STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

CHAD MARCUS WAGER,

Defendant-Appellee.
_____/

Supreme Court No. 113712

Court of Appeals No. 201457

Circuit Court No. C95-1441 FH

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

U.S. Court Cases

Michigan Cases

Michigan Statues, Court Rules and Jury Instructions

Other Authorities

INTRODUCTION

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 516 Michigan cities and villages of which 380 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent member cities and villages in litigation of statewide significance. This brief amicus curiae is authorized by the Legal Defense Fund's board of directors, whose membership includes: the president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: Philip A. Balkema, city attorney, Grand Rapids; William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Harold Deason, city attorney, Grosse Pointe Park; Catherine R. Ginster, city attorney, Saginaw; Andrew J. Mulder, city attorney, Holland; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; and William C. Mathewson, general counsel, Michigan Municipal League.

Most major Michigan cities prosecute OUIL/UBAL violations under local ordinances which mirror the state statute. Municipal law enforcement officers and municipal attorneys enforce and prosecute OUIL cases as a regular part of their duties. The issues which the Michigan Municipal League argues are dispositive of this appeal were not fully briefed in the courts below, nor were they addressed by either the trial court or the Court of Appeals. The League's position on these issues has been accepted by some district court judges, but the League is not aware of any appeals which have been taken from those rulings.

The Michigan Municipal League files this amicus brief because the Court of Appeals made significant errors of law in deciding this case by relying on *dicta* and erroneous holdings from earlier decisions. It also ignored the clear language of Michigan's OUIL statute, which requires that the results of any properly administered blood alcohol test given to a drunk driving defendant be admitted into evidence. These errors clearly frustrate the statutory presumptions that both state and local legislative bodies have placed in the OUIL statute and in local ordinances. These presumptions permit finders of fact to infer intoxication, impairment, or the absence of impairment based on the results of chemical tests administered to suspected drunk drivers. These statutory presumptions are paralleled in the Criminal Jury Instructions for drunk driving cases.

The Court of Appeals also erred by adding "timeliness of test administration" as a foundation requirement for the admission of chemical test results. In so doing, the court failed to give deference to the fact that the OUIL statute itself prescribes the standards for the administration of chemical test results. That statute expressly authorizes the Michigan State Police to promulgate rules governing the administration of chemical tests to suspected drunk drivers. These rules, like the statute, contain no provision concerning the "timely" administration of any chemical test. Notwithstanding the unambiguous language of the statute and administrative rules, the Court of Appeals' decision has improperly added timeliness as an additional foundation requirement, thereby assuring that many, if not most, OUIL prosecutions will become a battle of expert witnesses. There is simply no way for the prosecution to show that there was not an unreasonable delay in test administration without expert testimony. This result was not intended by the legislature when it wrote the statute, and it is one the Court of Appeals itself has specifically rejected in earlier decisions.

Defendant was convicted of driving while under the influence of intoxicating liquor causing serious injury, a violation of MCL 257.625.5; MSA 9.2325(5), based in part on the result of a blood alcohol test administered after he was involved in an accident. The test result was 0.09. MCL 257.625a(9); MSA 9.2325(1)(9), states that a test result of 0.09 creates a rebuttable presumption that a driver's ability to operate a vehicle has been impaired by the consumption of intoxicating liquor.

Defendant's expert testified that the blood test, which was administered at 12:50 a.m., "had no scientifically probative value with regard to defendant's blood alcohol content during the time period between 10:30 and 10:42" the previous night, when the alleged driving occurred. *Ibid* at p 7. The trial court allowed the evidence to go to the jury based on a determination that the prosecution had laid a proper foundation for the blood test results to be placed in evidence, and that it was for the jury to determine what weight should be given to that testimony. The Court of Appeals disagreed with the trial court on this point, holding that the prosecution had failed to meet its burden to "establish that there has not been unreasonable delay in the time between the arrest and the administration of the test." *Ibid* at p 7. The court found that the prosecution had failed to establish a proper foundation because it produced no evidence "that the test results accurately reflected the defendant's blood alcohol level at the time of the offense," noting that the only evidence on that point was the testimony of defendant's expert. *Ibid* at p 10. Based on its determination that the admission of the blood test results was not harmless error, the Court of Appeals reversed Defendant's conviction.

In reaching this conclusion, the Court of Appeals made three major errors of law which require reversal.

First, it ignored the clear language of the OUIL statute itself, as well as its previous holding in People v Calvin, 216 Mich App 403; 548 NW2d 720 (1996), *lv app den* 454 Mich 898. That case recognized that the legislature created a rebuttable presumptions concerning the driver's level of intoxication in the OUIL statute. Drivers with a blood alcohol level above 0.10 are presumed to be under the influence of intoxicating liquor; drivers with a blood alcohol level between 0.07 and 0.10 are presumed to be impaired by the consumption of intoxicating liquor; and drivers whose test result if below 0.07 are presumed not to be under the influence or impaired. These presumptions are valid, and are consistent with other presumptions found in Michigan law, with the rules of evidence concerning presumptions, and with jury instructions for OUIL cases. The statutory presumptions must be honored by courts. In the matter now on appeal, the Court of Appeals erroneously construed the statute as creating a presumption that the drivers blood alcohol level at the time of the test is the same as at the time of the alleged offense, which is a manifest misreading of the statute. Such a presumption would be absurd, as the testimony of the experts in both Calvin and Wager makes clear. The Court of Appeals erroneous holding in this case can be traced back to *dicta* in from a cases decided in the 1970's. The statutory presumptions are reinforced by numerous other provisions of the OUIL statutes, all of which show a clear legislative intent to have chemical test results admitted as evidence in all OUIL cases. These issues are discussed in detail below in Sections "A" through "E."

