STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN BISIO, Plaintiff-Appellant, v. THE CITY OF THE VILLAGE OF CLARKSTON, Defendant-Appellee.	Supreme Court Case No. 158240 Court of Appeals Case No. 335422 Oakland County Circuit Court Case No. 15-150462-CZ

DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S MOTION FOR LEAVE TO FILE REPLY REGARDING PLAINTIFF'S ANSWER TO DEFENDANT-APPELLEE'S MOTION FOR REHEARING

NOW COMES Defendant-Appellee The City of the Village of Clarkston, by its counsel Kerr, Russell and Weber, PLC, and for its Motion for Leave to File Reply Regarding Plaintiff's Answer To Defendant-Appellee's Motion For Rehearing, hereby states as follows:

1. On August 27, 2020, Plaintiff-Appellant Susan Bisio filed an Answer to Defendant-Appellee the City of the Village of Clarkston's ("the City") Motion for Rehearing.

2. In her Answer, Ms. Bisio makes a number of assertions that must be addressed by the City to avoid prejudice.

3. Under MCR 7.316(A)(7), this Court has discretion to grant leave to file a reply to assist this Court in deciding the Motion for Rehearing.

4. The City's proposed reply is attached to this Motion. (**Exhibit A**).

5. Allowing the City to file a reply will not cause any delay, will not cause any prejudice to Ms. Bisio, and is in the best interests of substantial justice so that the City is afforded an adequate opportunity to respond to Ms. Bisio's arguments and be heard on the rehearing issue.

6. This Motion, and the attached Reply, were served on Plaintiff via the Court's electronic filing system.

WHEREFORE Defendant-Appellee The City of the Village of Clarkston respectfully asks that this Honorable Court grant this Motion and accept the attached reply for filing.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: /s/ *Kevin A. McQuillan*

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Dated: September 15, 2020

CERTIFICATE OF SERVICE

Kevin A. McQuillan, being first duly sworn deposes and says that on September 15, 2020 he filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Kevin A. McQuillan
Kevin A. McQuillan

Exhibit A

STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v.

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee

Supreme Court Case No. 158240

Court of Appeals Docket No. 335422

Oakland County Circuit Court Case No. 15-150462-CZ

DEFENDANT-APPELLEE THE CITY OF THE VILLAGE OF CLARKSTON'S REPLY IN SUPPORT OF MOTION FOR REHEARING

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ARGUMENT

I. The Motion for Rehearing Satisfies the Rehearing Standard and Should be Granted.

The City's request for rehearing is not an "ultimatum." A motion for rehearing is the vehicle adopted by this Court to bring error to the Court's attention. The City properly seeks an opportunity to address the error in the majority's dispositive finding that the city attorney is a public body subject to FOIA - an issue that was never raised by the parties, decided by the lower courts, argued, or identified in this Court's leave order. The rehearing motion is entirely proper and should be granted.

A. The Dispositive Ruling on the New Amicus Issue Violates MCR 7.305(H)(4).

Plaintiff errs in asserting that it was perfectly fine for this Court to rule on a never-before raised, briefed, argued, or decided issue without giving notice to the parties or an opportunity to be heard. Contrary to Plaintiff's recounting of our court rules, the dispositive ruling on the new issue violates MCR 7.305(H)(4)(a), which states that "[u]nless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal." While this rule allows the "parties" to seek leave to raise new issues if "good cause" exists, it does not allow amicus curiae to unilaterally inject new issues into the case. MCR 7.305(H)(4)(b) states:

> On motion of *any party* establishing *good cause*, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal. Permission to brief and argue additional issues does not extend the time for filing the brief and appendixes (emphasis added).

Together, MCR 7.305(H)(4)(a) and (b) establish a violation of the rule. *First*, the issues on appeal are limited to the issues raised in the application unless otherwise ordered by the Court. *Second*, only a party can seek leave to add new issues, not an amicus curiae. *Third*, good cause must be established. *Fourth*, a new issue can only be added when the Court grants the party's request, i.e., by issuance of an order. And *fifth*, adding new issues must occur before briefs and

appendixes are filed (otherwise, there would be no need to state that adding new issues does not extend the time for filing briefs and appendixes).

Here, whether the city attorney was a public body under MCL 15.232(h)(iv) was not raised in the application or identified in this Court's leave order, and thus was not an issue that could be briefed by the parties. Plaintiff never moved for leave to add this issue to the appeal and good cause for such a request was never alleged, let alone established. This Court never entered an order adding to the appeal the issue of whether the city attorney "is a public body under MCL 15.232(h)(iv)" and it could not have done so in a timely manner as the issue was only raised in an untimely amicus brief filed just before oral argument, well after the parties' briefs were filed.

It should be noted that MCR 7.316(A)(3), under this Court's "miscellaneous relief" rule, allows this Court to "permit the reasons or grounds of appeal to be amended or new grounds to be added." However, this rule does not nullify the requirements of the more specific MCR 7.305(H)(4)(a) and (b). At the very least, there is no indication that this Court's MCR 7.316(A)(3) power can be exercised in secret, without an order or notice to the parties. The same analysis applies to MCR 7.316(A)(7), which permits this Court to "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require[.]" Because MCR 7.305(H)(4) more specifically governs amendment of the issues on appeal, the catchall rule cannot be applied to nullify the express requirements of MCR 7.305(H)(4), and as MCR 7.316(A)(7) itself provides, the exercise of authority under this rule requires an order.

