer causing injury in violation of *MCL 750.81d (1)* and *(2).*

On the morning of the incident, Officer Troy DeWys and Officer Matthew Hamberg were searching for Shane Adams. Adams had several outstanding warrants. Defendant's house was in the immediate [*3] vicinity of where Adams's vehicle was parked, so the officers knocked on defendant's front and back doors to inquire about Adams. While outside the house, Officer DeWys heard voices and people running inside the house. He identified himself as a police officer and stated that he wanted to ascertain the identities of the people inside the house. Officer Hamberg looked through a basement window and could see empty bottles of alcohol and people trying to hide.

Approximately 15 minutes after the officers had knocked on the doors, Mandy McCarry opened the front door. Officer DeWys smelled "intoxicants and burnt marijuana." McCarry admitted that underage persons were consuming alcohol inside the house, but Officer DeWys told her that he was not interested in writing "a bunch of minor in possession tickets." Officer DeWys told McCarry that he just wanted to identify who was inside the house. Officer DeWys asked McCarry if she knew the owner of the vehicle parked in the street. McCarry asked the officers if they were looking for Adams and stated that he was not inside the house. McCarry told the officers that they could not come inside the house without a warrant.

Officer DeWys then informed [*4] McCarry that the officers were entering the house to "secure it" while they waited for a warrant. At that time, defendant came to the front door and demanded that the officers obtain a warrant before entering his house. Defendant then attempted to close the door, but Officer Hamberg put his shoulder against the door to prevent defendant from closing it. A struggle ensued between defendant and the officers. Ultimately, the officers pulled defendant from his doorway, physically subdued him, and arrested him. Officer DeWys suffered a torn hamstring and bruised elbow in the struggle.

Defendant was charged with assaulting, resisting, or obstructing a police officer, *MCL 750.81d(1)*, and assaulting, resisting, or obstructing a police officer causing injury, *MCL 750.81d(2)*. Defendant was bound over for trial. He moved to quash the charges, arguing that the officers' entry into his home was unlawful. The trial court concluded that the officers had unlawfully entered defendant's home, specifically ruling that there were no exigent circumstances that would have provided an exception to the warrant requirement. Nevertheless, the trial court concluded that a "lawful" action by an officer is not [*5] a requirement of *MCL 750.81d* and, therefore, denied defendant's motion to quash the charges.

Defendant appealed as of right. The Court of Appeals affirmed the trial court's decision in an unpublished opinion per curiam.[2] The Court of Appeals relied on *Ventura* for the proposition that the lawfulness of police conduct is no longer an element of the offenses of resisting and obstructing because *MCL 750.81d* abrogated the common-law right to resist an unlawful arrest.[3] Therefore, the Court of Appeals concluded that the officers' conduct in forcibly entering defendant's home did not have to be lawful in order for defendant to be charged under *MCL 750.81d*.[4] This Court granted defendant's application for leave to appeal.[5]

2 *People v. Moreno, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2010 (Docket No. 294840, 2010 Mich. App. LEXIS 1055)*.

3 *2010 Mich. App. LEXIS 1055 at *18.*

4 *2010 Mich. App. LEXIS 1055 at *18.*

5 *People v Moreno, 488 Mich 1010; 791 N.W.2d 719 (2010).*

II. STANDARD OF REVIEW

This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo.[6]

6 *People v Lee, 489 Mich 289, 295; 803 NW2d 165 (2011)*; *Miller-Davis Co v Ahrens Constr, Inc, 489 Mich 355, 361; 802 NW2d 33 (2011).*

III. ANALYSIS

A. THE LANGUAGE [*6] OF *MCL 750.81d* DOES NOT SUPPORT ABROGATION

The issue before this Court is whether a person present in his or her own home can resist a police officer who unlawfully and forcibly enters the home or whether *MCL 750.81d* prohibits resisting unlawful actions by a police officer. Specifically, we must decide whether the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its 2002 enactment of *MCL 750.81d*.

MCL 750.81d states in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (2) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, [*7] or both.
>
> (3) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is perform-

> ing his or her duties causing a serious impairment of a body function of that person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.
>
> (4) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing the death of that person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.
>
> * * *
>
> (7) As used in this section:
>
> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

When interpreting statues, this Court must "ascertain and give effect to the intent of the Legislature."[7] The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.[8] In [*8] interpreting a statute, this Court avoids constructions that would render any part of the statute surplusage or nugatory.[9]

> 7 *People v Koonce, 466 Mich 515, 518; 648 NW2d 153 (2002).*
> 8 *People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999).*
> 9 *People v McGraw, 484 Mich 120, 126; 771 NW2d 655 (2009)*, citing *Baker v Gen Motors Corp, 409 Mich 639, 665; 297 NW2d 387 (1980).*

In addition to these basic rules of statutory interpretation, this Court must also adhere to the traditional rules concerning abrogation of the common law. The common law remains in force unless it is modified.[10] We must presume that the Legislature "know[s] of the existence of the common law when it acts."[11] Accordingly, this Court has explained that "[t]he abrogative effect of a statutory scheme is a question of legislative intent"[12] and that "legislative amendment of the common law is not lightly presumed."[13] While the Legislature has the authority to modify the common law, it must do so by speaking in "'no uncertain terms.'"[14] Moreover, this Court has held that "statutes in derogation of the common law must be strictly construed" and shall "not be extended by implication to abrogate established rules of common law."[15] In [*9] this case, we must be mindful of the rules regarding abrogation of the common law when determining whether the Legislature, in enacting *MCL 750.81d*, intended to abrogate the common-law right to resist unlawful police conduct.

> 10 *Wold Architects & Engineers v Strat, 474 Mich 223, 233; 713 NW2d 750 (2006).*
> 11 *Id. at 234*; see also *Dawe v. Dr. Reuven Bar-Levav & Assocs., P.C., 485 Mich. 20, 28; 780 N.W.2d 272 (2010)* (quoting *Wold Architects*).
> 12 *Dawe, 485 Mich at 28.*
> 13 *Wold Architects, 474 Mich at 233.*
> 14 *Dawe, 485 Mich at 28*, quoting *Hoerstman, 474 Mich at 74.*
> 15 *Rusinek v Schultz, Snyder & Steele Lumber Co, 411 Mich 502, 508; 309 NW2d 163 (1981)* (citation omitted).

Defendant was charged with resisting and obstructing a police officer in violation of *MCL 750.81d*. In Michigan, obstructing a police officer has been recognized as a common-law crime, as well as an offense governed by statute.[16] In addition, the right to resist *unlawful* arrests, and other *unlawful* invasions of private rights, is well established in our state's common law.[17] In explaining the common-law right to resist an unlawful arrest, this Court has stated that "one may use such reasonable force as is necessary to prevent an illegal attachment [*10] and to resist an illegal arrest" and that "the basis for such preventive or resistive action is the illegality of an officer's action, to which [a] defendant immediately reacts."[18]

> 16 *People v Krum, 374 Mich 356, 361-362; 132 NW2d 69 (1965).*
> 17 *Id.*; *People v Clements, 68 Mich 655, 658; 36 NW 792 (1888)* (recognizing the right to reasonably resist an attempted illegal seizure of property by the sheriff and noting that "[n]o officer can be legally authorized to invade private rights in any such manner"); *People v MacLeod, 254 Mich App 222, 226; 656 NW2d 844 (2002)* (holding that the lawfulness of the arrest was an element of the prior resisting-and-obstructing statute).
> 18 *Krum, 374 Mich at 361.*

In *Ventura*, the Court of Appeals compared the prior version of the resisting-arrest statute, *MCL 750.479*, to the current version, *MCL 750.81d*. The prior version stated in pertinent part:

> Any person who shall knowingly and willfully . . . obstruct, resist, oppose, assault, beat or wound . . . any . . . person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor . . . . [*MCL 750.479*, [*11] as enacted by 1931 PA 328.]