Second, by requiring a showing that there was not an unreasonable delay in test administration, the Court of Appeals has compelled the prosecution to put on expert testimony in all OUIL prosecutions. This ruling completely turns the seminal case on test administration on its head. Until Wager, Michigan courts had consistently rejected arguments that "the prosecution

is required to offer competent expert testimony to interpret and relate the results of Breathalyzer tests back to the time of the alleged offense before such tests can be admitted into evidence." People v Kozar, 54 Mich App 503, 505; 221 NW2d 170 (1974). After Wager, expert testimony will be required to show that the test result sheds some light on the defendant's blood alcohol level at the time of the offense. Even expert testimony might not be enough to meet the threshold Wager has established in light of the fact that the driver's blood alcohol rate will almost always be higher or lower at the time of the test than it was when the defendant was operating a motor vehicle. As the trial court judge noted, if it were to accept Defendant's expert testimony ". . . completely, then it is virtually impossible to ever get any information" which pertains in any way to the driver's blood alcohol level at the time of the offense. *Ibid* at p 12. If allowed to stand, Wager will inevitably convert all drunk driving prosecutions into a battle of experts, a result which both Michigan courts and the Michigan legislature have clearly and consistently rejected.

Third, the Court of Appeals erred by overlooking the fact that the Michigan Legislature delegated to the Michigan State Police full authority for promulgating rules governing the administration of chemical tests to suspected drunk drivers. This rule-making delegation is proper exercise of legislative authority, and courts should honor such administrative rules. These rules promulgated by the Michigan State Police have never included timeliness of test administration among the requirements for a properly administered test. This exclusion reinforces the clear legislative intent, found both in the statutory presumptions and elsewhere in the statute, that chemical test results should routinely be admitted into evidence. In almost all circumstances, tests which are not performed in conformance with the rules cannot be admitted into evidence; the corollary, of course, is that tests performed in conformance with the rules must be admitted.

ARGUMENT

A. Michigan's OUIL statute creates certain presumptions based on the results of chemical tests performed on suspected drunk drivers, and provides that these test results be placed in evidence and given whatever weight the finder of fact deems appropriate.

The Court of Appeals misread the relevant provision of Michigan's OUIL statute. MCL 257.625a(9); MSA 9.2325(1)(9), states as follows:

> Except in a prosecution relating solely to a violation of section 625(1)(b) or (6), the amount of alcohol in the driver's blood, breath, or urine at the time alleged as shown by chemical analysis of the person's blood, breath, or urine ***gives rise to the following presumptions***:
>
> (a) If there were at the time 0.007 grams or less of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine, ***it is presumed that the defendant's ability to operate a motor vehicle was not impaired due to the consumption of intoxicating liquor, and that the defendant was not under the influence of intoxicating liquor.***
>
> (b) If there were at the time more than 0.07 grams but less than 0.10 grams of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine, ***it is presumed that the defendant's ability to operate a vehicle was impaired within the provisions of section 625(3) due to the consumption of intoxicating liquor.***
>
> (c) If there were at the time 0.10 grams or more of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine, ***it is presumed that the defendant was under the influence of intoxicating liquor.*** (Emphasis added)

The Court of Appeals went astray by reading the statute as requiring a presumption that the defendant's blood alcohol level *at the time of the test* — which is objective evidence — was the same as it was *at the time of the alleged driving*. See 233 Mich App at pp 7 - 10. This is not what

the statute says. The statutory presumptions address the driver's degree of intoxication, not his or her blood alcohol level. A person can have a blood alcohol level of below 0.07 and still be under the influence, just as a person can have a blood alcohol level at or above 0.10 and not be under the influence. The blood alcohol test result is thus presumptive evidence of intoxication or the lack of intoxication, but it is never conclusive evidence. The statute leaves that determination to the finder of fact.

A statutory presumption can, of course, be rebutted by evidence at trial, but it may not be defeated by motion. Courts have no authority to interfere with a statutory presumption unless it somehow denies due process to the Defendant. The cases which have upheld the trial court's exercise of its discretion in suppressing blood test results as being untimely have failed to address the fact that ***the statute mandates a presumption***. By creating a presumption, the legislature evinced a clear intent that the test results should be presented to the fact finder and accorded whatever weight the fact finder chooses to give them.

Defendant's Answer in Opposition to Application for Leave to Appeal, at page 5, indirectly acknowledges the significance of the presumptions: "MCL 257.625(5); MSA 9.2325(5) prohibits an individual from being **intoxicated at the time of driving,** not at the time of arrest." Emphasis added. Defendant has implicitly recognized that any presumption of intoxication or lack of intoxication created by a test result applies to the time of the driving. The testimony of defendant's own expert makes it clear that a chemical test can performed after an individual has been arrested can only show the person's blood alcohol level at the time the test was administered, nothing more. The legislature was presumably aware of this fact when it wrote the statute, since it wrote the statute to create presumptions concerning intoxication based on blood alcohol level.

B. The statutory presumptions are proper, and are a reasonable legislative means to address the problems associated with drunk driving. They do not deny OUIL defendants due process.

The statutory presumptions are a reasonable means for the legislature to address the drunk driving problem. They provide a basis for determining how much alcohol a person ingested. In cases where the defendant argues that his or her blood alcohol level was lower at the time of arrest than at the time of the test, they address the fact the defendant would have continued driving but for being stopped or being involved in an accident. It would certainly be poor public policy to encourage drivers who have been drinking to drive home quickly before their blood alcohol level reaches unlawful levels.