Plaintiff argues that MCR 7.312(H) permits amicus to inject new issues into the appeal because unlike MCR 7.212(H), it does not say that amicus briefs are limited to the issues raised by the parties. But MCR 7.312(H) does not need to repeat what is already stated in MCR 7.305(H)(4)(a), i.e., that "[u]nless otherwise ordered by the Court, an appeal shall be limited to the

issues raised in the application for leave to appeal." And MCR 7.312(H), which only addresses amicus briefs and amicus argument, was certainly not crafted to *overrule by silence* what MCR 7.305(H)(4)(a) *expressly directs*.[1]

In summary, this Court's rules do not contemplate that issues can be added to the appeal in the Court's final opinion. Nor is there a logical basis to extrapolate from these rules that Supreme Court amici have greater liberty to add to the issues on appeal than the parties do (i.e., the amici need only raise new issues in their brief while the parties must seek leave, establish good cause, and obtain a court order). The fact that the Supreme Court sometimes graciously invites amicus participation should not be read as a license for amici to restructure the appeal. While amici assistance is valuable, it cannot replace the presentation of the parties who have the greatest interest in achieving a proper determination of their rights and obligations.

B. Contrary to Plaintiff's Current Argument, Plaintiff Moved to Strike the MML/MTA Amicus Brief Because it Ostensibly Introduced a New Issue.

Plaintiff is not being authentic. Today she validates an amicus brief that argued a never-before raised, briefed, argued, or decided issue. Previously, she opposed the filing of such a brief and moved to strike it, as shown by the following excerpts (with underline emphasis added):

1. Plaintiff's Resp to Motion to File Amicus Brief

- *Argument at p 1* – "The proposed amici <u>improperly seek to add a new issue</u> that is not relevant to the appeal and not permitted under MCR 7.212(H)."

- *Argument at 5* - "In mischaracterizing the issue on appeal, proposed amici are <u>attempting to add an issue to the appeal</u> that was not part of the case in the trial court and not briefed by the parties on appeal. <u>Amici cannot do that</u>. MCR 7.212(H)(2) limits an amicus "to the issues

[1] Unlike this Court, which entertains appeals only by leave orders, appeals to the Court of Appeals come by right or by leave. In both instances, the issues are principally identified by the "statement of questions" in the parties' briefs (MCR 7.212(C)(4) and (D)(3)), although as to appeals by leave, MCR 7.205(E)(4) provides that "[u]nless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief."

raised by the parties." *Accord*, *Kenney v Booker*, unpublished order of the chief justice, issued May 3, 2013 (Supreme Court docket no. 145116) (denying motion to file amicus brief because the "brief presents argument on issues not presented by this case"); *Smith v Dep't of Pub Health*, 428 Mich 540, 633 n33; 410 NW2d 749 (1987) (refusing to consider issue raised by amici that plaintiff did not preserve); *In re McLeodUSA Telecom Servs, Inc*, 277 Mich App 602, 621 n8; 751 NW2d 508, (2008) (refusing to consider issues raised by Michigan Townships Association amicus brief because the issues were not raised by the parties). The court should not allow an amicus brief that attempts to expand the issues."

2. Plaintiff's Br in Supp of Motion to Strike Amicus Brief

- *Statement of Facts at p 1* - "[T]hat brief mischaracterizes appellant's arguments, mischaracterizes what this case is about, and improperly seeks to introduce a new issue."

- *Argument at p 2* - "In a classic straw-man argument, amici MML and MTA say this case is about something the parties did not argue below, the circuit court did not consider or decide, and that is unnecessary to decide the narrow dispute here."

- *Argument at p 11* - "[A]mici improperly seek to introduce a new issue, one that the parties did not brief, the circuit court did not rule on, and that is unnecessary to decide the issue in this case . . . The court … should strike this nonconforming brief …"

- *Argument at p 11* - "The court should not permit amici to needlessly complicate this case by introducing a new issue.

- *Argument at p 12* - "The Supreme Court has denied leave to file an amicus brief that presents arguments on issues not presented by the case. *Kenney v Booker*, unpublished order of the chief justice, issued May 3, 2013 (Supreme Court docket no. 145116); 829 NW2d 869 (Mem); 2013 WL 1859108. Likewise it has refused to consider new issues raised by an amicus. *Smith v Dep't of Pub Health*, 428 Mich 540, 633 n33; 410 NW2d 749 (1987) (refusing to consider issue raised by amici that plaintiff did not preserve). Particularly pertinent is this court's refusal to consider new issues raised by the Michigan Townships Association, one of the amici that seeks to do the same thing here. *In re McLeodUSA Telecom Servs, Inc*, 277 Mich App 602, 621 n8; 751 NW2d 508 (2008)."

- *Argument at p 12* – "Because the MML and MTA amicus brief introduces a new issue contrary to MCR 7.212(H)(2), appellant asks the court to strike the brief."

3. Plaintiff's Motion to Strike Amicus Brief

- *Discussion at p 3* - "Because the MML and MTA amicus brief introduces a new issue contrary to MCR 7.212(H)(2), appellant asks the court to strike the brief."

