STATE OF MICHIGAN

COURT OF APPEALS

JO-DAN, LTD. and JOE E. MCLEMORE,

Plaintiffs-Appellees/Cross-Appellants,

v

DETROIT BOARD OF EDUCATION,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 14, 2000

No. 201406
Wayne Circuit Court
LC No. 95-509281-NZ

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

The Detroit Board of Education ("Board") appeals as of right from a jury verdict and a single $7,600,000 award in favor of plaintiffs Joe McLemore and Jo-Dan, Ltd. We affirm.

I. Factual Background

This case revolves around the Board's conduct in 1985 and 1986 while investigating Jo-Dan's eligibility for a contract to provide Detroit Public Schools with milk, juice, and ice cream under a program that favored Detroit-based, minority-owned businesses employing minorities or Detroit Public School students and graduates. The investigation commenced only after the Board President, Harold Murdock, accused Jo-Dan and McLemore of being a "black front" for Borden Dairy and, therefore, ineligible to receive a contract with the school district. At the time Murdock made this accusation, and while Murdock was president of the Board, Jo-Dan's chief competitor, Zuhair "Steve" Asmar, owner of Metro Institutional Food Service, was allegedly paying bribes to Murdock. This alleged bribery scheme did not form the basis for this suit; rather, it was based on the Board's subsequent conduct toward McLemore and Jo-Dan, including an allegedly harassing/sham investigation and hearing.

In April 1984, McLemore contacted the Food Services Department at the Detroit Public School System requesting the opportunity to bid on food contracts. Even though McLemore qualified under the preferences for minority-owned businesses, he ultimately secured a contract for the 1984-1985 school year worth approximately $800,000 to provide milk and juice because he was the low bidder even without the preferences. According to Jacqueline Tomlin, Gloria Oana, Howard Briggs, and Judith Penney, staff in the Food Services Department, McLemore and his unincorporated business

provided exemplary services under this contract. To Tomlin, Oana, and Briggs, this was quite a contrast to their experience with other vendors.

With the 1984-1985 school year an apparent success, McLemore incorporated Jo-Dan in March 1985 and the corporation submitted bids to deliver milk (and other dairy products) and juice for the 1985-1986 school year. With most other bidding businesses eliminated for various reasons, C.F. Burger was the lowest bidder with Jo-Dan in second place in terms of the price it would charge to provide the Detroit Public School System for milk and juice. The Food Services Department recommended that Jo-Dan receive a contract worth more than $2,000,000, or about fifty-seven percent of the milk and juice the Detroit Public School System planned to purchase for the school year, because Jo-Dan had "performed very well" in the previous year. The Food Services Department approved C.F. Burger Co. for the remaining forty-three percent of the contract, worth approximately $1,500,000. These recommendations, which the Food Services Department made in July 1985, then went to the EEO for the next step in bidding process.

According to the minutes of the EEO's Procurement and Purchasing Committee meeting held on August 19, 1985 to recommend which business should receive contracts for the 1985-1986 school year, EEO staff verified that Jo-Dan was a minority-owned business and qualified for "preferred" status. Rather than simply proceeding to the merits of the bid, Board President Murdock asked Ferd Hall, director of the EEO, to clarify Jo-Dan's ownership status. According to the minutes, Hall reportedly told the individuals at the meeting:

> – The financial base of Jo-Dan is supported totally by Borden Food Company, Jo-Dan's primary dairy supplier.
>
> – Payments for goods and services provided are issued to Borden. Borden's expenditure is deducted and the remaining portion is passed on to Jo-Dan.
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> – There is no existing agreement between Jo-Dan and Borden.
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> Mr. Hall stated that the relationship Jo-Dan has with Borden does not distinguish itself as an independent transaction because of the control and because of the financial base and other factors pointed out.
>
> Mr. Hall concluded that Jo-Dan, Ltd., does not control the contract or the resources by take [sic] orders for milk and ice cream and make [sic] deliveries.
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> [Board] Member [Alonzo] Bates stated that based on the information presented by Mr. Hall, Jo-Dan, Ltd., appears to be a "front" instead of a black-owned company. Member Bates further stated that he had difficulty with the arrangement described by Mr. Hall and he was not in favor of it; therefore, he requested that the item be pulled from the agenda in order for staff to find out the real type of agreement that exists between Jo-Dan and Borden.

Although Sterling Poole, the assistant director of the Purchasing Department, explained that it was not unusual for a business billing the Detroit Public School System for goods and services to request that some other person or entity be listed as a payee, Murdock succeeded in having Jo-Dan's bid "pulled" from the agenda. Allegedly, Hall and Murdock questioned Jo-Dan's authenticity as a minority-owned business only to aid in eliminating Jo-Dan from the competition for the contract in order to give it to Metro Institutional Food Services.

Conveniently for Hall and Murdock, Superintendent Jefferson placed Hall in charge of the "investigation" into Jo-Dan's legitimacy. From the very beginning, the investigation appeared to be designed to harass Jo-Dan and McLemore rather than to confirm or disprove the prevailing belief among Detroit Public School System staff members involved with food purchasing and deliveries that Jo-Dan was a genuine, minority-owned business. Since Hall was apparently receiving part of the bribes flowing from Steve Asmar to Murdock, Hall's motivation for his campaign of harassment against Jo-Dan is readily discernible.

According to McLemore, Hall directed EEO staff members to collect between 3,000 and 4,000 documents, spanning two business years, from Jo-Dan. These requests for documents came regularly, once or twice a week, from August 1985 through February 1986. Sometimes Hall directed his staff to hand-deliver letters requesting documents to Jo-Dan's offices in the evening, after business hours. At other times Hall demanded that Jo-Dan produce documents on the same day as they were requested. Even William Ruben, the assistant director of the EEO during the investigation, thought requesting this volume of documentation, and doing so by hand-delivered letter, was unusual. Sharon May, an EEO staff member who helped gather and organize the requested data in addition to inspecting Jo-Dan's offices, believed that Jo-Dan was a legitimate business and did not understand why there was such an exhaustive investigation.

In McLemore's opinion, he tried to comply with the requests as fully as possible. For example, he provided Jo-Dan's articles of incorporation, which clearly showed that he owned 100 percent of the corporation. He also submitted a variety of documents showing that Jo-Dan leased its own offices and equipment and paid its employees, as well as an explanation of the business arrangement between Jo-Dan and Borden. At McLemore's request, Borden wrote to the Board indicating that it was its practice *not* to enter into written agreements with its distributors. McLemore even gave EEO staff original documents instead of copies when pressed to produce them. Some of the documents Hall requested, like information regarding Jo-Dan's financial status for the current quarter, were difficult to obtain, but McLemore gave them to the EEO as soon as they were available.

None of this information satisfied Hall. Eventually, frustrated with the constant requests for information, McLemore asked Superintendent Jefferson to appoint a third-party to monitor Hall's request for documents and to observe any meetings between him and Hall. However, Superintendent Jefferson ignored McLemore's requests for help and his claim that he was being treated unfairly. Instead, Superintendent Jefferson actually instructed McLemore that he had to meet with Hall, and only Hall.

Finally, after this torturous process had ground away for several months, the EEO Procurement and Purchasing Committee recommended that the Board approve a $223,000 contract for Jo-Dan to provide juice, and a $1,406,000 contract for other milk, juice and dairy products to continue through August 31, 1986. Notably, the recommended vendors for the milk, juice, and dairy products also included Steve Asmar's company, Metro Institutional Food Services.

A December 9, 1985 memorandum Hall prepared indicated that Jo-Dan met the minimum requirements for a business to receive a contract, but that its preferred status was still "in negotiation." At a meeting on December 10, 1985, the Board voted to "pull" Jo-Dan from consideration for the contracts even though some members were concerned that when its contract extension expired on January 20, 1986 the schools Jo-Dan served would be left without milk and juice. Around January 12, 1996, the Board agreed to extend Jo-Dan's contract for an additional two weeks.

McLemore and his attorney met with Hall on January 16, 1986 and Hall, once again, requested documents. The meeting was in the same building as Jo-Dan's offices, so McLemore immediately retrieved the requested information. He believed that he had, finally, provided all the information Hall wanted. According to McLemore, Hall "indicated that he knew I was not a black front for Borden Dairy. I asked him, I said, 'Why don't you tell the board members that?', and he said, 'I would but I don't have enough documentation.'" Not surprisingly, given Hall's pecuniary motivation, the requests for information did not end that day.