A chemical test result can also shed light on the defendant's credibility. If, at a stop, defendant denies drinking, admits to the proverbial two beers, denies that alcohol affected his or her driving, or denies having been drinking recently, chemical test results can affirm or belie those statements. Finally, and most important, the presumptions are intended to discourage those who have consumed enough intoxicants to reach an unlawful blood alcohol level from driving. Since these are all rational reasons for the presumptions, they are valid.

. Michigan law has long recognized presumptions, both statutory and constitutional, as well as those recognized at common law, in criminal law. Possession of a motor vehicle or auto part with the manufacturer's serial number removed or defaced creates a presumption that MCL 750.415 has been violated. People v Battle, 161 Mich App 99; 409 NW2d 739 (1987). Government officials are presumed to know the law. People v Garska, 303 Mich 313; 6 NW2d 527 (1942). Public officials are cloaked with a "presumption of regularity" in the conduct of

official duties. People v Robinson, 33 Mich App 304; 189 NW2d 777 (1971). It is presumed that persons present at the time and place of a crime are *res gestae* witnesses. People v Solak, 146 Mich App 659; 382 NW2d 495 (1985). See Gillespie, Michigan Criminal Law, §388.

A presumption is by definition rebuttable. See Solak, supra. A statutory presumption may be held unconstitutional as a denial of due process or equal protection on the basis that it is irrational or arbitrary. See Battle, supra, 161 Mich App at 101. So long as there is a rational connection between the presumed fact and the inference to be drawn from it, and so long as the defendant has a fair opportunity to rebut, the presumption is valid. People v Rafalko, 26 Mich App 565, 569; 182 NW2d 495 (1970). See also Leary v United States, 395 US 6 (1969) and Gillespie, supra, §388, p 189.

The Michigan Rules of Evidence also make it clear that statutory presumptions are a valid exercise of legislative authority. MRE 302 states:

> (a) **Scope.** In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.
>
> (b) **Instructing the Jury**. Whenever the existence of a presumed fact against any accused is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic facts and that the prosecution still bears the burden of proof beyond a reasonable doubt of all the elements of the offense.[1]

MRE 302 clearly acknowledges the validity of statutory presumptions such as the one at issue here, and requires that juries receive appropriate instructions on them. Since the statutory presumptions have been held to be rebuttable and not conclusive, defendants are provided with an

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[1] MRE 302(b) is consistent with the standard jury instructions in OUIL cases. See discussion in Section "C", *infra.*

opportunity to rebut to them. Such presumptions are therefore valid so long as there is a rational basis for them. See Battle and Rafalko, supra. The legislature properly mandated certain presumptions based on the results of chemical tests. It was manifest error for the Court of Appeals to negate the presumption created by Defendant's chemical test result of 0.09 by holding that the test was not administered in a timely manner.

One other important point should be noted. The statutory presumptions cannot be applied when the Defendant is charged only with driving with an unlawful blood alcohol level, in violation of MCL 257.625(1)(b):MSA9.2325(5). This underscores the fact that the presumptions relate not to the Defendant's blood alcohol level, but rather to whether he or she was under the influence of or impaired by intoxicating liquor. The legislature clearly intended to sanction individuals who had imbibed enough to have a blood alcohol level in excess of the legal limit from driving, regardless of what their level was at any given time.

C. The Decision of the Court of Appeals in this case is contrary to its earlier holding in People v Calvin, where the court correctly held that certain chemical test results create a rebuttable presumptions that the driver is either under the influence, impaired, or not under the influence. Test results do not create a presumption concerning the driver's blood alcohol level at the time of the offense.

In its 1996 decision in People v Calvin, 216 Mich 403; 548 NW2d 720 (1996), its last decision on the admissibility of chemical test results prior to Wager, the Court of Appeals correctly held that the presumptions in the OUIL statute create a rebuttable presumption concerning "the degree of a person's intoxication." The court in this case recognized that the statutory presumptions do not create a rebuttable presumption of a specific blood alcohol level, and that they do not create not a non-rebuttable presumption of intoxication or sobriety. That case

should have put the "timeliness" issue to rest, as it apparently reversed earlier rulings which held that chemical tests must be administered "within a reasonable time" before they can be admitted into evidence. In Wager, there was no discussion at all of this case.

The facts in Calvin and Wager are strikingly similar in that both involve expert testimony concerning the significance of blood alcohol test results of 0.09. In Calvin, Defendant was charged with and convicted of impaired driving. The defense's expert testified that defendant's blood alcohol level was below 0.07 at the time of the offense, and could have been as low as 0.05. There was no expert for the prosecution. Defendant argued that the unrefuted testimony on his blood alcohol level compelled dismissal because of the statutory presumption of lack of impairment. The trial court let the case go to the jury, and used the standard criminal jury instructions, which make specific reference to all of the statutory presumptions.[2] On appeal, Defendant argued that a chemical test result below 0.07 per cent compelled a directed verdict because the OUIL statute created a mandatory presumption that his ability to drive was not impaired. The circuit court agreed with the defendant, and reversed his conviction. The Circuit Court ruled that the permissive inference in the standard jury instruction was inconsistent with the

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[2] The judge, using CJI2d, 15.5, instructed the jury as follows:

One way to determine when a person is intoxicated is to measure how much alcohol is in his blood . . . If you find that there was .07 per cent or less of alcohol in the Defendant's blood when he operated the vehicle, the law allows you to infer that the defendant was not impaired at that time.