Plaintiff's initial position – that an amici cannot unilaterally add to the issues on appeal - was correct. Only this Court can amend the issues on appeal pursuant to an order for good cause

shown. An order would have provided notice to the parties and an opportunity to be heard. In failing to do so, this Court violated MCR 7.305(H)(4), the party presentation doctrine, and due process. This is palpable error by which the City has been misled. [2]

II. Party Presentation is Violated Where the Court's Disposition Relies on a Never-Before Raised, Briefed, Argued, or Decided Issue That Has Been Ceded by Plaintiff.

The majority ruled that *the city attorney is a public body* subject to FOIA. Throughout these proceedings, Plaintiff correctly conceded that *the city attorney is not a public body*. Further, Plaintiff repeatedly insisted that she was not arguing the city attorney is a public body. Today Plaintiff disavows her concession and backtracks. Plaintiff is obviously more interested in the result than the rule of law. This Court does not have that luxury; it must always consider the jurisprudential impact of its decision beyond the facts of the pending case.[3] That may be why the majority wanted to avoid the agency issue Plaintiff proffered as the basis for her appeal. But because Plaintiff had conceded throughout this case that the Clarkston city attorney is not a public body, this issue did not provide a proper alternative for decision. The more appropriate course

[2] Plaintiff looks to the Rules of the United States Supreme Court to argue the propriety of the issue raised by amicus. Those rules are irrelevant to Michigan procedure, but even so, consent from the parties is generally required prior to filing an amicus brief in the US Supreme Court. If a party objects, the amicus may file a (disfavored) motion and the objecting party can file a response. See S. Ct. R. 37 (2)(b). This mechanism ensures the parties have notice of a new issue raised by an amicus and gives them an opportunity to be heard.

[3] This Court also sets precedent vis a vis the procedures it invokes to decide an issue that has been ceded by the parties without allowing the City the opportunity to be heard. Here, the majority justifies its dispositive ruling on this new issue by reference to cases that permit this Court to overlook preservation requirements where failure to consider the issue would result in manifest injustice, is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. See *Bisio* at 14, n 12. But this rule does not address an issue ceded by the parties and thus, not briefed by the parties. Nor does it contemplate that the issue would be decided without giving the parties notice and an opportunity to be heard. Indeed, the majority does not even explain why failure to consider the issue in this case would cause manifest injustice, why it is necessary to a proper determination of this case (Plaintiff did not think so), and why the majority finds that the necessary facts have been presented.

would have been to follow precedent in *Mich Open Carry, Inc v Clio Area Sch Dist*, 502 Mich 695; 918 NW2d 756 (2018), and deny leave, rather than dispositively rule on a ceded issue.

A. When the Court Dispositively Adopts an Abandoned and Ceded Argument, the Court Obscures its Role as Neutral Arbiter and Appears to Advocate.

The "principle of party presentation" serves many important purposes, one of which is to maintain the Court's neutrality. There is no "flexibility" in the Court's role as neutral arbiter of legal issues; impartiality is not a "guideline." This Court has recognized the differing roles of the parties and the court in the party presentation context and strived to preserve the distinction. Reading this Court's opinion in *Mich Open Carry,* the City can only wonder why the same safeguards that this Court respected there were not equally important here.

In *Mich Open Carry,* now Chief Justice McCormack declined to decide an argument that the parties had "abandoned … by failing to assert it in their applications for leave to appeal" and that had been specifically disclaimed upon questioning at oral argument. Justice McCormack wrote:

> "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." [*Id*. at 709-710, quoting *Greenlaw v United States*, 554 US 237, 243 (2008) (emphasis added)].

In distinguishing *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), a case the dissent relied upon in support of deciding the abandoned issue, Justice McCormack noted that "at least it [the issue in *Mack*] was raised at oral argument and not expressly disclaimed." *Mich Open Carry*, 502 Mich at 710, n 9. Justice McCormack continued:

> That significantly distinguishes this case from *Mack* and exposes the dissent's judicial overreach: *The dissent is ready to say point, game, match for the plaintiffs on an argument almost entirely of its own construction. There are plenty of considerations counseling against the dissent's position that it is "of no consequence" that the plaintiffs have not made the dissent's argument*. If it is truly "of no consequence," best we ditch the adversarial system of law today, as under

> the dissent's approach we the Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties. [*Id*. (emphasis added)]

Justice McCormack noted that if the Court "ever" takes "very seriously" the Court's rules regarding issue preservation and abandonment, "it should be here:"

> Granting leave to appeal under the circumstances presented *would send a message that we should and do decline to send*: Abandon an issue in your application for leave to appeal? And definitively distance yourself from that legal theory at oral argument? Worry not! The Court will revive the theory for you and give you free rein to try again after hearing oral argument on that application. [*Id*. (emphasis added)]

In a concurrence, Justice Clement expressed a similar view, stating:

> *I agree with the majority that we should decline to advance this argument for the parties when they have not only not made it for themselves, but instead—in the words of the partial dissent—"improvidently ceded*" this issue during oral argument . . . I believe this is consistent with our concern for "judicial modesty" recently articulated in *People v. Arnold*, 502 Mich. 438, 481, 918 N.W.2d 164 (2018) (Docket No. 154764), 2018 WL 3483281, slip op. at 37, and the admonition that "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them," *Jefferson v. Upton*, 560 U.S. 284, 301, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010) (Scalia, J., dissenting) (quotation marks and citation omitted). [*Mich Open Carry*, 502 Mich. at 723-724 (emphasis added)]

Justice Viviano likewise stated "I agree with the majority's decision not to reach this issue, since the parties chose not to pursue this theory in our Court even when given the opportunity to do so." *Id*. at 711, n 1 (Viviano, J, concurring). Even in advocating for a grant of leave to consider the abandoned issue, Justice Wilder did not contemplate that the parties would be excluded from the decision-making process. See e.g., *Id*. at 725-726 (Wilder J, concurring in part and dissenting in part and joined by Justice Zahra). *Bisio*'s "*point, game, match*" on a ceded issue without notice to the parties or an opportunity to be heard cannot be reconciled with *Mich Open Carry*.