At the January 28, 1986 Board meeting, despite his previous representation to McLemore and contrary to the December 1985 memorandum, Hall declared Jo-Dan "non-awardable." After Jo-Dan's attorney addressed the Board to note that the company was minority-owned and operated, the Board extended Jo-Dan's contract through February 28, 1986. At the meeting Bates specifically asked that Jo-Dan provide all requested documents so that the Board could make a full and informed decision. However, there was no indication that any Board member ever examined any part of the volumes of information Jo-Dan had already supplied, that any Board member intended to make an independent determination of Jo-Dan's legitimacy, or that any Board member even intended to examine Hall's recommendation critically.

At some time in late January or early February 1986, McLemore asked Board Member Gloria Cobbin and Hall for a formal hearing *before* Jo-Dan's last contract extension expired. However, the Board never permitted that hearing to take place. Finally, on Wednesday, February 26, 1986, Hall sent a letter to Jo-Dan declaring that it did not "qualify for Awardable Status." Although Hall had seen fit to have requests for information hand-delivered to Jo-Dan's offices, he mailed this letter. As a result, Jo-Dan did not know that it had to cease delivering to the Detroit Public School System immediately. When Jo-Dan trucks arrived at the individual schools on its delivery routes on Monday, March 3, 1986, Metro Institutional Food Services' trucks had already made deliveries, so the schools refused to accept Jo-Dan's products.

The Board finally granted Jo-Dan a hearing to appeal its status for receiving contracts on April 18, 1986, apparently only because McLemore refused to remain silent about what had occurred and had contacted the media and a variety of local politicians. The "hearing" was, however, quite simply a

sham. The Board restricted the meeting to a maximum of one and one-half hours, to be shared by Hall and Jo-Dan. After several attempts by Cobbin to get Jo-Dan's lawyer to concede that the hearing was pointless and should not proceed, Jo-Dan offered testimony by McLemore, Jo-Dan's accountant, and Borden's manager, Hollandsworth. They all gave detailed accounts of the relationship between Borden and Jo-Dan and described Jo-Dan's legitimacy. When Hall testified, he could only name one thing that Jo-Dan allegedly failed to provide in terms of documentation of its independence from Borden, namely evidence that Jo-Dan received the profits from its business. When Jo-Dan attempted to prove that it received the profits of the business with canceled checks and other documents, Cobbin, who was leading the meeting, refused to let Jo-Dan's attorney even *refer* to the documents because there were fewer than twenty copies of them available for the Board members. Cobbin, contradicting her initial statement that the hearing was informal, stood by this rule even though Hall and the EEO had had physical possession of all relevant documents for a number of months and despite Jo-Dan's attorney's offer to provide copies of the documents after the hearing. It is unclear whether Jo-Dan even had access to these documents before the hearing so that it could make the copies. In any event, Jo-Dan's accountant testified that Hall had received a copy of every single check and expenditure that Jo-Dan had made. Furthermore, even though Jo-Dan sustained a $5,384.29 net loss for 1985, it had a gross profit margin of $215,381.57 reflected in the corporate books, primarily earned from its dealings with Borden. Even though not all Board members were present at the hearing, Cobbin directed the reporter transcribing the proceedings for the Board to strike out Jo-Dan's attorney's comments at the end of the proceeding. She then promised that the Board would deliberate and inform Jo-Dan of its decision within fourteen days.

Although there were four months left in the 1985-1986 school year in which Jo-Dan could have provided the Detroit Public Schools with milk and juice, the Board *never* decided whether Jo-Dan was eligible to receive any contract, much less within fourteen days of the hearing. Nor did the Board, which apparently failed to examine any of the 3,000 to 4,000 documents in its possession, return those documents to Jo-Dan. In effect, the Board's inaction forced Jo-Dan out of business for a considerable period of time.

In May 1986, an audio tape surfaced, which was a recording of Murdock and Asmar discussing the bribes. McLemore, after playing the tape for his attorney, immediately took a copy of the tape to Superintendent Jefferson. The Board convened soon thereafter, at which time Superintendent Jefferson played the tape for everyone assembled. Once the bribery scandal became public, Murdock resigned as president of the Board and Superintendent Jefferson suspended Hall. Despite this new information about Hall and Murdock's motivations, the Board *never* completed the investigation into Jo-Dan's legitimacy, offered Jo-Dan a contract for the remainder of the school year, offered any explanation or apology for any of its conduct, or returned Jo-Dan's business documents.

II. Procedural History

Needless to say, this matter spawned a number of suits in both state and federal courts. In Jo-Dan and McLemore's state civil action in the late 1980s, the jury awarded Jo-Dan and McLemore $650,000. The parties cross-appealed, with Jo-Dan and McLemore arguing that the trial court improperly granted summary disposition to some defendants and the remaining defendants appealing the

jury verdict. This Court consolidated the appeals and, in an unpublished decision, vacated the judgment against Murdock, Metro Institutional Food Services, and Asmar, after explaining that Jo-Dan and McLemore had failed to establish that the bribery scheme or any other "illegal, unethical or fraudulent behavior" existed, which was necessary to make out a prima facie case of tortious interference with business relations. *Jo-Dan Ltd, Inc v Murdock*, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 127870, 127871, 127878, issued May 13, 1993), slip op at 2-3. This Court affirmed the trial court's order granting Board Member Cobbin and Superintendent Jefferson summary disposition because Jo-Dan and McLemore failed to allege that they, personally, engaged in any unlawful or improper conduct. *Id*. at 4. This Court also affirmed the trial court's decision to grant the Board summary disposition on Jo-Dan and McLemore's breach of contract claim because Jo-Dan's contract with the Board had merely expired and the Board had no obligation to extend that contract. *Id*. Nevertheless, unusual circumstances forced this Court to remand to the trial court:

> Subsequent to oral argument, plaintiffs Jo-Dan and Joe E. McLemore have filed with this Court a motion to remand for a jury trial against defendant Detroit Board of Education pursuant to MCR 7.211(C). Citing newly discovered evidence relating to the acceptance by defendant Murdock, then president of the defendant Board of Education, of $90,000 in bribes from MIFS [Metro Institutional Food Services], plaintiffs assert that Murdock acted in his official capacity to cause business to be awarded to MIFS and taken away from plaintiffs in violation of their rights to substantive due process. Based upon the new evidence, plaintiffs allege that the Detroit Board of Education is vicariously liable for any alleged criminal acts attributable to Murdock. The substance of the motion is that after oral argument in this Court defendant Steve Asmar entered a plea of guilty in federal court to an income tax violation in which he admitted paying bribes to defendant Murdock for milk contracts that are the subject matter of this case. Murdock was also indicted in federal court and as of the date of the motion, he was awaiting trial.
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> Although a remand for a jury trial is not appropriate in this case at this time, plaintiffs nonetheless raise serious matters that require the further development of a record adequate for deciding the motion for summary disposition under MCR. 2.116(C)(8) as well as the motion for leave to amend. MCR 7.216(A)(5); see *Ward v Frank's Nursery*, 186 Mich App 120, 134; 463 NW2d 442 (1990). For that purpose, we believe that it is appropriate to remand this matter to the trial court in order to permit plaintiffs the opportunity to present the newly discovered evidence regarding their claims. In light of this evidence, the trial court must reconsider whether to grant the motion for summary disposition in favor of the Detroit Board of Education and to deny plaintiff's motion to amend their complaint regarding the vicarious liability of the Detroit Board of Education in this case. Whether plaintiffs are entitled to relief as to the other defendants is also a matter to be addressed on remand. In the alternative, plaintiffs may move for relief from judgment under MCR 2.612. We express no opinion on the merits of such motions. [*Id*.]

Accordingly, this Court remanded without retaining jurisdiction.

On remand, rather than amending the complaint, Jo-Dan and McLemore filed a new suit solely against the Board, alleging that the Board was liable in tort for substantive and procedural due process violations, US Const, Am XIV; Const 1963, art 1, §17.[1] Substantively, Jo-Dan and McLemore claimed that, because Board President Murdock and Hall acted in their official capacities while they were taking bribes, the Board was vicariously liable for their manipulation of the contract award process. Additionally, they alleged that the Board did not provide a fair hearing or resolution to the investigation into Jo-Dan's eligibility for contracts, affecting their ability to enter into other contracts with the Detroit Public School System. Following trial, the jury awarded Jo-Dan and McLemore $7,600,000. The trial court subsequently denied the Board's motions for judgment notwithstanding the verdict ("JNOV"), new trial, and remittitur.