This means that you may find from his blood alcohol level that the Defendant did not violate the motor vehicle code, but you are not required to do so. Let me repeat that. If you find that there was .07 per cent or less of alcohol in the Defendant's blood when he operated the vehicle, the law allows you to infer that the defendant was not impaired at that time. This means that you may find , from the Defendant's blood alcohol level, that the Defendant did not violate the motor vehicle code, but you are not required to do so.

If you find that there was more than .07 per cent but less than .10 per cent of alcohol in the Defendant's blood when he operated the vehicle, the law allows you to infer that the Defendant's ability to operate a motor vehicle was impaired. This means that you may find from this blood alcohol level that the Defendant's ability to operate was impaired, but you are not required to do so.

statutory presumptions, "which the circuit court interpreted as embodying a mandatory or conclusive presumption of innocence (when the test result is) 0.07 or less." *Ibid* at pp 406-407.[3]

In reversing the Circuit Court's decision and reinstating the Defendant's conviction for operating while visibly impaired, the Court of Appeals noted the critical distinction between the "per se" offense found in subsection 625(1)(b) and operating while impaired:

> Unlike subsection 625(1)(b), which makes driving with a blood alcohol level of 0.10 percent or more a criminal offense per se, the offense of DWI is committed when a person drives a vehicle while the person's ability to drive is "visibly impaired."
>
> * * * * *
>
> The degree of a person's intoxication may be established by chemical analysis tests of the person's blood, breath or urine or by testimony of someone who observed the impaired driving.
>
> 216 Mich at 407.

The Court of Appeals found that the standard jury instructions were entirely consistent with the presumptions embodied in the statute, because those presumptions pertain to the driver's degree of intoxication, not to his blood alcohol level.[4] Having reached this conclusion, the court had no difficulty in finding that the presumptions of intoxication and impairment are rebuttable or permissive, as is the presumption of a lack of impairment created by a test result of .07 or below, and that the jury instructions clearly and properly drew this distinction:

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[3] The jury, of course, was free to believe or discredit defendant's testimony at trial, where he admitted to having consumed several more drinks than he acknowledged having consumed at the time he was stopped. *Ibid* at pp 404-405.

[4] The same logic which the Calvin court applied in allowing chemical test results to be admitted in that DWI prosecution would apply with equal force to the admission of test results in an OUIL prosecution. A test result greater than 0.10 per cent or more does not create an irrebuttable presumption that the driver was under the influence, nor does it create a presumption that the defendant had a particular blood alcohol level while driving; rather it is but one piece of evidence which the jury can consider when deliberating the OUIL charge.

> The legislature has determined that, when properly conducted, chemical tests for blood alcohol ***are a generally reliable indicator of the degree of intoxication***, and that their results are admissible at trial, along with other competent evidence of the Defendant's guilt or innocence . . .
>
> The presumptions *against* the accused in subsections 625a(9)(b) and (c) must be construed as permissive or rebuttable to ensure that the burden of proving all elements of the offense beyond a reasonable doubt remains on the prosecution. MRE 302(b). Similarly, the presumptions *in favor* of the accused in subsection 625a(9)(a) must be construed as permissive rather than as a conclusive presumption of innocence, because it is not an essential of the offense of DWI that a person's blood alcohol level exceed 0.07 per cent. (Emphasis in original)
>
> *Ibid* at pp 408-409.

The court held that even in circumstances when a defendant offered unrebutted testimony that his blood alcohol was below 0.07, a jury still could conclude that his ability to operate a motor vehicle had been impaired by the consumption of alcohol. It was thus proper for the jury to consider all the evidence, including the test results and the expert's testimony concerning the significance of those results. Calvin makes it clear that a person can be convicted of OWI when his or her blood alcohol level is below 0.07, and that a person can be acquitted of OUIL when his or blood or alcohol level is above 0.10. The Calvin court went on to acknowledge that the admissibility of evidence has evolved with advances in technology:

> "(S)pecialized statutes and regulations have largely supplanted the application of the common law principles and evidence codes in determining the admissibility of blood and breath test evidence. The Uniform Vehicle Code illustrates some common provisions. In proceedings involving driving or control of a vehicle while under the influence of intoxicating liquor, it makes chemical test evidence of BAC admissible so long as it is obtained by certified persons following [prescribed] procedures . . . The results of this testing can trigger two *rebuttable* presumptions: If BAC at the relevant time

> was .10% or more, that the individual was under the influence; and if the BAC was .05% or less, that he was not. An intermediate reading is deemed "competent evidence" for consideration along with other evidence in the case."
>
> 216 Mich at 409, n 1, quoting McCormick, *Evidence* (3rd Ed), §205, p 617. (Emphasis added by the court.)

The Calvin decision should have put to rest any doubts about when chemical test results should be admitted in OUIL prosecutions. So long as the requirements for test administration set out in the statute and in applicable administrative rules are followed, the test should be admitted into evidence, and the jury should be instructed that it may give the test results whatever weight it deems appropriate. There can never be a presumption that the driver's blood alcohol level at the time of arrest was the same as at the time of the test. Such a presumption would, in any event, be absurd in light of what is known about how alcohol is absorbed and is dissipated. See deposition of Dr. Dennis Simpson, pp. 11-15. It is apparent that the legislature was aware of this fact, since it wrote the statute so that the presumptions only apply to OUIL and OWI. The presumptions should have been applied in this case, and the Court of Appeals erred when it held that the results of Defendant's blood alcohol test should not have been submitted to the jury.

D. The Court of Appeals erred when it held that the prosecution must show that there was not an unreasonable delay in the administration of chemical tests to suspected drunk drivers. The court-created requirement that tests be performed in a "timely" manner evolved from *dicta*, and is contrary to the clear intent of the legislature that the results of all chemical tests be submitted to the finder of fact.