Noting that the prior version, *MCL 750.479*, included a reference to the lawfulness of an officer's actions, the Court of Appeals in *Ventura* then turned to the language of *MCL 750.81d*.[19] The Court stated that it could not find any similar reference to lawfulness in *MCL 750.81d*.[20] The Court also noted that other jurisdictions have found the right to resist an unlawful arrest to be "outmoded in our contemporary society."[21] The Court concluded that the Legislature had made an "obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest."[22] We disagree. We hold that *MCL 750.81d* did not abrogate the right to resist unlawful police conduct and that *Ventura* was wrongly decided.

19 *Ventura, 262 Mich App at 374-375.*
20 *Id. at 375.*
21 *Id. at 376* (citation and quotation marks omitted).
22 *Id. at 376-377.*

A fundamental principle of statutory construction is that common-law meanings apply unless the Legislature has directed otherwise.[23] If the Legislature intended to abrogate the common-law right to resist unlawful conduct by an officer, it had to do so by speaking in "'no uncertain terms.'"[24] Significantly, nowhere in *MCL 750.81d* [*12] does the Legislature state that the right to resist unlawful conduct by an officer no longer exists.[25]

23 *People v Young, 418 Mich 1, 15; 340 NW2d 805 (1983)*; see also *Const 1963, art 3, § 7* ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.").
24 *Dawe, 485 Mich at 28*, quoting *Hoerstman, 474 Mich at 74.*
25 The Legislature is aware of how to draft statutes when it is abrogating common-law principles. For example, in the context of self-defense, the Legislature changed the common-law duty to retreat by enacting *MCL 780.972*, which specifically explains that there is no longer a duty to retreat under certain enumerated circumstances. The Legislature also enacted *MCL 780.973* and *MCL 780.974*, which explicitly clarify that certain other aspects of the common law relating to self-defense were not abrogated. In enacting *MCL 750.81d*, the Legislature could have easily abrogated the right to resist an unlawful act by an officer by simply stating that the provision could be violated regardless of whether an officer's actions are lawful. The Legislature chose not [*13] to include such language.

Nevertheless, the dissent reasons that because *MCL 750.81d* does not include a "'lawful acts' proviso," the Legislature "clearly" and "in no uncertain terms" abrogated the common law and excluded the lawfulness of a police officer's conduct as an element of resisting an officer. The dissent relies on a footnote in *Reed v Breton, 475 Mich 531, 539 n 8; 718 NW2d 770 (2006)*, explaining that the mere absence of language specifically abrogating the common law does not necessarily mean that no abrogation occurred. However, nothing in *Reed* changes the longstanding rule that the Legislature must speak in no uncertain terms when it intends to abrogate the common law, and *Reed* does not support the dissent's position that the mere *absence* of language is somehow the same as the *presence* of "no uncertain terms."

The prior resisting-arrest statute, *MCL 750.479* as enacted by 1931 PA 328, prohibited obstructing or resisting a person "authorized by law to maintain and preserve the peace, in their lawful acts . . . ."[26] The current resisting-arrest statute, *MCL 750.81d*, prohibits obstructing or resisting an "individual" who is "performing his or her duties." We cannot conclude [*14] that the common-law right to resist an unlawful act by an officer ceased to exist merely because the Legislature did not include the word "lawful" in this phrase from *MCL 750.81d*. In fact, this Court has recently clarified that the Legislature's failure to expressly provide for a common-law defense in a criminal statute does not prevent a defendant from relying on that defense.[27]

26 We note that while *MCL 750.479* was amended by 2002 PA 270, it has not been repealed and remains an alternative statute under which resisting and obstructing may be charged.
27 *People v Dupree, 486 Mich 693, 705; 788 NW2d 399 (2010).*

In *People v Dupree*, this Court addressed whether a defendant could properly raise the common-law affirmative defense of self-defense when charged under the felon-in-possession statute, *MCL 750.224f*.[28] The felon-in-possession statute does not explicitly indicate that

self-defense is an available defense to this charge. Nevertheless, this Court clarified that "[t]he Legislature's failure to provide explicitly for the common law affirmative defense of self-defense does not foreclose defendants from relying on it to justify a violation of *MCL 750.224f*."[29] Specifically, this Court explained [*15] that "[h]istorically, in cases in which the statutory provision did not squarely resolve the issue before this Court, we have applied the common law, presuming that the Legislature enacted statutes mindful of those aspects of common law that have become 'firmly embedded in our jurisprudence . . . .'"[30] This Court went on to explain that "[m]ore recently, the United States Supreme Court recognized the interrelated nature of criminal statutes and the common law, stating that legislative bodies enact criminal statutes 'against a background of Anglo-Saxon common law . . . .'"[31] Finding this rationale instructive, this Court concluded that

> [a]bsent some clear indication that the Legislature abrogated or modified the traditional common law affirmative defense of self-defense for the felon-in-possession charge in *MCL 750.224f* or elsewhere in the Michigan Penal Code, we presume that the affirmative defense of self-defense remains available to defendants if supported by sufficient evidence.[32]

28 *Dupree, 486 Mich at 705.*
29 *Id.*
30 *Id.*, quoting *Garwols v Bankers Trust Co, 251 Mich 420, 424, 232 NW 239 (1930).*
31 *Dupree, 486 Mich at 705*, quoting *United States v Bailey, 444 U.S. 394, 415 n 11; 100 S Ct 624; 62 L Ed 2d 575 (1980).*
32 *Dupree, 486 Mich at 706.*

In [*16] the context of resisting or obstructing an officer, there must be some clear indication in *MCL 750.81d* that the Legislature abrogated the common-law right to resist an officer's unlawful conduct if this Court is to so hold. This Court has recognized that "'[t]he obstruction of or resistance to a public officer in the *performance of his duties* is an offense at common law, and by statute in all jurisdictions.'"[33] *MCL 750.81d* expressly defines "obstruct" as a "knowing failure to comply with a *lawful command*."[34] However, the decision of the Court of Appeals in this case conflicts with the statutory language. The Court held that *MCL 750.81d prohibits* a person from resisting an officer's unlawful conduct, yet the statute *allows* a person to obstruct an officer's unlawful command. This conflict casts substantial doubt on the argument that the Legislature intended, let alone "clearly intended," to abrogate the common-law right to resist an unlawful arrest by not including the phrase "in their lawful acts" in *MCL 750.81d.*

33 *Krum, 374 Mich at 361* (emphasis added; citation omitted).
34 *MCL 750.81d(7)(a)* (emphasis added).

Based on the plain language of *MCL 750.81d*, and without any certain indication [*17] otherwise by the Legislature, we cannot simply assume that the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its enactment of *MCL 750.81d.* Such an interpretation of the statute would be inconsistent with this Court's rules of statutory construction when abrogation of the common law is at issue.