III. Arguments On Appeal

On appeal, the Board raises nine arguments, some of which are duplicative or overlapping to a considerable degree. In the first grouping of arguments, the Board contends that the trial court erred in denying its motion for JNOV because: (1) it was not vicariously liable for Board President Murdock and EEO director Hall's criminal acts; (2) governmental immunity barred any suit; (3) McLemore lacked individual standing to sue for Jo-Dan's injuries; and (4) there was insufficient evidence to support the jury's multimillion dollar award. In the second grouping of arguments, the Board contends that the trial court erroneously denied its motion for a new trial because the trial court: (5) improperly and prejudicially permitted plaintiffs to play the tape Georgia Murdock compiled regarding the bribery scheme for the jury; (6) permitted Hall to testify to a legal conclusion regarding whether he acted within the scope of his official duties when he advised the Board regarding Jo-Dan's eligibility for contracts; (7) erroneously instructed the jury on Jo-Dan and McLemore's theory of the case;[2] and (8) allowed the

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[1] The Board does not argue that this procedure was, in any way, defective in light of the instructions in the opinion remanding the case.

[2] The Board contends that the trial court should have granted its motion for a new trial because it improperly instructed the jury on plaintiffs' theory of the case, allowing the jury to calculate an award that was purely speculative. In particular, the Board objects to the trial court's statement that "[t]he direct personal and financial consequences of the Board's unconstitutional behavior with respect to Jo-Dan has been the virtual destruction of an All American dream as well as past, present and future financial losses numbering in the millions of dollars" because it contends that there was no evidence of that amount of financial loss. However, at trial, defense counsel objected that the theory was argumentative and, therefore, the trial court should not read it to the jury. The Board is not entitled to raise this new argument on appeal under the rules of issue preservation. Therefore, we do not address the substance of the argument. *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). We do, however, note that the court rules do not specifically prohibit a theory of the case from being argumentative. MCR 2.516(2).

If the Board intended to argue that the trial court erred in allowing plaintiffs' counsel to argue directly to the jury in closing arguments that Jo-Dan sustained losses totaling millions of dollars, it failed

jury to make an excessive award. Finally, the Board argues that the trial court erred in not remitting the jury award to $144,000.

The fair and just treatment clause in Const 1963, art 1, § 17, plays a significant role in how we resolve some of the major issues on appeal.[3] Before addressing the Board's arguments on appeal, we first address the scope of this clause as it applies to the facts and arguments in this case.

IV. The Fair And Just Treatment Clause

A. Article 1, § 17

Article 1, § 17 of Michigan's 1963 Constitution provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. *The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed*. [Emphasis supplied.]

B. Plain Meaning

There are very few published cases that cite the fair and just treatment clause for any purpose, and none of these cases explain its meaning, larger purpose, or relationship to the other rights enumerated in that section of the constitution in any detail.[4] See, e.g., *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 730; 344 NW2d 788 (1984) (fair and just treatment clause "was not intended to modify the scope of the privilege against self-incrimination"); *Johnson v Wayne Co*, 213

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to present this issue for our review by listing it in the section of the brief presenting the questions on appeal. MCR 7.212(C)(5); *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999). The question presented concerning argument to the jury focuses narrowly on the theory of the case *the trial court* read to the jury, and not any statement plaintiffs' counsel personally made.

[3] Although Jo-Dan and McLemore pleaded in the complaint that the Board violated their due process rights, the substance of their claims, evidence, and arguments in the lower court unmistakably rested on this fair and just treatment language in the same section of the 1963 Constitution along with their due process theories of recovery. MCR 2.118(C)(1) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. . . ." Accordingly, we see no barrier to addressing the Board's arguments in light of this portion of Const 1963, art 1, § 17.

[4] Because this case presents a constitutional issue of first impression, we would ordinarily publish our decision under MCR 7.215(B). However, although the fair and just treatment clause allegations permeated the trial court proceedings and can thus form the basis for our affirmance of the verdict, that clause has been virtually ignored by the parties on appeal. We are uncomfortable publishing new and binding precedent on an important matter of constitutional law without the benefit of full advocacy.

Mich App 143, 155; 540 NW2d 66 (1995) (fair and just treatment clause did not apply because case did not involve legislative or executive hearings or investigations); *Saxon v Dep't of Social Services*, 191 Mich App 689, 698, n 4; 479 NW2d 361 (1991) (declining to expand state due process rights in welfare programs beyond federal precedent merely because due process appears in the same section of the constitution as the fair and just treatment clause); *People v Brown*, 173 Mich App 202, 214; 433 NW2d 404 (1988), rev'd on other grounds sub nom *People v Juillet*, 439 Mich 34 (1991) ("The record does not support defendant's contention of unfair and unjust treatment. Accordingly, we find that the authorities conducted the instant investigation in a fair and just manner and that defendant's rights were not infringed upon."); *Attorney General v Public Service Comm*, 165 Mich App 230, 237; 418 NW2d 660 (1987) (simply concluding that Detroit Edison was not denied fair and just treatment). Despite this dearth of precedent to help us understand the fair and just treatment clause, the task at hand is straightforward. When courts look at a constitutional provision, they primarily attempt to give effect to the language in the Constitution as the "popular mind" would have understood it at the time it was adopted. *Committee for Constitutional Reform v Sec of State*, 425 Mich 336, 340-342; 389 NW2d 430 (1986), quoting *People v Dean*, 14 Mich 406, 417 (1866).

We begin by observing that the plain language of the fair and just treatment clause consists of three elements. First, "fair and just treatment" identifies the abstract right in the provision, which the closing statement, that it "shall not be infringed," guarantees. Second, this right is for the protection of, and presumably enforceable by, "individuals, firms, corporations, and voluntary associations." Third, the phrase "in the course of legislative and executive investigations and hearings" indicates that an individual, firm, corporation, or voluntary association's right to fair and just treatment exists under two limitations, one contextual and the other temporal. Namely, this right exists only in the context of legislative and executive hearings and investigations, see *Johnson*, *supra*, and not before a hearing or investigation commences or after a hearing or investigation ceases.[5]

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[5] The Board failed to raise a critical issue in the trial court and on appeal, namely whether a municipal school board is part of the legislative or executive branch of government as those terms are used in the fair and just treatment clause. See *Nalepa v Plymouth-Canton School Dist*, 207 Mich App 580, 587-588; 525 NW2d 897 (1994), aff'd 450 Mich 934 (1995) ("We find that the school board members are the elective *executive* officials of their level of government.") (emphasis supplied). In its brief supporting its motion for judgment notwithstanding the verdict on the basis of governmental immunity, the Board argued that it is a state agency, citing *Bd of Ed of City of Detroit v Elliott*, 319 Mich 436, 449-450; 29 NW2d 902 (1947), which stated that a "school district is commonly regarded as a state agency," and "the term 'school district' is commonly regarded as a legal division of territory, created by the State for educational purposes, to which the State has granted such powers as are deemed necessary to permit the district to function as a state agency." A state agency is generally considered a part of the executive branch of government. See *Straus v Governor*, 230 Mich App 222, 231; 583 NW2d 520 (1998), aff'd 459 Mich 526 (1999); see also *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 552; 565 NW2d 828 (1997) (Riley, J. dissenting). We think it unwise to interpret the Board's assertion that it is a state agency as an argument that it is an agency that must obey the fair and just treatment clause, which would be contrary to its interests in this case.

We make a special point of noting that the framers wrote the fair and just treatment clause in the conjunctive, making fair *and* just treatment the constitutional minimum in every legislative and executive hearing or investigation. See generally *Thrifty Rent-A-Car Systems v Dep't of Transportation*, 236 Mich App 674, 679; 601 NW2d 420 (1999). Should those terms have meanings that diverge to any extent, a hearing or investigation that respects one principle but not the other would be constitutionally infirm. Accordingly, it is plain to us that a plaintiff may claim a violation of this provision if he, she, or it is an individual, firm, corporation, or voluntary association treated unfairly *or* unjustly during a legislative or executive hearing or investigation.[6]

C. Historical Context

"[T]he circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished" by it are often relevant to determining the meaning of a constitutional clause. *Committee for Constitutional Reform*, *supra* at 340, quoting *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), citing *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915). In this case, we cannot forget that the Constitution of 1963 is a product of those unique times in which certain legislative investigations and hearings, notably those aimed at identifying "subversives," negatively affected citizens even in the absence of proof that they actually committed any illegal conduct. Indeed, Michigan at one time had laws intended to protect government from "subversive" individuals and passed legislation creating a "security investigation division" as well as a "subversive activities investigation division" of the State Police in order to gather information on citizens and then have them register with the government. See 1950 PA (Ex Sess) 38-41; 1952 PA 117 as amended by 1953 PA 37; see also *Albertson v Attorney General*, 345 Mich 519, 77 NW2d 104 (1956) (holding the anticommunist Trucks Act unconstitutional);[7] *People v Ruthenberg*, 229 Mich 315; 201 NW 358 (1924) (the defendant, a member of the Communist Party, was convicted of "syndicalism" for attending a meeting with other communists). Although the official record of the constitutional convention does not indicate that any single incident motivated the fair and just

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Nevertheless, in the face of the Board's failure to address this absolutely crucial issue by arguing that the fair and just treatment clause *does not* apply to it, even in its reply brief, we assume without deciding that a municipal school board is subject to the fair and just treatment clause.