In the matter now before this Court, it is not disputed that the test administered to defendant Chad Wager was performed in strict conformance with the standards prescribed by Michigan's OUIL statutes and the rules for test administration promulgated pursuant by the

Michigan State Police. Neither the statute nor the rules impose any requirement that tests be performed in a "timely" manner. In its decision, however, the Court of Appeals ignored Calvin and resurrected the requirement that "the prosecution establish that there has not been unreasonable delay in the time between the arrest and the administration of the test." Wager, *supra* at p 7, citing People v Kozar, 54 Mich 503; 221 NW2d 170 (1974) and People v Schwab, 173 Mich App 101; 433 NW2d 824 (1988). The court held that these cases stand for the proposition that the prosecution must establish the absence of an unreasonable delay before chemical test results can be admitted as evidence. Closer examination of these cases shows, however, that the timeliness doctrine evolved from *dicta,* and was apparently derived from civil cases dealing with blood alcohol tests. Over time, this *dicta* evolved into precedent in criminal cases. None of the OUIL cases the Court of Appeals cited in Wager ever acknowledge that the rules governing admissibility — and the policy considerations underlying those rules — are fundamentally different in criminal OUIL prosecutions than they are in civil cases involving alleged intoxication.

The *dicta* which provides the foundation for the Court of Appeals' decision in the matter now before this court is found in a footnote in People v Kozar, 54 Mich App at 509; 221 NW2d 170 (1974). The issue in that case was " whether in a criminal prosecution for driving a vehicle while under the influence of intoxicating liquor, the prosecution is required to offer competent expert testimony to interpret and relate the results of the tests back to the time of the alleged offense before such test results can be admitted into evidence." 54 Mich App at 505. The defendant argued on appeal that the test results should not have been admitted into evidence because the prosecution only offered the test results themselves as evidence, and offered no expert testimony relating the test results back to the time that Defendant was arrested.

While the Court of Appeals correctly affirmed Defendant's conviction, its holding contained fundamental flaws, which evolved in subsequent decisions to provide the basis for the erroneous decision in Wager. The first error, one which was replicated in the matter now before this Court, was the court's failure to recognize the distinction between a violation of MCL 257.625(1)(a); MSA 9.2325(1)(a) — Operating Under the Influence of Intoxicating Liquor or OUIL, and a violation of MCL 257.625(1)(b); MSA 9.2325(1)(b) — Unlawful Blood Alcohol Level or UBAL:[5]

> We believe that the best evidence of blood alcohol content is the results of the specified chemical tests enumerated in the statute by our legislature, and that it was the Legislature's intent that for purposes of this statute, *a defendant's blood alcohol content as determined by a subsequent chemical test should be regarded as equivalent to his blood alcohol content as determined by a subsequent chemical test provided such test was administered within a reasonable time after the defendant's arrest*. (Emphasis added)
>
> *Ibid* at p 507-508.

The Court erred here by holding that a given test result — for example, a 0.15 — creates a presumption that driver's blood alcohol level at the time of the alleged offense was also 0.15. This is not what the statute says. The legislature clearly intended a different presumption by writing the statute as it did; a person who tests at 0.15 should be presumed to have consumed a sufficient amount of intoxicating liquor so as to be under its influence, regardless of what his or her blood

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[5] A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking or vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.

(b) The person has a blood alcohol content of 0.10% or more by weight of alcohol.

(This is the language of the statute in effect at the time of Defendant's arrest. It is substantially the same as the current statute.)

alcohol level was at the time of the alleged offense. This is a perfectly reasonable assumption for the legislature to codify. It sanctions any person who, prior to the time of the alleged offense, has consumed a sufficient amount of alcohol to test at 0.15. The intent of the statute was to deter driving by those people who have consumed enough intoxicants to reach the statutory thresholds.

The Court's second error is found in a footnote which purports to set forth the foundation requirements for admissibility of chemical test results in OUIL prosecutions:

> These prerequisites (to admissibility), not at issue in the case at bar, include establishing the qualifications of the operator administering the test, the method of procedure followed in administering the test, *that the test was performed within a reasonable time after the arrest,* and the reliability of the testing device. Foundation testimony concerning these prerequisites must be introduced before the test results may be admitted into evidence. (Emphasis added)

These requirements are *dicta*, because they in no way pertain to any of the issues raised on appeal. Moreover, the Opinion does not identify the source of these "prerequisites." It does not appear that these foundational issues were raised in the trial court, nor were they necessary to decide the case. It is possible that they were derived from earlier civil cases. In Gard v Michigan Produce Haulers, 20 Mich App 402, 407-408; 174 NW2d 73 (1969), the court set forth standards for admissibility of blood sample analysis which have been followed by Michigan courts in subsequent civil cases. These foundation elements include a requirement "that the blood was taken in a timely manner," as well as requirements that deal with the drawing of blood in a medical setting *Ibid.* Michigan Courts, however, have consistently recognized a clear distinction between blood criminal and civil cases when considering the admissibility of blood alcohol test results. Test results taken pursuant to the implied consent statute have been held admissible only in prosecutions for OUIL-related offenses. People v Keen, 396 Mich 573;242 NW2d 405 (1976). See also People

v Cutler, 86 Mich App 118, 124; 272 NW2d 206 (1978). The statutory presumptions only apply to criminal prosecutions, and it was therefore error for the trial court to permit a witness to testify that the plaintiff's blood alcohol level of 0.18 "was almost twice the 0.10 per cent legal limit for intoxication." Scott v Angies, Inc, 153 Mich App 652, 667; 396 NW2d 429 (1986). Different policy considerations come into play in criminal cases, which is why the legislature created the presumptions concerning intoxication.