B. A Ceded Issue That was Nonetheless Raised by Amici is Not an Issue the Parties Had the Opportunity to Address.

It does not suffice for Plaintiff to argue that the dispositive statutory interpretation argument was raised by amicus and that amicus arguments have carried the day in other cases. Here, the amicus argument was contrary to a legal (and factual) position ceded by Plaintiff, who repeatedly confirmed that "of course" the city attorney "is not" a public body and who disavowed ever making any such argument. There would have been no reason – and no authority – for the City to brief an issue (1) that Plaintiff had repeatedly ceded, (2) that Plaintiff did not seek to add by motion to the issues on appeal, and (3) that was not made part of the case by Court order pursuant to MCR 7.305(H)(4). Plaintiff's attempt to argue otherwise is simply not credible.

1. Plaintiff Ceded the "City Attorney is a Public Body" Argument.

Plaintiff's ceding and disavowal of the city attorney/public body issue appears throughout her filings including, but not limited to, the following (with underline emphasis added):

a. Plaintiff's Br in Supp of Motion to Strike Amicus Brief

- *Argument at p 3* - "Appellant <u>does not seek to treat a public body's agent as a public body</u> himself."
- *Argument at p 3* - "Appellant acknowledged that <u>the city attorney is not a public body</u>,"
- *Argument at p 3* - "It is the *city*—and the city's public records—that are at issue."
- *Argument at p 3* - "The request was addressed to the city, not to the city attorney or any other 'agent of the city.'"
- *Argument at p 4* - "<u>Appellant did not argue that the city's agent is subject to the requirements of FOIA</u>. The records request was to the *city*, not 'a city's agent.'"
- *Argument at p 9* – "The Records Request Was Not to the City Attorney and <u>Did Not Seek to Treat Him as a Public Body</u>."

b. Plaintiff's Motion to Strike Amicus Brief

- *Paragraph 4* - "Appellant made her request to the city, not to the city attorney. Appellant never sought to treat the city attorney as a public body or to apply FOIA to the city attorney."

c. Plaintiff's Answer to Motion for Leave to File Amicus Brief

- *Argument at p 4* - "Appellant never claimed the city attorney is a public body subject to FOIA."

d. Plaintiff-Appellant's Merits Brief

- *Argument at p 7* - "The city attorney is not a 'public body.'"
- *Argument at p 23* - "This Case is Not About Whether the City Attorney Is a 'Public Body.' It Is About Whether the Records Are 'Public Records.'"
- *Argument at p 24* – "Appellant never contended the city attorney was a public body."
- *Argument at p 35* – "To decide this case, we need not parse the definition of 'public body.' The issue is not who is a 'public body' but what is a 'public record.'"
- *Argument at p 39* – "[T]he fact that the city attorney is not a public body is not relevant."
- *Argument at p 42* – "Appellant never argued that the city's agent (the city attorney) is a public body subject to FOIA."
- *Argument at p 42* – "The fact that the city's agent isn't a public body doesn't mean he can't possess public records of the public body that he acts for."
- *Argument at p 43* - "Here that means the city attorney, an agent of the city, is not himself a public body—something appellant never argued."

Contrary to Plaintiff's present contention, her numerous admissions do not distinguish between the city attorney "himself" and the "office of the city attorney." Quite the contrary, in her merits brief in this Court, Plaintiff frequently referred to the city attorney as a charter-created office or official. The following references from just the first 11 pages are illustrative (with underline emphasis added): p 1 – referring to the city attorney as "formally appointed by the city to an office defined in the city charter;" p 1 – referring to the city attorney as "a city official;" p 2 - referring to the city attorney as " a formally appointed city officer" and explaining that "[t]he city charter

defines the office and requires the city council to approve the appointment," citing Charter §§ 5.1(a)-(b); p 2, n 4 – referring to Mr. Ryan as having "acknowledged his office as city attorney;" p 3 – describing a letter from Plaintiff's attorney referring to the city attorney as "a charter officer of the city acting on behalf of the city, a public body 'in the performance of an official function;'" p 4 – referring to Plaintiff's argument that "Ryan is a charter-appointed city officer;" p 6 – stating that "[t]he city attorney holds an office defined by the city charter" and "[t]he city council formally appointed him to that office;" p 7 – referring to the city attorney as a "city officer" performing an official function for the city; p 8 – referring to the "charter-appointed city attorney;" pp 9-10 – referring to the city attorney as "performing an official city function;" pp 10-11 – referring to "the charter-appointed city attorney."

Nor did Plaintiff circumscribe her concession to MCL 15.232(h)(iii) or exclude MCL 15.232(h)(iv). As Justice Viviano notes, Plaintiff argued that the city attorney was not a public body for strategic advantage. And apparently, for strategic advantage, she did not go on record expressing agreement with the amicus argument.