In this case, the Court of Appeals held that "[t]he fact that defendant refused entry to the officers unless they obtained a search warrant is indicative of defendant's knowledge of their status as police officers and that they were engaged in the performance of their official duties."[35] There is no question that defendant knew that the men at his door were police officers. However, the officers wanted to enter defendant's home without a warrant, and one of the officers physically prevented defendant from closing the door to his home. Accordingly, defendant's refusal to allow the officers into his home is not conclusive of whether defendant had reasonable cause to know that the officers were "engaged in the performance of their official duties." Consistently with the common-law rule, we conclude that the prosecution must establish that the officers' actions [*18] were lawful.

35 *Moreno, 2010 Mich. App. LEXIS 1055 at *12.*

B. THE LEGISLATIVE HISTORY OF *MCL 750.81d* DOES NOT SUPPORT ABROGATION

The legislative history of *MCL 750.81d* is also helpful in demonstrating that that the Legislature did not intend to abrogate the right to resist an unlawful act by an officer. However, this history must be reviewed in conjunction with the history of the corresponding statute, *MCL 750.479*. Before 2002, it was clear that a person had the right to resist unlawful police conduct. The pre-2002 version of *MCL 750.479* governed the offense of resisting and obstructing and generally prohibited resisting an officer discharging his or her duties.[36] This Court interpreted the former version of *MCL 750.479* as including the Michigan common-law principle that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest . . . ."[37]

Thus, the former version of *MCL 750.479* included the right to resist unlawful police conduct.

36 The former version of *MCL 750.479* provided:

> Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, [*19] or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or atempted [sic] to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars.

37 *Krum, 374 Mich at 361.*

In 2002, the Legislature passed House Bill 5442, amending the prior version of *MCL 750.479*.[38] Simultaneously, [*20] the Legislature enacted House Bill 5440 as 2002 PA 266, which added *MCL 750.81d*. Both bills contained reciprocal language providing that each would not take effect unless both were enacted into law.[39] The amended version of *MCL 750.479* no longer prohibits a person from resisting "persons authorized by law to maintain and preserve the peace," but is instead targeted at prohibiting threatening and dangerous conduct toward a list of enumerated persons connected with law enforcement.[40] The statute provides a tiered penalty structure for various degrees of danger posed and harm caused to a person protected by the statute,[41] clarifies that a person can be charged with and convicted of an underlying offense, and provides courts with discretion to impose a sentence for violating this statute that must be served consecutively to any sentence for an offense arising out of the same transaction.[42] Further, the statute defines the term "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."[43]

38 *MCL 750.479* now provides in pertinent part:

> (1) A person shall not knowingly and willfully do any of the following:
>
> (a) Assault, [*21] batter, wound, obstruct, or endanger a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise acting in the performance of his or her duties.
>
> (b) Assault, batter, wound, obstruct, or endanger an officer enforcing an ordinance, law, rule, order, or resolution of the common council of a city board of trustees, the common council or village council of an incorporated village, or a township board of a township.

39 The arguments offered for passing these bills were to protect persons in all professions connected to law enforcement instead of only peace officers and to establish a tiered penalty structure based on the seriousness of the injury actually inflicted. The bills were to provide uniformity of punishment and consolidate all provisions relating to attacks on law enforcement per-

sonnel, firefighters, and emergency medical personnel into one section of the law. House Legislative Analysis, HB 5440 through 5443 and 5601, August 29, 2002, [*22] p 5.

40 *MCL 750.479(1)(b)* retains the prohibition in the former version of the statute against threatening and dangerous conduct toward officers enforcing municipal law.

41 *MCL 750.479(2) through (5).*

42 *MCL 750.479(6)* and *(7).*

43 *MCL 750.479(8)(a).*

Meanwhile, *MCL 750.81d* focuses on prohibiting dangerous and threatening conduct toward a "person" protected by the statute.[44] This includes resisting an officer's actions. The statute expressly enumerates the law enforcement officials and other emergency responders who are protected and requires that an individual have reason to know that his or her conduct is directed toward a person "performing his or her duties."[45] Like *MCL 750.479*, *MCL 750.81d* provides a tiered penalty structure for various degrees of danger posed and harm caused to a person protected by the statute,[46] clarifies that a person can be charged with and convicted of an underlying offense, and provides courts with discretion to impose a sentence for violating the statute that must be served consecutively to any sentence for an offense arising out of the same transaction.[47] Further, just like *MCL 750.479*, *MCL 750.81d* defines the term "obstruct" as including "the use or threatened [*23] use of physical interference or force or a knowing failure to comply with a lawful command."[48] As evidenced by the language of these two statutes, it is clear that the Legislature changed some, but not *all*, aspects of the common law governing the offenses of resisting and obstructing a peace officer.[49] The Legislature made these changes using language that clearly set forth the changes it intended to make.

44 *MCL 750.81d(7)(b).*

45 *MCL 750.81d(1) through (4).*

46 *Id.*

47 *MCL 750.81d(5)* and *(6).*

48 *MCL 750.81d(7)(a).*

49 *MCL 750.479* and *MCL 750.81d* together now prohibit certain conduct against peace officers *and* additional persons connected to law enforcement, and they include tiered penalty structures for the various degrees of danger posed and harm caused to these persons. In these statutes, the Legislature clarified that a person can be charged with an underlying crime. The Legislature also abrogated the common-law rule of presumed concurrent sentencing by expressly providing for consecutive sentencing for all offenses arising out of the same transaction.

In contrast, the Legislature expressed no intent to do away with the common-law right to resist an unlawful arrest.[50] The most that could be said [*24] in favor of finding an abrogation of that right is the omission of the phrase "in their lawful acts" from *MCL 750.81d*. However, similar language regarding lawful acts was included in both *MCL 750.81d* and the amended version of *MCL 750.479*. Both statutes now include language that this Court has used in the past to explain that the common-law offense of obstructing or resisting an officer occurs while the protected person is "performing his or her duties." The term "duty" generally means "something that one is expected or required to do by moral or legal obligation"[51] and legally implies "an obligation one has by law or by contract."[52] *MCL 750.479* and *MCL 750.81d* both imply that the charged person "knows or has reason to know" that a protected individual is "performing his or her duties" when engaging in conduct authorized by law or required by legal obligation.[53] Thus, the Legislature retained the concept that the offense of resisting and obstructing requires that an officer's actions are lawful.

50 When legislatures from other states intended to do away with this common-law right, they found clear and unequivocal language to accomplish their task. For example, a Delaware statute makes [*25] it abundantly clear that "[t]he use of force is not justifiable under this section to resist an arrest which the defendant knows or should know is being made by a peace officer, *whether or not the arrest is lawful.*" *Del Code Ann, tit 11, § 464(d)* (emphasis added). A Texas statute clearly provides that "[i]t is no defense to prosecution under this section that the arrest or search was unlawful." *Tex Penal Code Ann 38.03(b).* An Oregon statute, *Or Rev Stat 161.260*, which is similar to *MCL 750.81d*, expressly provides, "A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful." Similarly, an analogous Colorado statute expressly provides: "It is no defense to a prosecution under this section that the peace officer was attempting to make an arrest which in fact was unlawful . . . ." *Colo Rev Stat 18-8-103(2).*

51 *Random House Webster's College Dictionary* (2000).