The Kozar *dicta* was subsequently elevated to case law status in People v Krulikowski, 60 Mich App 28; 230 NW2d 290 (1975), even though once again the timeliness of the administration of the chemical test to the suspected drunk driver was not an issue raised on appeal. Instead, the issue in Krulikowski was whether the prosecution had presented evidence "that the particular instrument used in testing defendant was accurate." *Ibid* at p 29. At trial, the officer who administered the test to the defendant testified that he administered the test by following a "checklist" without giving any evidence as to what requirements were on the checklist. The Defendant objected to the admission of the test results, contending that no scientific test result should be admitted without a showing that the test was properly administered on a reliable instrument. The Court of Appeals held that there was no evidence to show that the instrument was accurate, and held that the tests were not admissible. The court, however, cited the Kozar footnote in the body of its opinion, and held that it governed test result admissibility in all OUIL prosecutions.

In People v Schwab, 173 Mich App 101; 433 NW2d 824 (1988), the court held that the prerequisites for admissibility included timeliness, and that a trial judge has discretion to disallow an untimely test. The issue in this case was whether the trial court judge abused his discretion by

ruling that "the tests were too remote in time (just over two hours after arrest) to give any reliable indication of defendant's blood alcohol content at the time he was driving." *Ibid* at p 104. Schwab in essence enshrined Kozar's *dicta* without any analysis whatsoever of the statutory presumption. This error is manifest in court's reasoning:

> The reasonableness of the time lapse involved is a foundation issue, going to the admissibility of the test results. Krulikowski, *supra*, pp 32-33. Pursuant to MRE 104(a), this is an issue for the trial judge and is consigned to his sound discretion . . .
>
> We do not reach the issue of how much of a delay is reasonable in every case. Reasonableness is a somewhat amorphous concept that varies from one set of factual circumstances to the next. We find it unnecessary to set a time and limit the discretion of trial courts. Trial judges are capable of protecting each defendant's right to a fair trial *by making case-by-case evaluations based on the prosecutory's ability to prove the reasonableness of the delay*. (Emphasis added)
>
> 173 Mich App at 104-105.

Since Schwab, most courts around the state have implicitly adopted a "two hour" rule. Most tests given within two hours of arrest are admissible; those given beyond two hours are not. This type of line-drawing creates absurd results. There is no logic in disallowing a test merely because five or ten minutes have passed beyond some arbitrary point in time. A blood alcohol level of 0.20 recorded one hour and 55 minutes after arrest is no less relevant than the same level recorded two hours five minutes after the arrest. The same would be true of a result of 0.03.

Because it failed to consider the statutory presumptions, the discretion Schwab grants trial courts creates the potential for one court to disallow a test result which another court would allow. This approach is even less satisfactory than the two-hour rule, because identical blood alcohol test results obtained in an identical time frame could be held admissible in some cases, but not in

others.[6] This is clearly an absurd result, one which the legislature intended to avoid when it created the statutory presumptions.

E. The statutory presumptions, which require the admission of the results of all properly administered chemical tests, are consistent with other sections of the OUIL statute.

The legislature's intent to admit test results is manifest in other parts of the OUIL statute. MCL 257.625(c)(1); MSA 9.2325(3)(1) provides that a person who operates a vehicle on a public highway "is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine . . ." There is no reference to a person having given consent under the statute only if a request is timely.

MCL 257.625a(6); MSA 9.2325(1)(6) states:

> The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath *is admissible into evidence in any civil or criminal proceeding.* (Emphasis added)

Paragraph 6(a) is entirely consistent with the statutory presumptions. By requiring that test results always be admitted, the Legislature reinforced the presumption by creating an evidentiary rule regarding admissibility. A person who is arrested for a specified drunk driving crime must be advised that the test results are admissible.

MCL 257.625a(6)(b); MSA 9.2325(1)(6)(b) provides in pertinent part:

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[6] The Court of Appeals, in an unpublished case, held that trial courts should not consider the reasons for delays in test administration when determining whether the test was administered within a reasonable time. See People v Cover, Case No. 181259 (1995).

> A person arrested for a crime described in section 625c(1) shall be advised of all of the following . . .
>
> (ii) The results of the test are admissible in a judicial proceeding as provided under this act and will be considered with other competent evidence in determining the Defendant's innocence of guilt.

MCL 257.625a(1)(d); MSA 9.225(1)(1)(d) is also consistent with the statutory presumptions and provides:

> A chemical test described in this subsection *shall be administered* at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention. *The test results are admissible and shall be considered with other competent evidence in determining the defendant's innocence or guilt.* If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample. (Emphasis added).

This statutory provision clearly intends for all test results be admitted. If Mr. Wager had requested an independent test, and had its results been favorable to him, would that test result be excluded because it was more remote in time from his driving than was the blood test which was administered to him? Here again, the answer is obviously "no." Any other result would deprive him of his statutory and constitutional rights. Finally, MCL 257.625a(7); MSA 9.2325(1)(7) also reinforce the statutory presumptions:

> The provisions of a subsection (6) relating to *chemical testing do not limit the introduction of any other competent evidence bearing upon the question of whether a person was impaired by, or under the influence of, intoxicating liquor* or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or whether the person had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67

> milliliters of urine, or if the person is less than 21 years of age, whether the person had any bodily alcohol content within his or her body . . . (Emphasis added).

The wording of this subsection, by acknowledging that chemical test results routinely are admitted as evidence, is entirely consistent with the statutory presumptions. If the statutory presumptions did not mandate that the results of a properly administered test be admitted as evidence, this subsection would serve no purpose.