2. The City Did Not Have an Opportunity to Address the Non-Issue Focused on MCL 15.232(h)(iv).

Equally unavailing is Plaintiff's insistence that the City could have asked to reply to the non-issue that Plaintiff had already *conceded* and *did not move to add* to the issues on appeal. Why would the City reply to a conceded, unauthorized issue when MCR 7.305(H)(4)(a) unambiguously states that "[u]nless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal." This Court should not be persuaded by Plaintiff's attempt to transfer to the City the Plaintiff's burden of adding to the appeal (by motion establishing good cause) an issue Plaintiff now purports to have "agreed with" but "saw no reason for additional briefing on the point, particularly because the city had nothing to say on the point …" Pl. Resp. at

13-14. Respectfully, this is not a game of chicken. Sand-bagging is not an advocacy tool. The governing court rules place the burden on Plaintiff. [4]

Plaintiff also argues that the City could have raised the issue at oral argument or through the filing of a post-argument brief. The same response applies to this assertion but to an even greater degree. There was no discussion of this MCL 15.232(h)(iv) "other body" issue at oral argument. The bench had neither questions nor comments regarding the issue and Plaintiff at that time again conceded, for all to hear, that she was not arguing that the city attorney was a public body. There would have been no reason for the City to seek leave to reply to an issue that was not addressed by the Justices at oral argument and to which Plaintiff again conceded.

III. Due Process Is Implicated By the Failure to Give Notice and an Opportunity to be Heard on a Ceded Dispositive Issue That the Court did not Identify in its Leave Order and Did Not Mention at Oral Argument.

There is a sound legal and factual basis for the City's assertion that this Court's decision violates due process. This Court is not the City's creator; thus, the cases Plaintiff relies upon are inapposite. Further, Plaintiff's assertion that the City lacks a protected property interest disregards the City's interest in defending the litigation as well as avoiding the attorney fees and costs Plaintiff seeks to impose upon the City.

A. The City Was Not Created by This Court.

Plaintiff argues that because the City is a creature of state law, the City has no due process right to oppose the "will of its creator." Pl. Resp. at 17-18. But Plaintiff relies on irrelevant cases

[4] If this was an argument Plaintiff agreed with, she could have declined to concede that the city attorney is not a public body; she did not do so. If the issue was important to the disposition of the case, she could have raised it in her application for leave to appeal; she did not do so. Upon the filing of the amicus brief, Plaintiff could have moved on the record to add the issue to the appeal; she did not do so. Plaintiff could have named the city attorney as a defendant; she did not do so (and now asks this Court to use its miscellaneous authority to add the city attorney as a defendant at the very end of the case so any resulting order can be enforced against him).

in which local municipalities challenged *legislative* actions, such as state tax changes,[5] a state law changing reimbursement rates for skilled nursing care,[6] a state law preventing cities from suing firearm manufacturers,[7] and a state law causing the construction of radio towers.[8] Here, the City challenges the *judiciary's* action and the judiciary is not the City's creator.

This Court was constitutionally-created by the People of the State of Michigan. Const 1963, art 6, §1. The City is likewise conceived by Article VII, § 2 of the Constitution, which states in part, "The legislature shall provide by general laws for the incorporation of cities and villages." Const 1963, art 7, § 2. The Constitution further provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor…" Const 1963, art 7, § 34.

Here, the City does not assert that the Legislature is impinging on its due process rights. Nor does the City raise a constitutional challenge to a statute. Rather, the City is asserting a due process right to notice and an opportunity to be heard in litigation on the issue deemed dispositive by the majority. By ignoring principles of party presentation, this Court failed to afford the City adequate notice and an opportunity to be heard. See *Mathews v Eldridge*, 424 US 319 (1976). Even if a municipality and this Court share the same creator, the City is still entitled to the same due process rights as any other civil litigant. But in fact, this motion does not require decision on

[5] *Bay City v State Bd of Tax Admin*, 292 Mich 241; 290 NW 395 (1940); *DeWitt Twp v Clinton Co*, 113 Mich App 709; 319 NW2d 2 (1982); *Williams v Mayor & City Council of Baltimore*, 289 US 36 (1933).

[6] *Kent Co v Dep't of Social Servs*, 149 Mich App 749; 386 NW2d 663 (1986).

[7] *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48; 669 NW2d 845 (2003).

[8] *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563; 609 NW2d 593 (2000).

whether a municipality can assert a due process "claim" against the Court; the City is arguing a denial of due process as one basis for rehearing and if rehearing is granted, the City will be heard.

B. The City Has a Property Interest in the Outcome of This Proceeding.

Contrary to Plaintiff's assertion that there are no financial implications for the City in this litigation (Pl Resp at 19-20), the City has a cognizable interest in defending the litigation and in avoiding the award of attorney fees and costs that Plaintiff seeks to impose. Thus, like any other party to civil litigation, the City has a property interest in the outcome of this litigation. See *Williams v Hofley Mfg Co*, 430 Mich 603, 611; 424 NW2d 278, 282 (1988) ("It is beyond dispute that a money judgment rendered in this litigation against the defendant would deprive it of property."). Indeed, the day after this Court issued its decision, Plaintiff advised the City's attorney of her intent "to file a motion for an award of costs and fees under FOIA." See 7/25/2020 Email from Richard Bisio (Exhibit A). There can be no serious dispute that any sort of money judgment rendered against the City would deprive it of property.