52 Black's Law Dictionary (6th ed).

53 The meaning of this added phrase is not inconsistent with the omitted phrase "in their lawful acts." This concept was illustrated at oral argument when Justice CAVANAGH questioned the [*26] prosecutor as follows:

> *Justice Cavanagh*: Can I pose this hypothetical to you? What if you have a situation where you have a male officer performing his duties undertakes a search of a female prisoner and puts his hand inside her pants and commits a CSC [criminal sexual conduct]? Under your just stated interpretation of [*MCL 750.181d* and under *Ventura*'s holding, and assuming she resists--she fights him off, tries to fight him off--she could be charged could she not?
>
> [*Prosecuting Attorney*]: No.
>
> *Justice Cavanagh*: Why?
>
> [*Prosecuting Attorney*]: What--what duty is he performing?
>
> *Justice Cavanagh*: Doing a search.

This exchange illustrates that there is no relevant distinction between the meaning of an officer "performing his or her duties" and an officer engaging in "lawful acts." Just as an officer acts outside his or her legal duty to perform a search by committing an assault, the officers in this case acted outside their legal duties by unlawfully entering defendant's home without a warrant.

This Court has explained that if there is doubt about whether a statute abrogates established common-law rules, the statute shall be "'given the effect which makes the least rather than the most change in the [*27] common law.'"[54] Nevertheless, without any certain indication of the Legislature's intent to abrogate the common-law right to resist an unlawful arrest, the Court of Appeals in *Ventura* pronounced that it was "adopt[ing] the modern rule that a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion."[55] However, we find nothing in the language or legislative history of this statute to support this conclusion. Therefore, we simply cannot conclude that the Legislature abrogated the common-law right to resist unlawful invasions of private rights in "no uncertain terms."

54 *Nation v W D E Electric Co, 454 Mich 489, 494; 563 NW2d 233 (1997)*, quoting *Energetics, Ltd v Whitmill, 442 Mich 38, 51; 497 NW2d 497 (1993)*.

55 *Ventura, 262 Mich App at 377.*

Accordingly, we overrule *Ventura* to the extent that it concluded that the common-law right to resist an unlawful arrest was abrogated by *MCL 750.81d*.

IV. CONCLUSION

While the Legislature has the authority to modify the common law, it must do so by speaking in "no uncertain terms."[56] Neither the language of *MCL 750.81d* [*28] nor the legislative history of this statute indicates with certainty that the Legislature intended to abrogate the common-law right to resist unlawful arrests or other unlawful invasions of private rights. We cannot presume that the Legislature intended to abrogate this right. Therefore, we overrule *Ventura* to the extent that it held that the Legislature affirmatively chose to modify the traditional common-law rule that a person may resist an unlawful arrest.[57]

56 *Hoerstman, 474 Mich at 74.*

57 *Ventura, 262 Mich App at 376-377.*

Because the Court of Appeals in this case relied on *Ventura* and extended its broader principle to the context of unlawful entry of the home, we reverse the judgment of the Court of Appeals and remand this matter to the trial court. On remand, we instruct the trial court to grant defendant's motion to quash the charges on the basis of its ruling that the officers' conduct was unlawful.

Diane M. Hathaway

Michael F. Cavanagh

Marilyn Kelly

Mary Beth Kelly

Brian K. Zahra

DISSENT BY: Stephen J. Markman

DISSENT

MARKMAN, J. (*dissenting*).

I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals and overrule *People v Ventura, 262 Mich App 370; 686 NW2d 748 (2004)*. [*29] The only issue here is whether the Legislature abrogated the right to resist police conduct that is later determined to have been unlawful. Before 2002, the Legislature in *MCL 750.479* made it unlawful to resist a police officer, but only if that officer was performing what was later determined to constitute a "lawful act." However, in 2002, the Legislature amended *MCL 750.479* and also enacted a new statute addressing this subject, *MCL 750.81d*, neither of which contains the

"lawful act" requirement. By doing this, the Legislature clearly excluded consideration of the lawfulness of the police officer's conduct as a relevant element in forcibly resisting an officer as long as the police officer was "performing his or her duties," and it did so "in no uncertain terms." Therefore, I would affirm the judgment of the Court of Appeals, which, in reliance on *Ventura*, held that defendant was properly charged with resisting and obstructing a police officer under *MCL 750.81d* after he physically struggled with officers who had entered his home.[1]

1 The trial court ruled that the officers had unlawfully entered defendant's home, and the prosecutor did not appeal that ruling. Therefore, this opinion [*30] is written under the assumption that the officers' entry was unlawful.

I. LEGISLATIVE ABROGATION

Before 2002, *MCL 750.479* provided:

> Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or atempted [sic] to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, *in their lawful acts*, attempts and efforts to maintain, [*31] preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars. [Emphasis added.]

In *People v Krum, 374 Mich 356, 361; 132 NW2d 69 (1965)*, this Court held that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" without violating *MCL 750.479*. See also *People v Clements, 68 Mich 655, 658; 36 NW 792 (1888)* (holding that a debtor whose property was seized by a sheriff executing an invalid writ of attachment was not "compelled to submit to such trespass without reasonable resistance" in order to avoid violating 1882 How Stat 9257, a predecessor of *MCL 750.479*).

In 2002, the Legislature amended *MCL 750.479* and enacted *MCL 750.81d*. *MCL 750.479* now provides, in pertinent part:

> (1) A person shall not knowingly and willfully do any of the following:
>
> (a) Assault, batter, wound, obstruct, or endanger a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve [*32] or execute any process, rule, or order made or issued by lawful authority or otherwise *acting in the performance of his or her duties*.
>
> (b) Assault, batter, wound, obstruct, or endanger an officer enforcing an ordinance, law, rule, order, or resolution of the common council of a city board of trustees, the common council or village council of an incorporated village, or a township board of a township.
>
> (2) Except as provided in subsections (3), (4), and (5), a person who violates this section is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (3) A person who violates this section and by that violation causes a bodily injury requiring medical attention or medical care to an individual described in this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.
>
> (4) A person who violates this section and by that violation causes serious impairment of a body function of an individual described in this section is guilty of a felony punishable by imprisonment for

not more than 10 years or a fine of not more than $10,000.00, or both.

(5) A person who violates [*33] this section and by that violation causes the death of an individual described in this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

* * *

(8) As used in this section:

(a) "*Obstruct*" includes the use or threatened use of physical interference or force or a *knowing failure to comply with a lawful command*. [Emphasis added.]

MCL 750.81d provides:

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is *performing his or her duties* is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(2) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

(3) An individual who assaults, batters, [*34] wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a serious impairment of a body function of that person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(4) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing the death of that person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

* * *

(7) As used in this section:

(a) "*Obstruct*" includes the use or threatened use of physical interference or force or a *knowing failure to comply with a lawful command.*

(b) "Person" means any of the following:

(*i*) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

(*ii*) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, [*35] or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(*iii*) A conservation officer of the department of natural resources or the department of environmental quality.

(*iv*) A conservation officer of the United States department of the interior.

(*v*) A sheriff or deputy sheriff.

(*vi*) A constable.

(*vii*) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.

(*viii*) A firefighter.

(*ix*) Any emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, *MCL 333.20950.*

(*x*) An individual engaged in a search and rescue operation as that term is defined in [*MCL 750.50c*]. [Emphasis added.]

MCL 750.81d applies to police officers, firefighters, and emergency medical service personnel, and *MCL 750.479* applies to other persons involved with law enforcement, such as judges, prosecutors, and parole officers. Both statutes make it unlawful not only to assault or resist these individuals, but also to endanger them while they are performing their duties. Both statutes also have multitiered penalty structures based [*36] on the level of injury suffered.