[6] Because the Board failed to argue that it is not a legislative or executive body and Jo-Dan and McLemore introduced evidence at trial that they were treated unfairly and unjustly in the course of the Board's "investigation" and "hearing" on Jo-Dan's eligibility for contracts, we conclude that they established a prima facie case under this constitutional provision.

[7] Note that Harold Norris, the Delegate who drafted the fair and just treatment clause, was the attorney who submitted an amicus curiae brief on behalf of the Citizens' Committee Against Trucks Law in *Albertson*.

treatment clause,[8] several delegates[9] referred to legislative or executive "abuses" and the "oppressive" nature of hearings. See 1 Official Record, Constitutional Convention 1961, pp 546-549. As a result, even though the language of the fair and just treatment clause does not, itself, elaborate on the situations in which it acts as a limit on governmental authority, we believe that this particular provision was intended to provide a substantive and forceful right to the people to counteract such abuses if and when they occur.

D. Relationship to Due Process

Unlike the fair and just treatment clause, the due process clause of Const 1963, art 1, § 17 and its federal counterpart, the Fourteenth Amendment, have a long and rich history. Due process provides both substantive and procedural protections by enforcing enumerated constitutional rights, establishing procedural safeguards, and prohibiting laws that lack a legitimate public purpose or fail to have a rational relationship between a permissible aim and the requirements of a statute. See generally *Daniels v Williams*, 474 US 327, 337; 106 S Ct 662; 88 L Ed 2d 662 (1986) (Stevens, J., concurring); *Mudge v Macomb Co*, 458 Mich 87, 120, n 10; 580 NW2d 845 (1998); *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 66, n 9; 445 NW2d 61 (1989). However, taking cues from the text of

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[8] Although Delegate Norris explained that "[w]hile Michigan has not had an objectively measurable record of the abuses in legislative and executive hearings, the power and capability exist," he also stated:

> Parenthetically I might refer to several proceedings. I had my attention brought in the judiciary committee by Delegate Ford, for example, to the investigation of the J.P.s, a situation where in the morning an investigation was conducted of an individual and in the afternoon the gentleman committed suicide. There has been the Callahan committee; there has been the Francis committee; there have been a whole host of committees in which there have been abuses. My attention was invited by one delegate to this convention to the fact that he resigned from one of our own committees because of the conduct of the chairman. I am sure that we could recite instances which would indicate that this is a Michigan concern as well as a federal concern. [1 Official Record, Constitutional Convention 1961, pp 546-547.]

Delegate Stevens also remarked that

> [i]t is true the committee [on the Declarations of Rights, Elections and Suffrage] recognized that the problem with which this deals is mostly a federal problem, but wanted to make the application to the state if the matter should appear [in Michigan]. [1 Official Record, Constitutional Convention 1961, p 549.]

[9] The rules of constitutional construction permit us to consider the Address to the People, composed to explain a new constitution, as well as convention debates when attempting to give meaning to a constitutional provision. *Committee for Constitutional Reform*, *supra* at 341. However, with respect to delegate comments during debates, we keep in mind that those comments may not express consensus about the meaning of a constitutional provision. *Id*., quoting *Regents of the University of Michigan v Michigan*, 395 Mich 52, 59-60; 235 NW2d 1 (1975).

the Michigan and Federal constitutions, courts have constrained the due process doctrine to situations in which a person's life, liberty, or property is at stake. See, e.g., *Northwestern Nat'l Casualty Co v Ins Comm'r*, 231 Mich App 483, 491-493; 586 NW2d 563 (1998), quoting *Bundo v Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976), quoting *Bd of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (foreign insurer did not have a property interest in certificate of authority and, therefore, was not entitled to due process). Thus, a natural question is whether the fair and just treatment clause, because it is in the same section of the constitution as due process, also requires a plaintiff to demonstrate that his, her, or its life, liberty, or property interests are at stake before the Constitution can afford any relief from unfair or unjust treatment in an executive or legislative hearing or investigation.

We conclude that it does not. In terms of language, format, and the rights identified, this fair and just treatment clause is wholly distinct from the due process rights Const 1963, art 1, § 17 also explicitly ensures. Nothing in the fair and just treatment clause refers back to the due process clause. Cf. *Saxon*, *supra*. Nor does the language of the fair and just treatment clause refer specifically to hearings and investigations affecting a person's life, liberty, or property, which might imply that the right to fair and just treatment only apply in proceedings affecting those interests. Such a requirement would make little sense because a person who merely testifies at a legislative or executive hearing or, alternatively, furnishes information for a legislative or executive investigation, may not be the subject of a hearing or investigation where life, liberty, or property interests are at stake. Nevertheless, the informant or witness may still be treated unfairly or unjustly in the course of the investigation or hearing.

Furthermore, Delegate Norris' comments at the constitutional convention suggest that the drafters were aware that there might be some effort to fold the fair and just treatment clause into due process doctrine. Nevertheless, he made the point that due process was, itself, inadequate to afford the protection envisioned under the fair and just treatment clause:

> It may be asked, does not the due process clause protect the individual against unfair and unjust treatment? Yes, but not in executive or legislative investigations. The fact is that the due process safeguards of a criminal trial have not been interpreted to apply to legislative or executive investigations. While many investigations have unfairly and unjustly assumed the character of a criminal trial and abused the prestige of government, the rights of individuals, and our concept of separation of powers in so doing, the normal rights of an accused have not been judicially accorded to a witness in an investigation. In a criminal trial a defendant has at least the following rights:
>
> The right to notice of the nature of the accusation; the right to confront and question witnesses; the right to counsel; the right to subpoena witnesses; the right to take the stand in one's own defense; the right not to take the stand, or decline to answer incriminating questions, without adverse comment; the right to rules of evidence; and the right to a prompt public and fair trial.
>
> But the courts have held that only some specific guarantees of the bill of rights apply to legislative hearings. The specific guarantees protected in legislative hearings

have been the right of a witness not to answer self incriminating [sic] questions, the right not to be subject to unreasonable search and seizure, and the right not to answer questions invading first amendment freedoms of speech and association. The courts have also held that questions propounded in such hearings must be pertinent to the mandate of the inquiry. While there has been language in some decisions that go beyond these protections the specific holdings have been confined, in the main, to the specific guarantees outlined above. The court has not held that the due process clause applied to the legislative or executive investigations.

The need for fair and just treatment may be summarized as follows: while due process generally means simply fairness, experience with many legislative and executive investigations – federal and state – across the land in recent years, amply indicate that even the fairness in elemental due process has been wanting. The privilege against self-incrimination protects only against punishment; it does not protect against defamation of character – and such defamation, imputations and charges have been made under the auspices of such investigations – nor does it protect against the imputation of unfair business practices or, indeed, a charge of treason.

The court decisions to date have not protected individuals against being charged with innumerable offenses, offenses not proved nor intended to be proved. Investigators have assumed a right to ridicule, expose, demean, deprecate and intimidate witnesses with impunity. The witness usually has only a limited right to counsel, no right to submit a prepared statement, does not have a clear right to a clear definition of the scope of each inquiry, no right to a transcript of the proceedings, no influence on executive or open sessions, no opportunity to restrain the issuance of public statements by committee members, no right to confront witnesses, cross-examine witnesses, or call rebuttal witnesses, no right to decline appearances on radio or television, and no right to appear before subcommittees composed of more than one person.

Moreover, nonwitnesses, who are the subject of adverse hearsay comment,[10] identification, or charges at such hearings, with great resultant irreparable damage to

[10] See generally *Watkins v United States*, 354 US 178, 182-186; 77 S Ct 1173; 1 L Ed 2d 1273 (1957) (individuals called to testify before a subcommittee of the House Un-American Activities Committee alleged that the petitioner was a "card-carrying" member of the Communist Party and had recruited members for the Communist Party; when called to testify, petitioner freely admitted an association with communist causes, but flatly denied those specific allegations); *Smith v Dep't of Public Health*, 428 Mich 540, 546; 410 NW2d 749 (1987) (Brickley, J.), quoting *Will v Dep't of Civil Service*, 145 Mich App 214, 217-218; 377 NW2d 826 (1985) (the plaintiff alleged that the Department of Civil Service refused to promote him because it obtained information that his brother was a student activist).

> their reputation and livelihood are usually not permitted the right to appear. [1 Official Record, Constitutional Convention 1961, p 546.]