Further, the existence or non-existence of insurance coverage does not determine whether the City has a property interest for purposes of determining whether rehearing is required to afford due process. While Plaintiff apparently urges the Court to conclude that her mere positing of insurance negates a constitutional property interest, it logically does not follow. Insurance does not remove a judgment, the ramifications of which go beyond payment issues. But beyond this, Plaintiff provides no evidentiary support for her suggestion that the City has (or may have) a policy that *will* cover the monetary relief she seeks, offering only hearsay about a "discussion at a city council meetings [*sic*]," Pl Resp at 19-20, and acknowledging that a reservation of rights exists. Pl Resp at 20.

In addition, Plaintiff's argument is too narrowly focused on monetary liability and ignores claims for declaratory and equitable relief, as well as the City's protected property interest in

prevailing in the litigation. *Williams* held that "both parties have a property right in the litigation," and "to the extent that the procedure involved in this litigation would affect the ability of the defendant to present a legitimate defense, the defendant's property rights are also impaired." *Williams*, 430 Mich at 612. *Williams* continued: "Indeed, it is our conviction that both parties have a property right in the litigation, although the plaintiff would not affirmatively be deprived of any other property as a result of an adverse judgment." *Id*. at 612, n 16. Here, the City was precluded from presenting a defense to the majority's dispositive analysis, contrary to the rules established by this Court for addressing issues on appeal. See *Williams*, 430 Mich at 610-611 ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions *are defined by existing rules or understandings that stem from an independent source such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"), quoting *Bd of Regents of State Colleges v Roth*, 408 US 564, 577 (1972) (emphasis added).

C. There Was No Opportunity to be Heard.

The City will not repeat here what is already written above regarding its "opportunity" to be heard on the dispositive issue. Under the rules, understandings, and customary procedures of this Court, the City had no such opportunity. See *supra*. Plaintiff's ceding of the dispositive issue continued through oral argument and beyond. As shown above, Plaintiff repeatedly insisted she was not arguing, and had never argued, that the city attorney is a public body. The Court directed no questions to this issue and did not issue an amended order. To the extent Plaintiff is suggesting the City should have disregarded this Court's leave order, there was neither a basis nor authority to do so. The City had no realistic reason to request supplemental briefing. The *Bisio* majority adopted an argument ceded by Plaintiff. No one familiar with this Court's recent decision in *Mich Open Carry* would have anticipated this.

Plaintiff's reliance on *Thomson v Dearborn*, 347 Mich 365; 79 NW2d 841 (1956), is misplaced. There, the trial court essentially decided an issue based on the briefs without holding a hearing. *Id*. at 376. In describing *Thomson*, Plaintiff fails to note that the trial court in *Thomson* issued a written opinion and *waited ten days to ensure there were no objections* before entering a final order. *Id*.[9] On appeal, the appellant argued in pertinent part that the trial court should have heard testimony without explaining why the issue was not previously raised. *Id*. This Court rejected the appellant's effort to raise an issue on appeal without raising it to the trial court. *Id*. Here, the due process issue arose because the majority opinion decided an issue that Plaintiff disavowed and did not raise in the questions presented or in the lower courts. The City timely sought rehearing after the majority opinion was issued. To deny rehearing would have the effect of denying the City the opportunity to defend against the dispositive issue. Thus, *Thomson* is not illustrative here. [10]

Plaintiff argues in footnote four that "[a] statement in a brief . . . is not a 'judicial admission,'" citing *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996). *Radtke* notes that "stipulations by a party or its counsel" *in addition to* "formal

[9] Plaintiff's block quote omits a key sentence: "The decree was not entered for a period of 10 days thereafter." *Thomson*, 347 Mich at 376.

[10] Contrary to Plaintiff's assertions, there is no issue of waiver or forfeiture by the City. "A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." *Wood v Milyard*, 566 US 463, 470 (2012) (internal citations omitted). Here, there is no evidence of the City knowingly and intelligently relinquished a known claim or defense nor evidence that the City failed to preserve an issue. Moreover, Plaintiff takes quotations out of context. "That the hearing required by due process is subject to waiver, and is not fixed in form *does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest*, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v Connecticut*, 401 US 371, 378–79 (1971) (footnotes omitted, emphasis added). Because the Court did not put the parties on notice of the issue that the majority opinion decided, neither waiver nor forfeiture are an issue.

concessions in the pleadings" are formal acts that may constitute judicial admissions. The disjunctive term "or" indicates a choice between two alternatives. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Statements made by counsel at oral argument are treated the same way. *See Am Civil Liberties Union of Nevada v Masto*, 670 F3d 1046, 1064–65 (CA 9, 2012) ("representation at oral argument is judicial admission," citing *United States v Wilmer*, 799 F2d 495, 502 (CA9, 1986)). Here, as shown above, Plaintiff repeatedly argued that the city attorney is not a public body to expressly dispense with that issue and focus instead on her agency argument. See, e.g., Plaintiff's Br in Support of Mot to Strike at 3-4. In fact, Plaintiff argued to this Court that the definition of a public body was irrelevant:

> Appellant never contended the city attorney was a public body and also never contended that, as the city posits, the common law of agency expands the definition of "public body." The identity of the public body in this case—the city—was never in dispute. That Ryan is not a "public body" is beside the point. [Plaintiff's Merits Br. at 23-24]

By stipulating that the city attorney is not a public body, Plaintiff fully conceded the issue, a concession the City was entitled to rely upon.