The question before us concerns whether the rule announced in *Clements* and reaffirmed in *Krum, 374 Mich at 361*, that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" remains the rule of law in Michigan in light of the 2002 amendment of *MCL 750.479* and the enactment of *MCL 750.81d*. More specifically, the issue concerns whether a person who forcibly resists a police officer who is unlawfully entering that person's home may be found guilty of violating *MCL 750.81d*. I believe that the answer to the latter question must be in the affirmative.

As mentioned earlier, in 2002 the Legislature enacted significant changes to this state's resisting-and-obstructing laws. Perhaps the most significant change pertained to the elimination of the phrase "in their lawful acts" from *MCL 750.479*. This language was also notably left out of the newly enacted *MCL 750.81d*. This is significant because while the former version of *MCL 750.479* clearly made it unlawful to resist police officers only if those officers were performing "lawful acts," the absence of this same language in *MCL 750.81d* equally clearly makes [*37] it unlawful to resist police officers regardless of whether those officers were performing "lawful acts."

At the outset, it must be observed that the majority states that the issue here is "whether the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its 2002 enactment of *MCL 750.81d*," *ante* at 5, when it cites no case of any Michigan court in support of the underlying assumption that there was such a common-law right in Michigan. Instead, each case the majority cites supports only the proposition that the pre-2002 versions of *MCL 750.479* made it illegal to resist a police officer only if the officer's actions were "lawful." See *Krum, 374 Mich at 361* (interpreting 1948 *CL 750.479*), and *Clements, 68 Mich at 658* (interpreting 1882 How Stat 9257). That is, in Michigan, pursuant to *Krum* and *Clements*, there was a *statutory* right to resist police officers in their unlawful acts. *Ventura, 262 Mich App at 374* (stating that "under *MCL 750.479*, the right to resist an unlawful arrest was, in essence, a defense to the charge of resisting arrest, because the legality of the arrest was an element of the charged offense").[2] Therefore, contrary to the majority's [*38] contention, "the rules regarding abrogation of the common law," *ante* at 7, are not even clearly relevant here.

> 2 I recognize, of course, that there was an English common-law right to resist unlawful arrests. Apparently, this right originated from the belief that an unlawful arrest "created adequate provocation for the victim, thus justifying the victim's resistance and reducing the charge from murder (an unprovoked killing) to manslaughter (a killing upon sufficient provocation)." Hemmens & Levin, *"Not a Law at All": A Call for a Return to the Common Law Right to Resist Unlawful Arrest, 29 Sw U L R 1, 9 (1999)*, citing *Hopkin Huggett's Case*, 84 Eng Rep 1082 (KB, 1666). This right was later extended to excuse assaults against police officers. Hemmens & Levin, *29 Sw U L R at 11*, citing *Rex v Thompson*, 168 Eng Rep 1193 (KB, 1825). However, the majority cites no authority for the proposition that this aspect of English common law was ever expressly adopted in Michigan.

However, even assuming that as a legacy of the English common law there was a common-law right to resist unlawful police conduct in Michigan, and therefore that the rules regarding legislative abrogation must be invoked, the [*39] Legislature clearly abrogated this common-law right in 2002. "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." *Const 1963, art 3, § 7*. "Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent." *Wold Architects & Engineers v Strat, 474 Mich 223, 233; 713 NW2d 750 (2006)*. However, "the Legislature 'should speak in no uncertain terms' when it exercises its authority to modify the common law.'" *Dawe v. Dr. Reuven Bar-Levav & Assocs., P.C., 485 Mich. 20, 28; 780 N.W.2d 272 (2010)*, quoting *Hoerstman Gen Contracting, Inc v Hahn, 474 Mich 66, 74; 711 NW2d 340 (2006)*.

Assuming that there was a common-law right in Michigan to forcibly resist a police officer's unlawful acts, I believe the Legislature "in no uncertain terms" abrogated this right when it amended *MCL 750.479* and enacted *MCL 750.81d*. As discussed, before 2002, *MCL 750.479* made it unlawful to resist a police officer only if that officer was performing a "lawful act." However, in 2002, the Legislature removed the "lawful acts" proviso in *MCL 750.479* and [*40] enacted *MCL 750.81d*, which similarly does not contain the "lawful acts" proviso. By doing so, the Legislature "in no uncertain terms" excluded the lawfulness of the police officer's conduct as

an element of resisting an officer. That is, the Legislature clearly abrogated the right to resist unlawful police conduct. Therefore, in Michigan, as of 2002, it is unlawful to forcibly resist a police officer, regardless of the lawfulness of the police officer's actions. As the Court of Appeals explained in *Ventura, 262 Mich App at 375-377*:

> Examining the language of the [sic] *MCL 750.81d*, unlike in [the former version of] *MCL 750.479*, we find no reference to the lawfulness of the arrest or detaining act. The language of *MCL 750.81d* is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. *MCL 750.81d*. Because the language of the statute is clear and unambiguous, further construction is neither necessary nor permitted, and we decline to "'expand what the Legislature clearly intended to cover'" and "read in" a lawfulness requirement.
>
> * * *
>
> When the Legislature enacts statutes, it has knowledge [*41] of existing laws on the same subject, and it is not within our province to disturb our Legislature's obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest. [Citations omitted.]

The majority argues that the common-law right to resist unlawful police conduct was not abrogated because "nowhere in *MCL 750.81d* does the Legislature state that the right to resist unlawful conduct by an officer no longer exists." *Ante* at 9. However, this Court has already held that the Legislature does not have to expressly state that it is "abrogating a common-law right" in order for it to abrogate a common-law right. As this Court explained in *Reed v Breton, 475 Mich 531, 539 n 8; 718 NW2d 770 (2006)*:

> In *Wold Architects & Engineers v Strat, 474 Mich 223, 234; 713 NW2d 750 (2006)*, we stated that nothing in the act at issue there showed an intent to abrogate the common law. We did not extend that analysis to conclude that the absence of language specifically abrogating the common law demonstrated that no abrogation occurred.

Here, the Legislature abrogated the common-law right to resist unlawful police conduct by *removing* this right from *MCL 750.479* and [*42] by enacting the related statute, *MCL 750.81d*, without including this right. The Legislature's intent to abrogate the common-law right to resist unlawful police conduct is sufficiently clear without its having to specifically state that this was its intent. A legislative body need not provide a blow-by-blow analysis concerning the effect of its actions on the common law when its actions will admit of only the most obvious interpretation.

Contrary to the majority's position, the Legislature's striking of the lawfulness requirement from the "resisting" portions of the pertinent statutes was hardly inadvertent. This is evidenced by the fact that the lawfulness requirement was partially retained in the obstruction portions of the statutes. Both statutes define "obstruct" as "the use or threatened use of physical interference or force or a knowing failure to comply with a *lawful command*." *MCL 750.479(8)(a)*; *MCL 750.81d(7)(a)* (emphasis added). Accordingly, while an individual who physically interferes with or forcibly resists an officer may be guilty of "resisting" or "obstructing," regardless of whether the officer's conduct was lawful, an individual who fails to comply with an officer's [*43] command may be guilty of "obstructing" only if the officer's command was "lawful."[3] See *Brooks v Rothe, 577 F3d 701, 707 (CA 6, 2009)* ("[A] straightforward reading of the language of *[MCL] 750.81d(7)(a)* provides that the law can be violated in two ways: by physically resisting a command, whether lawful or unlawful, *or* by refusing to comply with a lawful command without using force.") (emphasis in the original). By expressly providing that failing to comply with an officer's command can constitute obstruction only if the officer's command was "lawful" and yet expressly removing this same lawfulness requirement from the physical interference and resistance portions of the statutes, the Legislature "in no uncertain terms" exercised its authority to modify the common law. That is, it modified the common-law rule-- that one could be found guilty of resisting or obstructing an officer only if the officer's conduct was lawful-- to allow one to be found guilty of resisting or obstructing an officer for failing to comply with an officer's lawful command or for physically interfering with or resisting the officer regardless of whether the officer's conduct was lawful. The distinctions drawn [*44] are clear, reasonable, and fully within the judgment of the Legislature.