The overall legislative scheme is obvious: the results of all properly administered tests should be received as evidence in OUIL prosecutions.

F. By requiring the prosecution to establish that there has not been an unreasonable delay in the administration of the chemical test, the Court of Appeals has compelled the prosecution to provide expert testimony. This requirement is contrary to both the legislature's intent and to the Court of Appeals own precedents, which recognize that the prosecution is not required to produce expert testimony relating the test results back to the time of the alleged offense.

In Kozar, the seminal case on the "timeliness" issue, the issue before the court was whether the prosecution had to produce expert testimony to relate the results of the chemical test back to the time of the alleged offense as a condition precedent to the admission of that evidence. Kozar expressly rejected the defendant's argument that "the prosecution is required to offer competent expert testimony to interpret and relate the results of Breathalyzer tests back to the time of the alleged offense before such tests can be admitted into evidence." Kozar, *supra* at p 505. As it now stands after Wager, this holding has been turned upside down.

The Court of Appeals has now held that chemical test results can be barred whenever "the prosecution fail(s) to offer any evidence that the blood test results accurately reflected defendant's blood alcohol level at the time of the offense." *Ibid* at p 10. The only testimony on the issue,

which was offered by defendant's expert, indicated that there was only one thing that could be said with any degree of scientific certainty concerning defendant's blood alcohol level:

> . . . I would be more than glad to state with a great degree of scientific certainty that at 12:50 a.m., the blood alcohol concentration of this individual was rate [sic] by volume .09. That was a number at that time which could be held with scientific certainty at that time.
>
> Deposition Transcript of Dr. Dennis Simpson, p 20, lines 13-18.

This is all that can be said of any chemical test result — it accurately reflects the blood alcohol level **at the time it was administered.** By requiring the prosecution to prove a negative, "that there has not been unreasonable delay" in the administration of the test, the Court of Appeals has created a situation where the prosecution will be compelled to put on expert testimony in every case, and even this might not be enough. Wager not only improperly negates the statutory presumptions, it also reverses Kozar and its progeny which have all held that the prosecution is not required to produce expert testimony to relate the test results back to the time of the alleged driving. As the trial court and the dissenting judge correctly noted, "to accept the premise being postured here would mean that every time there's a driving incident or an accident there would have to be portable medical teams, portable labs on the site, investigation, and that's just not the statutory scheme." Wager, *supra*, at p 12.

Although he did not articulate the correct reason for why the test results should be admitted, the trial court correctly recognized that the statutory scheme requires all test results to be admitted into evidence. He also correctly recognized that the argument defendant is advancing would totally frustrate the clear intent of the legislature by 1) requiring the prosecution to put on expert testimony to establish that the test was in fact administered within a reasonable period of

time; and 2) making it all but impossible to get chemical test results into evidence unless the test was performed at the scene within minutes of the officer's arrival.

G. **All of the statutory requirements for blood draw in a medical setting are contained in the OUIL statute and in the rules promulgated by the Michigan State Police, who have exclusive authority to promulgate rules governing blood alcohol testing. The result of any test performed in conformance with the statute and the administrative rules is admissible in any OUIL prosecution.**

Under the 1991 amendments to the OUIL statutes, the Michigan State Police are required to promulgate rules governing the administration of blood alcohol tests. MCL 257.625a(6)(g); MSA 9.2325(1)(6)(g) provides in pertinent part as follows:

> The department of state police shall promulgate uniform rules pursuant to the administrative procedures act of 1969 . . . for the administration of chemical tests for the purposes of this section.

Defendant Chad Wager's blood was drawn at Borgess Hospital. The use of blood or urine test results from samples taken in a medical setting in OUIL prosecutions is governed by MCL 257.625a(6)(c); MSA 9.2325(1)(6)(c), which provides in pertinent part that:

> A sample of urine or breath shall be taken and collected in a reasonable manner. Only a licensed physician, or an individual operating under the delegation of a licensed physician, . . . qualified to withdraw blood and acting in a medical environment, may withdraw blood at a peace officer's request to determine the amount of alcohol or presence of a controlled substance or both in the person's blood.

It is not disputed that Mr. Wager's blood was drawn in full conformity with this subsection.

Prior to the 1991 amendments, this subsection provided that the State Police "may" promulgate rules governing the administration of chemical tests. As a result of the 1991 amendment to the statute, which now provides that the State Police "shall" promulgate such rules, all aspects of blood alcohol tests of suspected drunk drivers involving blood drawn in a medical

setting are governed by this subsection and by the rules promulgated by the Michigan State Police. These rules have the force of law. Even if it was proper for courts to consider the lapse of time between arrest and test administration prior to the 1991 amendments, the current OUIL statute and rules have superseded that requirement.

The Michigan Court of Appeals has addressed the issue of such wording changes in the context of the administrative rules for chemical tests of OUIL suspects:

> We apply the usual rules of statutory construction to administrative rules. People v Tipolt, 198 Mich App 44, 46; 497 NW2d 198 (1993). One such rule is that a change in the wording is presumed to reflect a change in the meaning. In re Childress Trust, 194 Mich 319, 326; 486 NW2d 141 (1992).
>
> People v Tomko, 202 Mich App 673, 676 (1993).