IV. Jurisprudentially, the Majority Provides No Legal Path to Enforcement, Which Renders the Opinion Moot.

Plaintiff makes numerous assumptions and predictions about whether the documents will be provided by the City or the City Attorney. But this Court did not state who was to produce the records and according to what legal theory. It left the end of the trail uncharted. The majority's failure to identify a legal path to enforceability is another reason why the leave order should be vacated or rehearing ordered. The lack of enforceability shows palpable error.

A. Plaintiff's Re-argument of the Rejected Agency Issue Does Not Provide a Path to Enforceability.

Plaintiff argues that this Court should order the City to produce the contested records immediately. But the majority articulated no legal basis for ordering the City to produce the

documents of another public body. And Plaintiff merely invokes her rejected agency argument. See e.g., Pl Resp at 23 ("The city attorney works for the city. The city can tell him to turn over the records…"); *id.* at 24 ("There is no question that the city attorney's records are the city's records and are under the city's control"); *id.* at 26 ("The office of the city attorney is part of the city" and "[a]s such, the records there are the city's records and the city can disclose them.").

The majority's failure to chart a legal basis for enforceability is not a technicality, as Plaintiff argues. It is an endemic deficiency, which results from the mismatch between the majority's holding that the city attorney is a public body and Plaintiff's repeated denial of that proposition. Plaintiff adopted – and constructed her case upon - an opposing legal theory that cast the documents as the City's records required to be produced under agency theory. This legal construct influenced who she sent the FOIA request to (the City) and who she sued (the City). When this Court rejected her agency argument, that should have ended the case. This Court should not have sought after another theory of liability which lacked a mechanism for enforcement. This flaw cannot be swept under the carpet and is yet another reason for this Court to vacate its opinion and deny leave.

Plaintiff argues that Mr. Ryan responded to the records request to the City. That the city attorney responded to the records request "on behalf of the City" does not mean the City must produce documents on behalf of the city attorney (to whom no FOIA request has been directed). When this Supreme Court accepts a case, it is because it believes a principle of law can be articulated that will advance the jurisprudence of this state. It is not just about this plaintiff, this city attorney, and this City. How will future litigants see this case? What will they take from it? Here, the majority concludes that documents demanded in a FOIA request to the City are the documents of another public body that has not been named in the action and over whom the Court

lacks jurisdiction. What then, is the practical effect of its decision? How can it be enforced against the City when the documents are not the City's public records but the records of another public body? How can the decision be enforced against the city attorney when Plaintiff did not direct the FOIA request to the city attorney, did not name the city attorney as a defendant, and the statute of limitations has now long since expired? Plaintiff argues that the City controls the city attorney and can just produce the documents (under the rejected agency theory). But that is not what the majority held. If that was the majority's ruling, its public body analysis would be dicta.[11]

Nor is the answer in the majority's footnote quotation of the FOIA fee provision for the proposition that "a 'public body' may exist within a 'public body.'" Maybe Plaintiff wishes that was the answer, but the majority did nothing more than cite this unrelated provision, unaccompanied by any analysis. It did not say that because a public body can exist within a public body, the City must produce the city attorney's records or even indicate how legally that would follow given the Court's rejection of agency liability.

B. This Court Cannot Add the City Attorney as a Party.

Plaintiff urges this Court to resolve the enforcement dilemma by adding the city attorney to this case at the end of the game. Plaintiff wants this Court to violate the city attorney's constitutional rights by adding him to the litigation so the majority opinion can be enforced against him despite the fact that he was never given the opportunity to defend against the theory of liability

[11] Plaintiff argues that the City says "We won't disclose the records because they are in the city attorney's file" and "[i]n the city's view, the years of litigation and this Court's ultimate decision mean nothing and these public records will still not see the light of day." Plaintiff should not impute arguments to the City that the City has not made. One argument in support of rehearing is that the majority has not indicated who must produce the records and according to what theory. Plaintiff wants to skip over that part. But we are in the highest court in the state and this Court does not skip over critical issues that flow from its decision. This is a motion for rehearing and the City is properly identifying error in the majority opinion. Nothing more should be read into the City's arguments.

Plaintiff now seeks to enforce. That Plaintiff so blatantly urges this Court to violate the city attorney's right to due process is somewhat shocking. But there are also other hurdles that bar any such action. First, as Plaintiff repeatedly admitted in her merits brief, Plaintiff never directed a FOIA request to the city attorney. What authorizes a FOIA suit against him? Further, even if the request had been directed to the city attorney, this Court should not contemplate adding a party to this years-old matter when FOIA's 180-day statute of limitations has long-expired. See MCL 15.240(1)(b).

V. Under Plaintiff's Analysis of the Public Body Definition, the Subsection (h)(iv) "Other Body" Catchall Improperly Nullifies the Subsection (h)(iii) Definition.

This is not the place to definitively address the many flaws in the majority's opinion. The motion for rehearing identified palpable error in the analysis, but supplemental briefing and argument should be granted to properly address this extremely important issue (as well as the other identified errors).