> 3 The majority holds that "the decision of the Court of Appeals in this case conflicts with the statutory language" because the Court "held that *MCL 750.81d prohibits* a person from resisting

> an officer's unlawful conduct, yet the statute *allows* a person to obstruct an officer's unlawful command." *Ante* at 12 (emphasis in the original). The decision of the Court of Appeals does not, in my judgment, conflict in any way with the statutory language; rather, the majority simply fails to recognize the distinction between physically interfering with or resisting an officer and simply failing to comply with an officer's command. Pursuant to *MCL 750.81d*, while an individual may be guilty of the former even if the officer's conduct is unlawful, an individual can be guilty of the latter only if the officer's command was lawful. For example, if a person responds to an officer's unlawful command to hand over his car keys by punching the officer, this person may be guilty of obstructing the officer; however, if the person does nothing other than refuse to hand over his keys, he would not be guilty of obstructing the officer. This [*45] distinction makes perfect sense. It is perfectly logical to punish people who physically interfere with an officer, even if the officer's conduct is unlawful, yet not punish those people who do nothing other than fail to comply with an officer's unlawful command.

The majority further contends that the Legislature's removal of the language "in their lawful acts" is irrelevant because "this Court has recently clarified that the Legislature's failure to expressly provide for a common-law defense in a criminal statute does not prevent a defendant from relying on that defense." *Ante* at 10, citing *People v Dupree, 486 Mich 693; 788 NW2d 399 (2010)*. As discussed earlier, it appears that the right to resist unlawful police conduct was a statutory right rather than a common-law right in Michigan. However, even assuming that it was a common-law right in Michigan, it was a common-law right that the Legislature codified when it enacted 1869 PA 24, which amended a predecessor of *MCL 750.479*, and rejected when it amended *MCL 750.479* and enacted *MCL 750.81d* in 2002. This historical context makes this case altogether distinguishable from *Dupree* in which this Court held that an individual charged with [*46] being a felon in possession of a firearm can raise the common-law affirmative defense of self-defense even though the felon-in-possession statute is silent regarding self-defense, because the Legislature had never expressly included self-defense in the statute and then removed it. Unlike in *Dupree*, in which the Legislature simply remained silent about self-defense in the felon-in-possession statute, the Legislature has not remained silent about the right to resist unlawful police conduct. Instead, from 1869 until 2002, the Legislature clearly provided for such a right, and in 2002, the Legislature equally clearly removed it. By doing so, the Legislature "in no uncertain terms" abrogated the right to resist unlawful police conduct,[4] and *Dupree* is hardly relevant in establishing the contrary.

4 Defendant argues that he should be able to claim "self-defense" because the Self-Defense Act, *MCL 780.972(2)*, provides, in pertinent part:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat [*47] if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent *unlawful* use of force by another individual. [Emphasis added.]

First, defendant may very well have been engaged in the commission of a crime when he used force to resist the officers' entry into his house. Marijuana was found inside defendant's house, and defendant's girlfriend admitted that minors were drinking alcohol inside defendant's house. Even more significantly, it is well established that "the more specific provision prevails over the more general . . . ." *Manuel v Gill, 481 Mich 637, 648-649; 753 NW2d 48 (2008)*. Clearly the resisting-and-obstructing statute more specifically pertains to the subject of resisting and obstructing a police officer than does the Self-Defense Act, and pursuant to the resisting-and-obstructing statute, an individual can only forcibly resist a police officer if he does not know or have reason to know that the officer is performing his duties. *MCL 750.81d*; see also *State v Hobson, 218 Wis 2d 350, 365; 577 NW2d 825 (1998)*, in which a similar argument was rejected. Moreover, there is no evidence that [*48] defendant "'reasonably believe[d] . . . that he [was] in immediate danger of unlawful bodily harm from his adversary . . . .'" *Dupree, 486 Mich at 707*, quoting 2 LaFave, Substantive Criminal Law (2d ed), § 10.4, p 142. At most, defendant could reasonably have believed that he was in immediate danger of an unlawful entry into his home by a police officer, which does not give rise to a right to forcefully resist.

Next, the majority argues that the removal of "in their lawful acts" is irrelevant because it was replaced with "similar language," namely, "performing his or her duties." *Ante* at 17-18. The majority fails to recognize the substantial distinction between "in their lawful acts" and "performing his or her duties." It is well established that the lawfulness of an individual's conduct is not necessarily determinative of whether that individual is "performing his or her duties" because an individual can commit an unlawful act while "performing his or her duties." See *People v Corr, 287 Mich App 499, 504; 788 NW2d 860 (2010)*, lv den *488 Mich 946; 794 NW2d 324 (2010)* ("Under *MCL 750.81d(1)*, it is illegal to assault, batter, resist, or obstruct an officer even if the officer is taking [*49] unlawful action, as long as the officer's actions are done in the performance of the officer's official duties."). This has been recognized time and time again in the context of the doctrine of respondeat superior. Pursuant to that doctrine, "[a]n employer is generally liable for the torts its employees commit within the scope of their employment." *Hamed v Wayne Co, 490 Mich 1, 10-11; 803 NW2d 237 (2011)*. Indeed, "'[a] municipal corporation may . . . be liable for an *unlawful* and unauthorized act of one of its officers or agents if the act was done in the course of his official *duty* or employment, and within the general scope of his authority.'" *Ross v Consumers Power Co (On Rehearing), 420 Mich 567, 624; 363 NW2d 641 (1983)*, quoting *57 Am Jur 2d, Municipal, School, and State Tort Liability, § 88*, pp 99-100 (emphasis added).[5] The fact that a municipality may be liable for an unlawful act of an officer if the act was done in the course of the officer's official duty or employment necessarily means that an officer can commit an unlawful act while "performing his or her duties." Therefore, contrary to the majority's suggestion, "in their lawful acts" and "performing his or her duties" [*50] are not even remotely synonymous.[6]

5 See also *Anschutz v Liquor Control Comm, 343 Mich 630, 637, 73 NW2d 533 (1955)* ("[T]he instruction to the employee did not relieve defendant from responsibility for the illegal act on the ground that such employee placed himself outside the scope of his employment when he violated it."); *Barnes v Mitchell, 341 Mich 7, 19-20; 67 NW2d 208 (1954)* ("'The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master's orders, nor upon the legality of the servant's conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do.'") (citation omitted); *Randall v Chicago & Grand Trunk R Co, 113 Mich 115, 119; 71 NW 450 (1897)* ("'[T]he fact that the injury was occasioned by the negligent or unlawful acts of the appellant's employés would not make the appellant liable, unless it further appeared that the acts complained of occurred within the scope of the servants' employment.'") (citation omitted).