Delegate Norris also commented that applying due process principles to legislative and executive investigations and hearings would be unwise in some circumstances, explaining:

> Now we have to understand that we are not talking about due process for a very important reason. We do not wish to encourage the trend of regarding legislative hearing as criminal trials. We want to get away from that and get them to think in terms of the purpose of the investigation or the hearing, which is to get facts upon which to predicate remedial legislation. That's why we do not use the words due process. We're talking in terms of fair and just treatment . . . . [1 Official Record, Constitutional Convention 1961, p 548.]

We are aware that Delegate Norris, as a proponent of the fair and just treatment clause, was not in a position to speak definitively for all delegates to the convention or the people who adopted the constitution. *Committee for Constitutional Reform*, *supra* at 341. Nevertheless, these comments by Delegates Norris, Stevens, Ostrow, and others, which were not the subject of significant dispute[11] in the debates, suggest that the fair and just treatment clause is an independent constitutional initiative that protects individual rights because due process does not, and perhaps should not, provide the constitutional framework for these particular hearings and investigations.

The Address to the People echoes Delegate Norris' understanding of the distinct nature of the fair and just treatment and due process clauses. In particular, the Address to the People notes that the fair and just treatment clause is a "new guarantee," which "recogniz[ed] the extent to which such investigations have tended to assume a quasi-judicial character." 2 Official Record, Constitutional Convention 1961, p 3364. This "new guarantee" language implies that the principles in Michigan's 1908 constitution, including the due process clause, did not embrace the rights secured in the fair and just treatment clause and, therefore, due process was not intended to be the primary influence on its substantive meaning. The framers clearly reflected this sentiment when, also in the Address to the People, they wrote:

> The language proposed in the second sentence *does not impose categorically the guarantees of procedural due process upon such investigations*. Instead, it leaves to the Legislature, the Executive and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations. It does, however, guarantee fair an just treatment in such matters. [*Id*. (emphasis supplied).]

Thus, while the Legislature, the executive branch of government, and the courts may ultimately find that some of the procedures and other hallmarks of due process would be useful to enforce the right to fair

[11] Research of newspaper articles at the time of the constitutional convention shows remarkably little mention of the fair and just treatment clause and virtually no debate on its wisdom.

and just treatment,[12] the subtleties of the due process doctrine do not define or expand the fair and just treatment clause because they are separate rights.

E. Violation And Remedies

Perhaps the most difficult aspect of the fair and just treatment clause is determining what specific conduct would be unconstitutional and what remedies might be available to cure the damage such a violation might cause. The debate at the constitutional convention provides only brief glimpses of what the delegates thought might be unconstitutional conduct. For example, Delegate Stevens stated:

> It is also true that the committee recognized the fact that the consequent witnesses sometimes irritate members of committees and commissions and perhaps lead them to actions which are not proper and right be we didn't feel there was much we could do about that. We simply thought that a person called by subpoena or certainly one who appears voluntarily should be treated with *courtesy* and fairness, that this *personal reputation should not be impugned* if he is there merely to make statements to the committee – certainly so long as he voluntarily cooperates with the committee. . . [1 Official Record, Constitutional Convention 1961, p 549 (emphasis supplied).]

Delegate Norris, quoted at length above, eloquently compared and contrasted the protections afforded in a criminal trial and absent in legislative and executive hearings and investigations but stopped short of stating the absence of those protections would constitute unfair or unjust treatment. Likewise, Delegate Ostrow was only able to explain the conduct prohibited by the clause in terms of what would not be

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[12] In response to Delegate Higgs' criticism that this single section of the Constitution encompassed three separate rights, Delegate Norris remarked:

> With regard to the proposition that this particular proposed language in its relation to the due process law and self incrimination laws, I think these are all elements of fairness and justness in proceedings. To be sure, the first 2 relate principally to criminal matters, but not only to criminal matters, and similarly with regard to investigations. . . . [1 Official Record, Constitutional Convention 1961, pp 548-549.]

Delegate Stevens also commented,

> [W]e hoped that the constitution, as we changed it [to include the fair and just treatment clause], would be a guide to not only to the courts but to the legislature and administrative bodies to be fair and just. *It is not expected that due process of law in the sense which it would apply in a court would necessarily apply in an administrative hearing or in a legislative hearing.* It never has and it isn't intended that it should. [1 Official Record, Constitutional Convention 1961, pp 547 (emphasis supplied).]

The Action Journal of the Committee on Declaration of Rights, Suffrage, and Elections, No. 10 (November 7, 1961) also indicates that the drafting committee originally considered placing the fair and just treatment clause in a separate section of the Constitution.

"ordinary . . . decent human conduct . . . ." 1 Official Record, Constitutional Convention 1961, p 550. The other comments at the convention do not paint a more explicit picture of what would be unconstitutional.

However, this vagueness was, in large part, purposeful because the framers rather clearly intended that the fair and just treatment clause "provide the absent impulse and incentive" for the Legislature, the executive branch, and the courts to carry out these principles by taking action "to protect and promote fair and just procedures in investigations" as was possible in each arm of the government. 1 Official Record, Constitutional Convention 1961, p 546. In other words, the fair and just treatment clause was designed to encourage the government to police itself in legislative and executive investigations and hearings. There are examples of the government taking the initiative to do so. For instance, when the Legislature enacted the Administrative Procedures Act of 1969, MCL 24.201 *et seq*.; MSA 3.560(101) *et seq*., it helped to define this constitutional boundary between permissible and impermissible conduct by state agencies, which are part of the executive branch, by enacting procedural safeguards. See MCL 24.203(2); MSA 3.560(103)(2); *Michigan State Employees' Assoc v Michigan Liquor Control Comm*, 232 Mich App 456, 465; 591 NW2d 353 (1998). Nevertheless, when the Legislature, executive branch, or the courts fail to prescribe the safeguards necessary to carryout fair and just treatment in legislative and executive investigations and hearings, the 1963 Constitution still provides the minimum standard for conduct; simply put, the failure of the Legislature, executive branch, or courts to define what constitutes fair and just treatment and to put safeguards in place does not diminish the right to that treatment. See *Detroit Branch, NAACP v Dearborn*, 173 Mich App 602, 614; 434 NW2d 444 (1988) ("We find that, *like all the other provisions of the Michigan Constitution protecting individual rights*, art 1, § 2 does not require implementing legislation in order to operate as a limitation on the exercise of governmental power.") (emphasis supplied).

Consequently, when reviewing a case alleging a prima facie case of unfair and unjust treatment, the most logical avenue of inquiry is to focus first on whether the allegedly offending governmental unit disobeyed any rules, laws, or other guidelines that have the effect of enforcing fair and just treatment. Those rules, laws, or other guidelines should, in most cases, also prescribe the relief available.

In the absence of any relevant rules, laws, or other guidelines, the only other logical inquiry is an intensely factual one. If the finder of fact in the trial court determines that a plaintiff sustained his, her, or its burden of proving that the defendant violated the fair and just treatment clause, the full panoply of remedies are available. Those remedies include, but are not limited to, monetary damages when "appropriate" according to *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd on other grounds sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989).[13]

[13] Interestingly, the Board does not argue that monetary damages are inappropriate in this case.

V. JNOV

A. Standard Of Review

We review the trial court's decision denying the motion for JNOV de novo. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 672; 591 NW2d 438 (1998).

B. Legal Test

When reviewing a trial court's decision on a motion for JNOV, this Court focuses on "whether there are material issues of fact upon which reasonable minds might differ." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 178; 475 NW2d 854 (1991). In doing so, the Court must examine "the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence, so viewed, fails to establish a claim as a matter of law, should a motion for JNOV be granted." *Phinney v Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997) (citations omitted).

C. Vicarious Liability

The Board first argues that the trial court erred in denying its motion for JNOV because Jo-Dan and McLemore relied on the illegal conduct of Hall and Murdock to support the Board's liability. The Board correctly asserts that an employer cannot be held liable for an employee's illegal acts committed outside the scope of the employment relationship. See *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). Furthermore, an employer "cannot be held liable for the intentional torts," *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995), or criminal acts of its employees, *Bryant v Brannen*, 180 Mich App 87, 103-104; 446 NW2d 847 (1989). However, Jo-Dan and McLemore did not claim that the Board was vicariously liable for the decision of Hall and Murdock to take bribes. Rather, they asserted that the Board was *directly* liable for the way it conducted the investigation and the hearings on Jo-Dan's eligibility for contracts and that Hall and Murdock contributed to the oppressive nature of that investigation and the unfairness of the resultant hearing.