The change in the statute on rule promulgation came after People v Schwab, 173 Mich App 101; 433 NW2d 824 (1988) was decided. Whatever authority the courts formerly might have had to add a judicial gloss to the then existing administrative rules, or to impose requirements not found in the rules, has been superceded by the 1991 amendment which changed "may" to "shall," and by the formal adoption of the rules. These rules have the force of law, and must be respected by the courts. A test not administered in compliance with the rules is per force inadmissible; one administered in conformance with the rules is per force admissible. These rules govern all aspects of chemical tests. Courts must respect them, and cannot enlarge or ignore them unless they somehow deprive suspected drunk drivers of due process.

A copy of the rules in effect governing both blood alcohol tests and breathalyser tests of suspected drunk drivers are attached. Each set of rules contains numerous safeguards to ensure that the test result is accurate and reliable. The rules provide ample protection to defendants. The

rules contain no requirement that a test be performed within a particular time in order to be acceptable.

Test results may be thrown out for the most minor and technical of violations of the rules, even though these rule violations cast little or no doubt on the reliability of the results. The Court of Appeals has affirmed the primacy of the administrative rules, even where the rule violation in question *de minimis*. In People v Boughner, 209 Mich App 397; 531 NW2d 746 (1995), the Defendant's activities were recorded on video tape during the 35 minutes prior to the administration of a breath test. He was actually observed personally by a police officer during the eight minutes preceding the administration of the test. The court held that the administrative rules were to be literally and strictly approved, and threw out the test result because the rules require that the person to be tested shall be observed by an officer for an uninterrupted 15-minute period.

It is interesting to note that the other three prerequisites for admissibility set first set forth in Schwab, -- those relating to operator certification, proper procedures, and instrument reliability -- are continued in the current administrative rules, which have been through several revisions since Schwab was decided. These requirements relate to the accuracy and reliability of the result, and are intended to insure due process in the administration of the tests. See R 325.2651 et seq, appended to this brief. The rules make no mention of timeliness, presumably because it has no bearing on the accuracy of a test result. Both the legislature and the state police must be presumed to have been aware of Schwab. Their omission of its timeliness requirement in the statute and rules underscores the fact that timeliness is not a prerequisite for admission of test results.

The state police have the sole authority to promulgate rules governing the administration of chemical tests in OUIL cases, and the courts cannot add to or subtract from those rules unless there is a due process violation. The rules require the prosecution to show that proper procedures

were followed with each OUIL Defendant. Defendants are free to show that proper procedures were not followed, and they are afforded a full opportunity to rebut the statutory presumption. This is all that due process requires. See People v Kayne, 286 Mich 571; 282 NW2d 248 (1938). Under the 1991 revisions, Michigan courts no longer have authority to throw out the result of a chemical test in an OUIL case based on the time it was administered to the suspected drunk driver.

The legislature's intent to have all chemical test results admitted into evidence, provided that the statute and rules are followed, is further underscored by the provisions of MCL 257.625a(6)(e) and (f); MSA 9.2325(1)(6)(e) and (f), which deal with blood drawn for medical purposes from individuals injured or killed in motor vehicle accidents:

> (e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged . . .
>
> (f) If, after an accident, the driver of a vehicle involved in the accident is deceased, a sample of the decedent's blood shall be withdrawn in a manner directed by the medical examiner to determine the amount or alcohol or the presence of a controlled substance, or both, in the decedent's blood . . .

Neither of these subsections makes any reference to timeliness. If blood is withdrawn for medical purposes, there is no guarantee that the hospital will even record the time at which the blood was withdrawn. Nonetheless, the statute provides that the test results "are admissible in any civil or criminal proceeding to show the amount of alcohol" in the driver's blood. These two subsections, which involve chemical tests conducted in a medical environment, impose no requirement that test result be excluded from evidence because it was not performed within a reasonable period of time. Indeed, a defendant could be deprived of due process.

If, for example, Mr. Wager had been involved in an accident at an intersection controlled by a traffic light, and there was a question about who had the right of way, and the other driver was charged with some offense related to failing to yield the right of way, there would be no question but that the other driver would be able to introduce the results of the test performed on Mr. Wager into evidence. There is no logical reason why a test result which would be admissible in a civil case should not also be admissible in a criminal prosecution.[7]

MCL 257.625a(8); MSA 9.2325(1)(8) requires that test be made available to the defendant upon demand. If Mr. Wager had tested at 0.03 instead of at 0.09, could the prosecution, relying on testimony identical to that offered by Dr. Simpson, bar admission of that test result in a prosecution for OWI because the test was not administered within a reasonable period of time? Under the Court of Appeals faulty reasoning, such an improper outcome would be compelled, even though it clearly would deprive defendant of relevant evidence, and thus deprive him of due process.

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[7]The logical absurdity of the rulings the Court of Appeals has issued on "timeliness" issues is further highlighted by People v Prelesnik, 219 Mich App 173; 555 NW2d 505 (1996), where the Court of Appeals held that the district court should have held an evidentiary hearing to determine "whether an independent test performed when defendant requested it (four hours after his arrest) could have produced relevant evidence about defendant's blood alcohol level at the time of his arrest." 219 Mich App at 180. If the independent test defendant requested had been administered, and if the result cast doubt on the reliability of the breathalyzer result — for example, a 0.02 — Wager would bar the result from being presented to the finder of fact. Such a result would clearly deny defendant due process.

PRAYER FOR RELIEF

The Michigan Municipal League respectfully urges this court to grant leave to appeal to the prosecution leave to appeal and reverse the Court of Appeals and reinstate Defendant's conviction on the basis that his blood was tested for alcohol in full conformance with both the OUIL statute and with the administrative rules promulgated by the Michigan State Police. MCL 257.625a(9); MSA 9.2325(1)(9) mandates that the result of any properly administered test must be submitted to the finder of fact with instructions that the test result gives rise to the applicable presumption.

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