FOIA's public body definition is specific. The Legislature did not make all records of government subject to FOIA. In MCL 15.232(h), the Legislature defined with specificity the "public bodies" whose records must be disclosed, distinguishing among the various levels and branches of government. In creating this provision, the Legislature did not intend subsection (iv) to be used as a catchall to "sweep" into the definition of public body that which the Legislature could have included but chose not to. Indeed, were that the intent, the Legislature itself could be an "other body" subject to FOIA despite its obvious intentional omission from subsection (h)(ii). Here, the local government definition (subsection (h)(iii)) expressly excluded by omission the category of "officers and employees" that the Legislature included within the executive branch definition in subsection (h)(i). It also excluded the "other body" reference that exists in subsection

(h)(i). But the majority ignored the directly applicable language of subsection (iii) and used subsection (i) and (iv) to nullify it.[12]

Under the majority's analysis, most of subsection (h) is surplusage,[13] such that MCL 15.232(h) might just as well read:

> "Public body" means any entity, including individuals and their offices, that is created by state or local authority or is primarily funded by or through state or local authority, except:
>
> i. the judiciary,
> ii. the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court
> iii. the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof

Plaintiff argues that the majority distinguished between the "officer" and the "office" but this likewise was only accomplished by importing language from subsection (i) (i.e., office of the governor and lieutenant governor) and subsection (iv) (office of the clerk) that does not appear in subsection (iii). Further, the majority's construction is unavailing in this case. As explained in the motion for rehearing, there is no "office of the city attorney" in Clarkston, and Mr. Ryan is not created nor primarily funded by the City. Nor is Mr. Ryan's professional corporation. The assertion that the City retained Mr. Ryan's law firm, not him as an individual, does not change Mr. Ryan or his law firm into an "office of the city attorney"; nor does it transform his law firm into a "public

[12] "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). A court may not read into the statute a requirement that the Legislature has seen fit to omit. *In re Hurd–Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). Rather, "[i]f the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

[13] See e.g., *In re MCI Telecom Complaint*, 460 Mich 396, 414 (1999) ("[A] court should avoid a construction that would render any part of the statute surplusage or nugatory.").

body." Thus, even if subsection (iv) could be interpreted to include intentionally omitted municipal officers and employees, the city attorney does not satisfy the "other body" requirements.

Plaintiff disregards the rules of statutory construction in arguing that the definition in subsection (iii) does not limit the definition in subsection (iv). If this is true, what is the purpose of subsection (iii)? The wide sweep Plaintiff gives to the "other body" definition in subsection (iv) would render all of subsection (iii) surplusage because every "county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof[,]" MCL 15.232(h)(iii), is in some way "created by state or local authority or is primarily funded by or through state or local authority[.]" *Id* at (h)(iv). This Court has held that where "'a statute contains a general provision and a specific provision, the specific provision controls.'" *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (quoting *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994)); see also *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997) ("The specific statute is treated as an exception to the general one."). "In order to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm." *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008).

Plaintiff argues that the City's *unexpressed* "simplistic interpretation" that the city attorney is not a public body "would apply to all city officers" including the city clerk and the city assessor. This Court should recall that until the majority released its opinion, this was also Plaintiff's repeatedly-stated view, i.e., that the city attorney is not a public body subject to FOIA. But beyond that, this interpretation flows from the plain meaning of the statute. The Legislature did not include

officers and employees, or "other body" within the subsection (h) (iii) definition of public body. If Plaintiff has a problem with that, she should lobby the Legislature.

Respectfully, the majority has gone out on a limb in contorting the rules of statutory construction to reach the unwarranted and unprecedented conclusion that the Clarkston city attorney is a public body. This unprecedented expansion of FOIA will have far-reaching consequences. So will the majority's method of reaching that conclusion, which can be cited by future litigants who seek to disregard the statutory language as indicative of legislative intent.

VI. This Court's Rejection of Plaintiff's Agency Argument Has Not Been Preserved for Rehearing and is not a Rehearing Option.

Plaintiff's result-oriented request to substitute Justice McCormack's opinion for the majority opinion as a rehearing alternative is improper. Six justices declined to sign on to that opinion. Thus, Plaintiff's agency theory has been rejected by all but one justice of this Court. Plaintiff has not moved for rehearing of that decision. If this Court finds merit in the City's rehearing motion, as it should, either the leave order should be vacated or briefing and argument allowed on the question of whether the city attorney is a public body under Subsection (h)(iv). By failing to move for rehearing, Plaintiff accepts this Court's rejection of her agency argument. It has not been preserved for rehearing.

KERR, RUSSELL AND WEBER, PLC

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Dated: September 15, 2020

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on August 14, 2020 she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve

Exhibit A

From: Richard Bisio <Richard.Bisio@kkue.com>
Sent: Saturday, July 25, 2020 1:21 PM
To: James Tamm <JTamm@kerr-russell.com>
Subject: [EXTERNAL] Bisio v Clarkston

Dear Mr. Tamm:

In light of the Supreme Court's opinion, please advise as to the following:

1 Will the city stipulate to entry of summary disposition for plaintiff?
2 Will the city immediately produce the contested documents?
3 Will the city withdraw its pending Motion for Costs and Attorney Fees, which the circuit court took under advisement pending the appeal?
4 Plaintiff intends to file a motion for an award of costs and fees under FOIA. Is the city interested in resolving that without the need to engage in further litigation?

Richard Bisio

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