The record shows that the Board explicitly sanctioned Hall's investigation of Jo-Dan, which was evidently part of his routine responsibilities in the EEO. Likewise, Murdock, as a Board member, was entitled to speak at Board meetings, where he influenced the other Board members' views on Jo-Dan's legitimacy and McLemore's integrity. When McLemore voiced his concerns regarding the progress of the investigation, the Board failed to take *any* protective action, implicitly approving the methods used to harass Jo-Dan and McLemore in the name of inquiry. Even if we presume that the Board itself acted within constitutional limits and was not directly liable for any harm to Jo-Dan and McLemore, when we view the evidence in the light most favorable to Jo-Dan and McLemore as the nonmovants, we conclude that there was a question of fact concerning whether the Board was vicariously liable for the acts of Hall and Murdock taken in furtherance of the Board's investigation and hearings. Therefore, the trial court did not err in denying the motion for JNOV on this basis.

D. Governmental Immunity

The Board next argues that the trial court should have granted the motion for JNOV because, as a governmental agency, the Board is immune from tort liability as it was carrying out its governmental function of contracting for goods and services. See MCL 691.1407; MSA 3.996(107); see also MCL 691.1401(b), and (d); MSA 3.996(101)(b), and (d) (the Board is a subset of a political subdivision and, therefore, falls within the definition of a "governmental agency" for the purpose of governmental tort immunity). In *Ross v Consumers Power Co*, 420 Mich 567, 624-625; 363 NW2d 641 (1984), the Supreme Court the explained the rationale for imposing or withholding a governmental unit's liability for the acts of employees:

> A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to Sec. 7 of the governmental immunity act.

Jo-Dan and McLemore do not argue that any of the statutory exceptions to governmental immunity apply in this case, nor that the Board was acting in a nongovernmental or proprietary manner. See MCL 691.1402-1403, 1405-1406, 1413; MSA 3.996(102)-(103), (105)-(106), (113). Nor is it apparent to us that any of those exceptions to immunity could apply. Rather, Jo-Dan and McLemore maintain that a governmental agency can be held liable for violating a constitutional right irrespective of the statutory limits on governmental tort liability. Therefore, rather than addressing this question under the traditional governmental immunity analysis, we turn to *Smith*, *supra* and its progeny.

In *Smith*, *supra* at 544, a majority of the members of the Supreme Court determined that "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." This Court extended the same principle to municipalities in *Marlin v City of Detroit*, 177 Mich App 108, 114; 4415 NW2d 45 (1989), after remand 205 Mich App 335, 337-340; 517 NW2d 305 (1994). See also *Stamps v City of Detroit*, 218 Mich App 626, 635-636; 554 NW2d 603 (1996), citing *Marlin*. To avoid governmental tort immunity for a constitutional violation, *Smith* explicitly requires a plaintiff to prove that the defendant violated a constitutional right "by virtue of a custom or policy that the governmental employees were carrying out." *Johnson*, *supra* at 151. Although, in the trial court, the Board cited this legal proposition, it never specifically made an argument on this ground. Further, the Board does not address this issue on appeal. Rather, the Board argues as if governmental immunity is an absolute bar to tort immunity in *every* case without exception. This, very clearly, is not true. Accordingly, we hold that the Board waived any argument that the trial court should have granted the

motion for JNOV because governmental immunity applied in this case.[14] Therefore, the Board is not entitled to relief on this basis.

E. McLemore's Standing To Sue

The Board also argues that the trial court should have granted the motion for JNOV because, even though McLemore was the corporation's sole shareholder, McLemore lacked a property interest in Jo-Dan's potential contract with the Board and had no independent basis to sue. The Board is correct that an individual does not have standing to sue in tort or contract on behalf of a corporation when the corporation, not the individual, is the real party in interest. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 366 (1991); MCR 2.201(B). However, the circumstances of this case and this particular constitutional provision are unique and, for three reasons, we see no reason to bar McLemore from sharing an award with Jo-Dan in this case.

First, we made clear above that due process "interests" analysis does not govern the separate right to fair and just treatment. Thus, whether McLemore had a property interest in any contract between Jo-Dan and the Board is irrelevant to his constitutional right to seek redress for unfair or unjust treatment he suffered during the course of the Board's investigation into and hearing on the contract matter. In many ways this case exemplifies the concerns the drafters of the fair and just treatment clause expressed regarding legislative or executive abuse of individuals who are connected to an investigation, but not necessarily its subject.

Second, the situation in this case is unique in that the Board's initial basis for investigating Jo-Dan was McLemore himself. By calling McLemore a "black front" for Borden Dairy, the Board attacked McLemore personally.[15] The effect, and only apparent purpose, of making such an allegation,

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[14] In any event, we question whether the custom and policy requirement would apply in this case because part of plaintiffs' theory was that the Board violated their constitutional rights by failing to *create* and follow procedures to ensure fair and just treatment. We believe that the custom and policy language in *Smith* and conforming cases may be distinguishable because they predominantly concern due process claims where there were customs and policies already in place. To the contrary, in this case, the Board essentially made up the policies it purportedly followed as the dispute with Jo-Dan and McLemore progressed.

More importantly, were we to conclude that governmental immunity could bar this suit, we would essentially render the fair and just treatment clause completely unenforceable absent voluntary legislative or executive action. However, the framers anticipated that the Legislature and the executive branch might not want to treat individuals and other entities fairly and justly, which is why the Address to the People states that the courts have a role in developing appropriate safeguards; as a check against great power in two branches of the government, the judiciary, the third branch, must have a role in carrying out the fair and just treatment clause's guarantee.

[15] We note that Board President Murdock was not the only individual to refer to McLemore in this manner.

was to insinuate that McLemore was lending his race to a non-minority business in order to take illegitimate advantage of the preference system. Whatever excuse the Board may have had for its suspicions about the relationship of Jo-Dan and McLemore with Borden Dairy did not entitle the Board to make McLemore the public emblem of a scandal. Moreover, although the Board points out that McLemore never claimed any of Jo-Dan's business losses on his individual tax returns, McLemore and his wife both testified to the negative effect the Board's conduct and the whole affair had on McLemore. Under these facts we can say with assurance that McLemore was, indeed, a party in interest and entitled to sue in his own name as well as on behalf of the corporation. MCR 2.201(B).

Third, by virtue of Delegates Cudlip and Habermehl's amendments to the fair and just treatment clause, extending its protection to "all individuals, firms, corporations and voluntary associations" rather than merely to "persons" as the clause originally read,[16] this constitutional provision applies broadly. 1 Official Record, Constitutional Convention 1961, pp 547-548, 551. In particular, the word "all" implies that the fair and just treatment clause is intended to cover *whomever* becomes involved in legislative and executive hearings or investigations, whether as a subject, witness, or a person or entity merely connected to the proceedings. We see no reason to draw an artificial line between who or what might be protected by the fair and just treatment clause as long as each plaintiff proves that he, she, or it was treated unfairly or unjustly. In this case, the Board must literally pay the price for treating both a corporation *and* an individual unfairly and unjustly. As a consequence, the trial court did not err in denying the motion for JNOV on this basis.

VI. New Trial

A. Standard Of Review

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). This standard of review is particularly applicable where, as here, the appellant claims that the trial court should have granted the motion for new trial because of underlying errors in admitting evidence and testimony or instructions, which we also review for an abuse of discretion. See *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997).

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[16] The original proposal, by Delegate Norris, for the fair and just treatment clause read, "The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." Proposals 1157 and 1207, Committee on Declaration of Rights, Suffrage, and Elections, Constitutional Convention of 1961 (November 2 and 7, 1961); see also Action Journal of the Committee on Declaration of Rights, Suffrage, and Elections, No. 10 (November 7, 1961). In Committee Proposal 15, dated January 4, 1962, the Committee on Declaration of Rights, Suffrage, and Elections proposed that the fair and just treatment clause read, "The right of all persons to fair and just treatment in the course of legislative and executive proceedings, investigations, and hearings shall not be infringed." *Id*. at 4.

B. Georgia Murdock's Tape

The Board first contends that the trial court should have granted its motion for a new trial because it erred in allowing McLemore and Jo-Dan to admit into evidence Georgia Murdock's tape compiling abstracts of conversations her husband and Hall had with Asmar. The unusual aspect of this tape is that it consisted of conversations Georgia Murdock compiled from many other tapes, which she later destroyed; she essentially edited the original tapes, preserving only the conversations she thought were relevant on the compilation tape before destroying the original, unedited tapes.[17]

The Board contends that the compilation tape was inadmissible under MRE 901, the court rule that addresses authentication. MRE 901 states in pertinent part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is *satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.*
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of Witness With Knowledge. *Testimony that a matter is what it is claimed to be.*
>
> * * *
>
> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

In *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991), the Michigan Supreme Court explained authentication under this rule in simple terms. "[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more." *Id*.