6 Even the English common-law [*51] right to resist unlawful arrests did not apply to all unlawful arrests. Instead, "the cases in which the common law courts held that an illegal arrest created sufficient provocation to excuse resistance, generally involved police officers arresting individuals through truly outrageous conduct and 'arbitrary assertions of authority.'" Hemmens & Levin, *29 Sw U L R at 12*, quoting Chevigny, *The Right to Resist an Unlawful Arrest*, 78 Yale L J 1128, 1131 (1969). In particular, individuals did not have a right to resist "good faith" arrests, i.e., arrests made by police officers who had a good-faith belief that the arrest was lawful. Hemmens & Levin, *29 Sw U L R at 12*.

However, this is not to say that an officer who is "on the clock" is necessarily performing his duties or acting within the scope of his employment. Instead, an officer is performing his duties or acting within the scope of his employment when he is "'"engaged in the service of his master, or while about his master's business."'" *Hamed, 490 Mich at 11* (citations omitted). "Although an act may be contrary to an employer's instructions"-- or unlawful-- it is within the employee's scope of employment "if the employee accomplished [*52] the act in furtherance, or the interest, of the employer's business." *Id.* On the other hand, "[i]ndependent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment." *Id.* Therefore, contrary to the majority's assertion, the issue here is not whether the officers lawfully entered defendant's house, but rather whether the officers were acting to further their employer's or their own individual interests. In other words, were they going "about [their] master's business" or their own business when they entered defendant's house? *Id.*[7]

7 This interpretation is consistent with how other jurisdictions have interpreted similar statutes. For example, in *United States v Heliczer, 373 F2d 241, 245 (CA 2, 1967)*, cert den, *388 U.S. 917; 87 S Ct 2133; 18 L Ed 2d 1359 (1967)*, the United States Court of Appeals for the Second Circuit rejected the defendant's "claim that if the arrest was unlawful, the agents were not engaged in performing their official duties, and [the defendant] had a right to resist." *Heliczer* explained:

> "Engaged in * * * performance of official duties" is simply acting within the scope of what [*53] the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful. [*Id.*, quoting *18 USC 111.*]

See also *United States v Street, 66 F3d 969, 978 (CA 8, 1995)* ("The 'scope of what the agent is employed to do' is not defined by 'whether the officer is abiding by laws and regulations in effect at the time of the incident . . . .'") (citation omitted); *United States v Jennings, 991 F2d 725, 732 (CA 11, 1993)* ("The test is not whether the officer is abiding by laws and regulations in effect at the time of the incident, but whether the officer is on some 'frolic of his own.'") (citations omitted); *Barnes v State, 946 NE2d 572, 578 (Ind, 2011)* (holding that an officer "was engaged in the execution of his official duty" regardless of whether his entry into the defendant's apartment was lawful); *State v Valentine, 132 Wash 2d 1; 935 P2d 1294 (1997)* (holding that an officer "was engaged in performance of his official duties" regardless of whether his arrest of the defendant was lawful); *Commonwealth v Moreira, 388 Mass 596, 601; 447 NE2d 1224 (1983)* [*54] ("[A] person may not use force to resist an arrest by one who he knows or has good reason to believe is an authorized police officer, engaged in the performance of his duties, regardless of whether the arrest was unlawful in the circumstances."); *State v Austin, 381 A2d 652, 654 (Me, 1978)* (noting that a statute that "makes a person guilty of assaulting an officer if he 'knowingly assaults a law enforcement officer while the officer is engaged in the performance of his official duties' . . . 'discourage[s] people in custody from a violent response to what they see as an illegal arrest'") (emphasis and citations omitted). The majority, on the other hand, does not cite a single case in support of its contrary position.

There is no question that the officers in this case were going about their master's business when they entered defendant's house. They knocked on defendant's door because a vehicle belonging to Shane Adams, who had several outstanding warrants, was parked near defendant's house and a person leaving defendant's house told one of the officers that several minors were consuming alcohol inside defendant's house and that Shane Adams "might be" inside. The officers saw empty [*55] bottles of alcohol and several people running and hiding inside the house. The officers were wearing their police uniforms, and they verbally identified themselves as police officers. Fifteen minutes after the officers knocked on the door, defendant's girlfriend, Mandy McCarry, opened the door and admitted that minors were drinking alcohol inside. When an officer asked her if she knew who owned the vehicle parked on the street, she asked if the officers were looking for Shane Adams and then denied that he was there. Both officers smelled intoxicants, and one of the officers also smelled burnt or burning marijuana. When an officer told McCarry that they were going to enter the house to secure it while they obtained a search warrant, defendant came to the door and, using obscene and vulgar language, told the officers that they could not enter. When defendant moved to close the door, an officer placed his shoulder to the door to prevent it from being closed. A struggle ensued between defendant and the officers, and defendant was removed from the house and arrested. One of the officers suffered a torn hamstring and injured elbow as the result of the struggle, for which he sought medical [*56] treatment. The officers entered the house and patted down the occupants for weapons. After a search warrant was obtained, the officers found marijuana inside the house.

Although the trial court ruled that the officers' entry into the house was unlawful because they did not yet have a warrant and there were no exigent circumstances to justify the warrantless entry into the house,[8] this does not mean that the officers were not "performing their duties" when they entered the house. Indeed, the officers were unquestionably acting in furtherance of their employer's interests and not in furtherance of their own personal interests. They were simply trying to do their job by locating a person who had multiple outstanding warrants while protecting minors who they had reason to believe might have been drinking alcohol and smoking marijuana. Given these circumstances, it cannot be reasonably disputed that the officers were performing their duties as law enforcement officers and, more importantly, that defendant knew or had reason to know that they were performing their duties.[9] Therefore, defendant had no right under law to resist or obstruct them.[10]

> 8 Again, because the prosecutor did not appeal [*57] that ruling, this opinion is premised on the assumption that there were no "exigent circumstances" to justify the warrantless entry into the house, and thus that the entry was unlawful. Nevertheless, it is worth noting that the "exigent circumstances" exception to the warrant require-

ment does allow the police to enter a home without a warrant to prevent the "imminent destruction of evidence," *In re Forfeiture of $176,598, 443 Mich 261, 267-268; 505 NW2d 201 (1993)*, and when asked why the officers "wanted to 'secure' the residence," one officer testified, "[W]e wanted to prevent any destruction of evidence and so we were going to secure it so noone [sic] could flush marijuana or further eat it, or do whatever they could to destroy it," and the other officer testified that their entry "was based on probable cause that there was evidence that could be destroyed inside the residence." Accordingly, even assuming that the officers' entry was unlawful-- and I undertake no effort to resolve that question in this case-- the officers did not believe at the time that it was unlawful, and they certainly believed that they were performing their duties.

9 Indeed, defendant himself has never argued [*58] that the officers were not performing their duties in the instant case.

10 The majority refers to a hypothetical situation posed by Justice CAVANAGH at oral argument in which a male officer, while performing a search, sexually assaults a female prisoner. The majority contends that this scenario demonstrates why the language "performing his or her duties" and "in their lawful acts" must be interpreted as synonymous. Otherwise, the majority contends, this female prisoner would not be allowed to resist the officer without risking a resisting-and-obstructing charge. I respectfully disagree. The officer in Justice CAVANAGH's hypothetical situation simply cannot be said to have been performing his duties, not simply because his actions were unlawful, but because they were "independent action[s] accomplished solely in furtherance of [his] own criminal interests," i.e., outside the scope of his employment. *Hamed, 490 Mich at 11*. And because the female prisoner would have obvious reason to know that the officer was not performing his duties by sexually assaulting her, she could certainly resist the officer without risking being charged with resisting and obstructing.