The proponents of the tape in this case, McLemore and Jo-Dan, met this requirement by no more complicated means than those identified in *Berkey*, *supra* and MRE 901(b)(1) or (5). By the time the Board objected to the tape, Georgia Murdock had already testified to the circumstances under which she made the tape and selected the conversations she transferred to it. She explained the technique she used to transfer the separate conversations to the single tape. Plaintiffs' counsel showed her the tape, which she assumed was the tape she made. After defense counsel stipulated that plaintiffs' counsel could play a portion of the tape that revealed all three voices on it, Georgia Murdock listened to the tape, identified the voices as those belonging to Murdock, Hall, and Asmar, and even pointed out where Hall was sitting in the courtroom gallery. During defense counsel's voir dire of Georgia

[17] There is no evidence that Georgia Murdock destroyed the original tapes in bad faith.

Murdock, she stated that she had listened to the tape being offered into evidence only shortly before trial. Although she had not had an opportunity to compare the compilation tape to a master copy, she said that she did not need to do so because she had made the tape. Additionally, even though the Board points out that Georgia Murdock did not possess the tape after she sent it to McLemore, her testimony indicated that she had no doubt that the tape played to the jury was the same tape she made. The tape was exactly what Georgia Murdock claimed it was, and we see no basis for excluding the tape as inauthentic.

We might be persuaded that Georgia Murdock's testimony failed to authenticate the tape had she, McLemore, or Jo-Dan claimed that it was original, complete, and unedited. However, they never made such a claim. Rather, Murdock candidly admitted to the inexpert way she made the tape. While the jury was certainly entitled to discount the value of the tape if it thought that Georgia Murdock was not credible, insufficiently skilled at editing tapes, or a poor judge of what conversations were relevant to save, these other considerations do not undermine her consistent testimony that she made the tape and that the voices on the tape belonged to the three men she identified.

The Board is correct in asserting that the majority opinion in *Berkey*, *supra* at 50-51, stated that the seven-part test[18] for authenticity articulated in *People v Taylor*, 18 Mich App 381, 383-384; 171 NW2d 219 (1969), aff'd 386 Mich 204 (1971), may still have some relevance under the standard for authentication since put into place by the Michigan Rules of Evidence. However, we reject the Board's implicit argument that we must shape our analysis around *Taylor* when *Berkey*, *supra* at 52, makes clear that MRE 901, with its very basic requirement that a piece of evidence "is what its proponent claims," now establishes the baseline for admissibility when the objection is authentication. In fact, the *Berkey* Court addressed the substance of the Board's concerns when it wrote:

> While the elements of the seven-part test are important considerations, we believe that they are matters that should ordinarily be addressed to the finder of fact. It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly. [*Id.*]

Accordingly, the trial court did not err by admitting the compilation tape as authentic.

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[18] Those seven considerations are:

> (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. [*Taylor*, *supra* at 383-384, quoting 58 ALR 2d 1024, 1027.]

The Board also claims that the trial court should have excluded the tape because the conversations ultimately played for the jury may have been taken out of context and it may have wanted to introduce portions of the original tapes Georgia Murdock did not save pursuant to MRE 106.[19] Essentially, the Board claims that the trial court should have excluded the tape under MRE 403 because it was substantially more unfairly prejudicial than probative.

MRE 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court originally found the tape relevant to whether Board President Murdock and Hall were acting within the scope of their duties and that the evidence, although inherently prejudicial, was not unfairly prejudicial in a proportion substantially outweighing this relevance. We agree that the tape was strongly relevant in this case because it explained why Board President Murdock and Hall used their official positions to manipulate the investigation in a way that was unfair and unjust to Jo-Dan and McLemore. The evidence falls short of explaining why the Board members who were not part of the bribery scheme went along with and even added their own twists to the constitutionally deficient investigative process. However, the tape explained the origins of this reprehensible episode in the Board's history and supported plaintiffs' theory of the case. This met the relatively low threshold set for relevance in MRE 401.

We do not underestimate the prejudice that missing portions of a tape may, in the abstract, cause to an adverse party. Indeed, every piece of evidence introduced at trial is, at some level, intended to prejudice the opposing party in order to help the proponent of the evidence to prevail. However, we see no evidence of *substantial* and *unfair* prejudice in this case because the Board merely speculates that it might have found something useful in the portions of the original tapes that Georgia Murdock excluded from the compilation tape. MRE 403. The Board did not question Georgia Murdock about any potentially helpful information that might have been on the original tapes. Nor did the Board have Board President Murdock, Hall, or Asmar testify that they engaged in telephone conversations at the times and places Georgia Murdock was recording them that would show that the Board's conduct in the investigation was more reasonable or warranted. Without a firmer foundation or some offer of proof, we have no reason to believe that the conversations that Georgia Murdock excluded from the compilation tape would have been helpful to the defense rather than the plaintiffs. Accordingly, we have no reason to conclude that the trial court abused its discretion when it rejected MRE 403 as a reason for excluding the tape or denying the motion for a new trial on this basis.

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[19] MRE 106 states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Further, even if the trial court erred in admitting the tape because it was not authentic or it was substantially more unfairly prejudicial than probative, the error was harmless. Both Asmar and Board President Murdock corroborated that the bribery scheme existed.

C. Hall's Legal Conclusion

The Board contends that the trial court erred in allowing Hall to testify that he was acting within the scope of his official duties when he spoke to Board members regarding Jo-Dan because that was a legal conclusion. The pertinent portion of the record reveals the following exchange between plaintiffs' counsel and Hall.

> *Q.* Mr. Hall, did you tell board members and your superiors at the board various statements between September and February of – September of 1985 – or August of 1985 and February of 1986 a substantial number of times with references to the Jo-Dan situation?
>
> *A.* Yes.
>
> *Q.* Were you at all times – as far as you are concerned, between August of 1985 and February of 1986, acting within the course and scope of your employment with the board?
>
> *A.* Yes.
>
> * * *
>
> *Q.* Did you discuss with your superiors at the board all of your activities in your official capacity with the board regarding the Jo-Dan contract?
>
> *A.* Yes, I did.

The Board is correct that even an expert may not testify to a legal conclusion. See *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994). However, the Board fails to present any authority or persuasive argument that Hall's testimony that he acted within the course of his employment was, in fact, a legal conclusion. While we wholly agree that Hall's testimony was a conclusion of some sort, it is not clear that the conclusion was purely legal. The case law does not provide an easy answer to this issue because it is mixed regarding whether answers to similar questions invade the trial court's exclusive province over legal issues or properly relate the facts necessary to apply the law. See *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 528-529; 538 NW2d 424 (1995); MRE 701 (lay opinion testimony).

On the whole, the substance of the relatively brief testimony shows a close relationship to questions of fact. Certainly, for example, plaintiffs' counsel would have been able to ask Hall: how he understood his job responsibilities; if he had attended Board meetings voluntarily or as one of those job responsibilities; if he sat in a place designated for school officials at the meetings; if he spoke of the Jo-

Dan matter at the meetings; and if he was identified as a Detroit Public School System employee at those meetings or if he spoke during portions of the meetings designated for public comment. Answers to those questions would have established the facts necessary to assert that, when Hall spoke to the Board about Jo-Dan, he was acting in his official capacity, which is no different from the substance of his testimony at trial. Indeed, defense counsel covered some of that same ground on cross-examination when he asked Hall about his specific duties and other witnesses had previously testified to Hall's role in the Detroit Public School System. Board Member Bates even testified:

> Well, Mr. Hall's position – he was over – like I say, over the EEO department. So therefore the EEO committee – they would get reports from Mr. Hall. It was a process that went through. You know, the EEO's job was to investigate the reliability or investigate the credibility of a firm to see if they would fit the board of education's guidelines. So Mr. Hall was the person whose job was to contribute information to give to the board. . . .

Likewise, Board Member Cobbin stated that, even though the EEO had a number of staff members, Hall was responsible for working with the Board and making recommendations on purchasing. As a result, there was already a factual basis in the record for Hall to testify that he was acting within the scope of his employment when he spoke to the Board regarding the Jo-Dan contract, and Hall's testimony merely confirmed these facts.