II. CONSTITUTIONALITY

The next [*59] issue is whether *MCL 750.81d*, so interpreted, is unconstitutional, i.e., whether there is a constitutional right to resist unlawful police conduct. Defendant argues that there is such a right and specifically argues that it derives from the *Fourth Amendment*, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [*US Const, Am IV.*]

Defendant cites *Payton v New York, 445 U.S. 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980)*, for the proposition that "the *Fourth Amendment* has drawn a firm line at the entrance to the house [and] [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Although this is certainly true, it says nothing about whether an individual has a right to physically resist a police officer. In other words, while the *Fourth Amendment* prohibits the police from entering an individual's house without a warrant absent exigent circumstances, the *Fourth Amendment* [*60] says nothing about entitling an individual to physically resist the police when they do enter that individual's house. Defendant also cites *Wright v Georgia, 373 U.S. 284, 291-292; 83 S Ct 1240; 10 L Ed 2d 349 (1963)*, for the proposition that "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." However, *Wright* says nothing about whether an individual has a right to go *beyond* simply failing to obey an officer's unlawful command and actually physically resist the officer. As noted earlier, the Legislature recognized this distinction and expressly incorporated it into our resisting-and-obstructing statutes. *MCL 750.479(8)(a)*; *MCL 750.81d(7)(a)*. Only the "failure to comply" form of obstruction in these statutes is premised on the officer's command being lawful; the "physical interference" alternative says nothing about the lawfulness of the command. Our resisting-and-obstructing statutes are completely consistent with *Wright*'s prohibition on punishing a person for failing to obey an officer's unconstitutional command. *Wright, 373 U.S. at 291-292*." If the defendant in the instant case had simply refused to allow [*61] the officers into his home, he could not have been charged with resisting and obstructing, but because he physically resisted the officers, he can be so charged.

11 This was also recognized in *Bourgeois v Strawn, 452 F Supp 2d 696, 710 (ED Mich, 2006)*, which explained:

> That argument, that police can manufacture grounds to arrest a person innocent of wrongdoing

> simple [sic] by telling him to leave his own home without any lawful authority to do so and then arresting him for violating that directive, is a disturbing proposition. The Court does not read the Michigan intermediate appellate court's decision in *Ventura* as sanctioning that argument, and the proposition is of questionable constitutional validity.

> That is, *Bourgeois* recognized that *Ventura, 262 Mich App at 377*, which held that "a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion," did not hold that a person may not refuse to comply with an unlawful command, and, thus, neither our resisting-and-obstructing statutes nor *Ventura*'s interpretation of them runs afoul of any constitutional [*62] protection.

In summary, defendant has not cited a single case that supports his proposition that a person has some *constitutional* right to physically resist a police officer who is engaging in unlawful conduct. Indeed, all the cases of which I am aware support the opposite proposition. See, for example, *People v Curtis, 70 Cal 2d 347, 354; 74 Cal Rptr 713; 450 P2d 33 (1969)* ("There is no constitutional impediment to the state's policy of removing controversies over the legality of an arrest from the streets to the courtroom."); Miller, *Retail Rebellion and the Second Amendment, 86 Ind L J 939, 952-953 (2011)* ("[N]o Supreme Court decision has ever held that the right to defend against an unlawful arrest is a constitutional as opposed to a mere common law right."). That there is no constitutional right to resist unlawful police conduct is also obviously supported by the fact that the Model Penal Code,[12] the Uniform Arrest Act,[13] and "a majority of states"[14] have abolished the right. *Barnes v State, 946 NE2d 572, 576 (Ind, 2011)*.[15]

> 12 "[T]he Model Penal Code, adopted by the American Law Institute in 1958, denies the right 'to resist an arrest which the actor knows is being made by a peace [*63] officer, although the arrest is unlawful.'" *Heliczer, 373 F2d at 246 n 3* (citations omitted). "The Model Penal Code eliminated the right on two grounds: '(1) the development of alternate remedies for an aggrieved arrestee, and (2) the use of force by the arrestee was likely to result in greater injury to the person without preventing the arrest.'" *Barnes v State, 946 NE2d 572, 575 (Ind, 2011)*, quoting Hemmens & Levin, *29 Sw U L R at 23*.
>
> 13 The Uniform Arrest Act was a model act "drafted by a committee comprised of police officers, prosecutors, defense attorneys, judges, attorneys general, and law professors." Hemmens & Levin, *29 Sw U L R at 18*. It provided that "'[i]f a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest'" and "it prevented an arrestee from using the illegality of the arrest as a defense to charges of assault, manslaughter, or murder." *Id. at 18-19*, quoting Warner, *The Uniform Arrest Act*, 28 Va L R 315, 345 (1942).
>
> 14 As of 1999, 39 states had eliminated the common-law right, "twenty-three by statute [*64] and sixteen by judicial decision." Hemmens & Levin, *29 Sw U L R at 24*. See also 2 LaFave, Substantive Criminal Law (2d ed), p 159 (noting that many modern state codes include a provision "outlawing the use of force against a known police officer, though the arrest is unlawful," and that "even in the absence of such an enactment some courts have abandoned the common law view").
>
> 15 See 4 Torcia, Wharton's Criminal Law (15th ed), p 280:
>
> > In some states, the traditional common-law rule has been changed. A person may not resist an arrest, lawful or unlawful, which he knows or believes is being made by a peace officer. The obvious purpose of this change is to avoid a dangerous confrontation and require the issue of an arrest's lawfulness to be resolved not in the street but in a court.
>
> See also Perkins, Criminal Law (3d ed), p 554:
>
> > [T]he problems involved are so complicated that it is easy for either the officer or the arrestee to be mistaken in regard to the lawfulness of the arrest and it seems wise to require such issues to be decided in court rather than by force and the present trend . . . is to provide that there is no privi-

> lege to resist an arrest which the arrestee knows is being made [*65] by a peace officer, even if the arrest is unlawful.

See, for example, *Commonwealth v Gomes, 59 Mass App Ct 332, 342; 795 NE2d 1217 (2003)*:

> [T]he lawfulness of police entry into a residence often presents close and peculiarly fact-dependent questions as to which lawyers and even judges may disagree. Such questions, which are only resolved later with the benefit of dispassionate reflection, are particularly ill-suited to the split-second judgments required of police in their interactions with the citizenry. "Such a close question is more properly decided by a detached magistrate rather than by the participants in what may well be a highly volatile imbroglio." [Citations omitted.]

III. CONCLUSION

I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals and to overrule *Ventura*. Before 2002, the Legislature in *MCL 750.479* made it unlawful to resist a police officer, but only if that officer was performing what was later determined to constitute a "lawful act." However, in 2002, the Legislature amended *MCL 750.479* and also enacted a new statute addressing this subject, *MCL 750.81d*, neither of which contains the "lawful act" requirement. By doing this, [*66] the Legislature clearly excluded consideration of the lawfulness of the police officer's conduct as a relevant element in forcibly resisting an officer as long as the police officer was "performing his or her duties," and it did so "in no uncertain terms." Therefore, I would affirm the judgment of the Court of Appeals, which, in reliance on *Ventura*, held that defendant was properly charged with resisting and obstructing a police officer under *MCL 750.81d* after he physically struggled with officers who had entered his home.

Stephen J. Markman

Robert P. Young, Jr.