Even if we considered Hall's testimony a conclusion of law, we do not see error requiring reversal in the trial court's decision to allow him to assert that he was acting within the scope of his duty. Whether Hall was duty-bound to communicate with the Board regarding the Jo-Dan matter was not significantly in dispute, as the testimony by Board Members Cobbin and Bates shows. Putting the conduct of Hall and Board President Murdock aside, McLemore and Jo-Dan still presented sufficient evidence of the Board's unconstitutional conduct. For example, the evidence showed that Superintendent Jefferson, acting on behalf of the Board, did not acknowledge McLemore's concerns about Hall and that the Board either refused or failed to conduct timely or principled hearings. The Board also failed to issue any findings, conclusion, or offer some resolution to the dispute after the "hearing" Board Member Cobbin directed. Nor did the Board ever return Jo-Dan's documents after it completed the investigation. Thus, we cannot conclude that permitting Hall to make these statements in front of the jury was "inconsistent with substantial justice" in relation to the claims against the Board. MCR 2.613(A). Accordingly, the Board was not entitled to a new trial on this ground.

VII. Damages

A. The Board's Arguments

Not surprisingly, the Board's most significant objection to the outcome in the trial court is the amount of damages the jury awarded Jo-Dan and McLemore. The Board contends that the evidence fails to support the jury's award and, as a result, the trial court should have granted the motion for JNOV, ordered a new trial, or remitted the award to no more than $144,000.

Although we address the substance of the Board's argument regarding why JNOV would have been appropriate in light of the jury's award, we do not believe that forms the proper framework for our analysis. As we explained above, when reviewing a trial court's decision for JNOV, this Court looks at the evidence in the light most favorable to the nonmovant in order to determine if there was a question of fact regarding a particular issue for the factfinder to resolve. *Byrne*, *supra* at 178. In this case, because Jo-Dan and McLemore established a prima facie case of the Board's unfair and unjust treatment under Const 1963, art 1, § 17, which allowed the jury to conclude that the Board was liable to Jo-Dan and McLemore for their damages, the jury then had an appropriate role in determining the amount of damages the Board owed. See generally *May v City of Grosse Pointe Park*, 122 Mich App 295, 298; 332 NW2d 411 (1982) (damages are for the factfinder to determine). The more appropriate context for our review of the jury's award in this case is in terms of whether the trial court should have granted the motion for a new trial or remittitur.

B. Standard Of Review

We have already articulated that the standard of review for a motion for new trial is abuse of discretion. *Bordeaux*, *supra* at 170. We also review a trial court's decision on a motion for remittitur for an abuse of discretion. *Szymanski*, *supra* at 431.

C. Appropriate Damages

Determining damages is not, by any turn of the imagination, an exact science. As we explained in *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995):

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

The "'law does not require impossibilities' and does not require a higher degree of certainty than the nature of the case permits." *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986), quoting *Allison v Chandler*, 11 Mich 542, 554 (1863). Accordingly, "when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount." *Body Rustproofing, Inc*, *supra*. Furthermore, when damages concern the loss of future financial gain, we entrust the calculation of damages to the "sound judgment of the trier of fact . . . ." *Henry v City of Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999), citing *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953).

If, however, the jury returned an "excessive award" that was "influenced by passion or prejudice," a trial court has the discretion to grant a motion for a new trial. MCR 2.611(A)(1)(c). An

improper award does not, in every instance, demand a new trial. "If the court finds that the only error in the trial is the . . . excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the . . . highest (if the verdict was excessive) amount the evidence will support." MCR 2.611(E)(1).

D. The Damages Of Jo-Dan And McLemore

There are several distinct problems with the Board's argument regarding how to calculate the damages of Jo-Dan and McLemore, which relates to why it claims the trial court should have granted a new trial or remitted the award. The first, and most significant, problem is that the Board assumes that damages for the type of constitutional violation alleged here (fair and just treatment clause) are only economic in nature, but fails to make any argument or provide any authority for this proposition. To a large extent, this flawed reasoning relates back to the Board's theory that only parties with a property interest may sue for a violation of Const 1963, art 1, § 17. However, we have already explained that individuals, firms, corporations, and voluntary associations fall under the protection of the fair and just treatment clause without regard to their property interest in a legislative or executive investigation or hearing.[20]

We are also mindful that, even without a violation of property interests, "there are circumstances in which a constitutional right can only be vindicated by a damage remedy . . . ." *Smith*, *supra* at 647 (Boyle, J.). To hold that a party's damages must be limited to ascertainable economic loss, to the exclusion of noneconomic damages, might preclude any and all recovery in some cases. In fact, such a holding would likely deny McLemore any relief in this case. Further, absent the deterrent effect and relief from injury that a monetary award brings with it, we would have few, if any, means to enforce the Constitution's mandate for fair and just treatment. As a result, and without any contrary argument or authority from the Board, we decline to adopt its reasoning that the only proper award in this case should have relied solely on the amount of profit Jo-Dan could have earned from contracts with the Detroit Public School System.

The second problem with the Board's argument is that it never proposed to the jury, whether through lay or expert witness testimony, closing argument, or the trial court's instructions at the end of the trial, what the appropriate measure of damages would be for this type of constitutional violation. The parties stipulated that the trial court would issue some of the Board's proposed jury instructions on damages and the trial court agreed to submit the special verdict slip that the Board prepared to the jury. Neither those instructions nor the jury verdict slip gave the jury any specific directions with regard to whether it could consider the actual and future economic losses of Jo-Dan and McLemore, the relevance of any difference between lost corporate net profits or gross income, damage either to the reputation of Jo-Dan and McLemore, or any other factors that might be relevant in this case. The

[20] To the extent that the Board argues that McLemore is not entitled to share the award with Jo-Dan because he lacked standing to sue, we have already determined that McLemore was entitled to sue in his own name.

Board never identified appropriate factors to determine this type of award even in the parties' discussion with the trial court regarding what instructions it should issue on damages. The trial court accordingly instructed the jury:

> If you suffered damages, you should determine when those damages accrued and add interest from then to March 31, 1995, the date the complaint was filed. If you decide that the Plaintiff will sustain damagesd [sic] in the future you may consider the effect of inflation in determining the damages to be awarded for future losses.
>
> * * *
>
> If you find that the Plaintiffs are entitled to damages you must calculate the amount Plaintiffs are entitled to. The law holds that the [sic] damages are not recoverable where they are remote, contingent, speculative or not as a result of the claimed injury. In addition, although damages do not have to be [sic] a firm mathematical basis for calculation, the measure of damages must be controlled by the evidence adduced during the trial which is reasonable certain and not speculative.

The Board's counsel then expressed satisfaction with the jury instructions.

The damages issue in this case amounts to the situations described in *Body Rustproofing, Inc, supra* and *Henry*, *supra*. The parties did not know how to measure actual and future damages, so they placed that responsibility with the jury as the factfinder. The special verdict form returned by the jury does not aid us in reviewing the specific basis of its damages decision. Nonetheless, we trust that the jury executed its responsibility as instructed, considering the evidence introduced at trial: Jo-Dan was following a plan for growth its accountant estimated at ten percent a year; Jo-Dan had a history of entering into contracts with the Detroit Public School System worth more than a million dollars and was being considered for a contract worth more than $2 million at the time the investigation in this case started; McLemore was personally upset at what occurred; the Board made public statements reported in the media questioning Jo-Dan and McLemore's legitimacy; before the scandal both Jo-Dan and McLemore had excellent business reputations; following the scandal Jo-Dan was forced out of business for some time and McLemore lost the income he was earning as Jo-Dan's employee. Cf. *People v Bradford*, 69 Mich App 583, 589-590; 245 NW2d 137 (1976) ("[W]e will not presume that the jury refused to follow the trial court's limiting instructions."). Accordingly, we conclude that the trial court did not abuse its discretion when denying the motion for a new trial or remittitur on this basis.

VIII. Conclusion

In sum, the Board has failed to articulate any reason why we should take the very serious action of reversing the factfinder's determination in this case.[21] Following a close review of the facts and

[21] In light of the fact that the Board's arguments on appeal do not warrant reversing the verdict, we need not consider plaintiff's arguments on cross-appeal regarding the trial court's failure to provide requested jury instructions.

arguments presented to the jurors, we cannot conclude that they reached an unreasonable result. What we see from the record could only have been more vivid and disturbing at trial, leading to the jury's eminently reasonable result in this case. The possession of power does not give license to its abuse. For almost forty years, this state was able to point to a complete absence in its case law of an example of the type of corruption of the authority to investigate that once so preoccupied our nation. The Board, by its conduct and that of its members and employees, has furnished the citizens of the state with a blatant example of such corruption. This type of conduct, involving bribery, an onerous and ill-conceived "investigation," and a sham "hearing," was reprehensible, shameful, and illicit. We fervently hope that giving meaning to the fair and just treatment clause as it applies in this case will minimize the prospect for the recurrence of such abuse. The public and, in particular, every school-age child the Detroit Public School System serves or ought to serve, deserve no less.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck