

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

PROPERTY CONDEMNATION DISPUTE BEFORE MICHIGAN SUPREME COURT THIS WEEK; HIGHWAY PROJECT'S IMPACT ON PART OF LAND THEY RETAIN SHOULD BE FACTOR IN COMPENSATION, OWNERS CLAIM

Court also to hear challenge to attorney fees award; trial court approved \$450 per hour for plaintiff's lead lawyer in dental malpractice case, but defendants say it's excessive

LANSING, MI, December 3, 2007 – Where part of a parcel of land was taken for a highway project, should the project's impact on the remaining property be a factor in determining just compensation for the owners? The Michigan Supreme Court will consider that issue during oral arguments this week.

In *Michigan Department of Transportation v Tomkins*, MDOT acquired a strip of land for an overpass, but the owners retained the rest of the property. The owners contend that dust, noise, fumes and vibrations from the Grand Rapids-area project have diminished the value of the remaining land, and that they should be compensated for the "general effects" of the project on their property.

The Court will also hear *Smith v Khouri*, in which the trial court ordered defendants in a dental malpractice case to pay nearly \$68,000 in attorney fees to lawyers for the plaintiff. The attorney fees award was a sanction for the defendant dentist's rejection of a pre-trial case evaluation, which the plaintiff accepted. The trial court, noting that plaintiff's lead counsel has "superlative standing" in the area of dental malpractice, calculated the attorney fees award based on a \$450 per hour rate for the lead counsel and a \$275 per hour rate for associate counsel. The defendants argue that the award was excessive, pointing in part to a 2003 State Bar of Michigan survey that indicated a range of billing from \$100 to \$350 per hour for equity partners in litigation practice.

The remaining cases involve insurance, personal injury, civil rights, contract, and procedural, and criminal law issues.

Court will be held on **December 4 and 5** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the

significance of their cases. Briefs in the cases are available on the Supreme Court's web site at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Tuesday, December 4
Morning Session

PEOPLE v CANNON (case no. 131994)

Prosecuting attorney: John T. Horiszny/(989) 790-5330

Attorney for defendant Trumon Dontae Cannon: Patrick K. Ehlmann/(517) 324-9577

Trial court: Saginaw County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/131994/131994-Index.htm>

At issue: In sentencing criminal defendants, trial courts use statutory “offense variables,” which assign a number of points based on various factors in the crime; the number of points determines the length of the sentence. In this case, the defendant was convicted of conspiracy to commit armed robbery for his part in a restaurant robbery. There was evidence that the defendant and two companions planned the robbery, waited for the restaurant’s customers to leave, selected the defendant to be the lookout, and parked a getaway vehicle nearby. The trial court assessed 15 points for predatory conduct under Offense Variable (OV) 10 (Exploitation of a Vulnerable Victim), MCL 777.40(3)(a). What are the parameters of predatory conduct under OV 10? Does predatory conduct include this type of pre-offense planning?

Background: Three men entered a Saginaw Burger King. According to testimony in the case, two of the men went into the restroom, while the third man, Trumon Cannon, approached the counter. When the employee asked if she could help him, Cannon acted nervous and said he needed another minute. The other two men then emerged from the restroom with their faces hidden by bandanas; they proceeded to round up the employees and rob the restaurant. One employee escaped and hid in the freezer, calling 911 from a cell phone. Meanwhile, Cannon was pacing back and forth, looking out the front windows of the restaurant. Then, as Cannon and his companions ran from the restaurant, the police gave chase and apprehended the men. Cannon was charged with armed robbery, conspiracy to commit armed robbery, and felony-firearm; the prosecutor argued in part that Cannon helped plan the robbery and served as the lookout. A jury convicted Cannon of conspiracy to commit armed robbery, but acquitted him of the other charges. At sentencing, the prosecutor asked the trial judge to assess 15 points for Offense Variable (OV) 10, alleging that Cannon had engaged in predatory conduct. Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The prosecutor argued that Cannon and his companions engaged in predatory conduct because they waited until there were no customers in the restaurant in order to victimize the employees. The trial court agreed, and assessed OV 10 at 15 points; as a result, the guidelines range for Cannon’s minimum sentence was 126 to 210 months in prison. If no points had been scored for OV 10, the range would have been only 108 to 180 months. The court imposed a sentence at the top of the calculated range, sentencing Cannon to a term of 210 to 500 months. The Court of Appeals affirmed Cannon’s conviction and sentence in an unpublished per curiam opinion. Cannon appeals, arguing that he and his companions intended only to rob the store and so did not engage in “predatory conduct” within the statute’s meaning.

ROSS v AUTO CLUB GROUP (case no. 130917)

Attorney for plaintiff Randall L. Ross: Jules B. Olsman/(248) 591-2300

Attorney for defendant Auto Club Group: John A. Lydick/(248) 646-5255

Attorney for amicus curiae Farm Bureau Mutual Insurance Company of Michigan: John A. Yeager/(517) 351-6200

Attorney for amicus curiae Coalition Protecting Auto No-Fault: Salvatore W. Pirrotta/(616) 831-1700

Attorney for amicus curiae Michigan Health & Hospital Association: Joan L. Lowes/(248) 740-7505

Trial court: Macomb County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/130917/130917-Index.htm>

At issue: In this auto no-fault case, the plaintiff sought to recover personal protection insurance benefits from the defendant insurer. The insurer claimed that the plaintiff, the sole owner of a subchapter S corporation, was self-employed and therefore not entitled to benefits under *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986). The trial court rejected the insurer's argument and, relying on MCL 500.3148(1), ordered the insurer to pay attorney fees to the plaintiff on the ground that the insurer "unreasonably" refused to pay benefits. Was the defendant properly ordered to pay attorney fees?

Background: After he was injured in an automobile accident, Randall Ross submitted a claim to Auto Club Group for first-party no-fault personal protection insurance benefits. At that time, Ross was the sole shareholder and employee of Michigan Packing Company, Inc., a meat packing business incorporated as a subchapter S corporation. The parties could not agree whether Ross was a company employee or was self-employed. Ross argued that he was an employee, but Auto Club took the position that Ross was self-employed and that, under *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986), he could not establish a claim for lost wages. In *Adams*, the Court of Appeals ruled that the self-employed plaintiff was entitled to work loss benefits based on his taxable income, rather than gross receipts. But in Ross' case, the trial court said, *Adams* did not apply because Ross was seeking benefits based on actual W-2 wages. While agreeing with Auto Club that Ross was self-employed, the trial court found that Ross had established a claim for lost wages. Accordingly, the trial court granted Ross' request for attorney fees under MCL 500.3148(1), which states that "An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that *the insurer unreasonably refused to pay the claim* or unreasonably delayed in making proper payment" (emphasis added). Explaining the award of attorney fees, the trial court stated that Auto Club "provided no legitimate justification, no legal authority, no rational or logical arguments" in support of its claim that Ross was not entitled to benefits. Auto Club appealed. On the question of attorney fees, the Court of Appeals affirmed the trial court; in a published opinion, the appellate court that it was not left with a definite and firm conviction that the trial court made a mistake in ordering Auto Club to pay attorney fees to Ross. Auto Club appeals.

MICHIGAN DEPARTMENT OF TRANSPORTATION v TOMKINS (case no. 132983)

Attorneys for plaintiff Michigan Department of Transportation: Raymond O. Howd, Patrick F. Isom/(517) 373-0626

Attorney for defendants Rodney Tomkins and Darcy Tomkins: Scott J. Steiner/(616) 235-3500

Attorney for amicus curiae Michigan Association of County Drain Commissioners:

Geoffrey H. Seidlein/(517) 886-7176

Attorney for amicus curiae Ackerman Ackerman & Dynkowski: Alan T. Ackerman/(248) 537-1155

Attorney for amicus curiae Mackinac Center for Public Policy: Patrick J. Wright/(989) 631-0900

Trial court: Kent County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/132983/132983-Index.htm>

At issue: The Michigan Department of Transportation acquired part of the defendants' property for a highway project. Do the property owners have a constitutional right to be compensated for the reduction in value of their remaining property, due to the increased noise, dust, fumes, and vibration from the newly constructed highway?

Background: This case arises from construction of the M-6 highway (South Beltline) near Grand Rapids; the highway connects I-96 to M-37 and US 131 by way of a 20-mile limited access highway loop around the city. The Michigan Department of Transportation sought to acquire a 49-foot by 120-foot strip of property for an overpass; the land was part of a larger parcel owned by Rodney and Darcy Tomkins. After the owners rejected MDOT's offer of \$4,200 for the land, MDOT filed a condemnation complaint pursuant to the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.* Experts for both parties agreed that the fair market value of the strip of land was \$3,800. But the property owners also sought payment for \$48,200 in damages to their remaining property, which they claimed was diminished in value by its proximity to the M-6 highway. In measuring these "highway effects" damages, the owners' expert took into account the "dust, dirt, noise, vibration, and smell" from the highway. MDOT argued that § 20(2) of the UCPA, MCL 213.70(2), precluded the owners from presenting evidence of the construction project's "general effects" as part of determining just compensation. MDOT also argued that the owners' claim for general highway effects damages failed to state a claim upon which relief may be granted. In response, the property owners contended that just compensation in a partial-taking case must include compensation for any and all causes of diminution in the remaining land's market value, including highway effects. They further argued that § 20(2) of the UCPA was an impermissible limitation on their right to just compensation under article 10, section 2 of the Michigan Constitution. But the trial court ruled in MDOT's favor, holding that the M-6 project's general effects would not be considered in determining the property owners' just compensation. In a published per curiam opinion, the Court of Appeals reversed, ruling that § 20(2)'s limitation on general damages, as applied to partial taking cases, "impermissibly conflicts with the established constitutional meaning of 'just compensation,' which requires that *any* and *all* factors relevant to market value be taken into consideration when determining the difference in the remaining property's value before and after the taking." To evaluate whether the diminution in value of the remaining parcel was sufficiently "traceable" to the highway project as a whole, the Court of Appeals adopted an "integral and inseparable part" test. The panel ultimately remanded the case to the trial court for further proceedings to determine whether the overpass constituted an integral and inseparable part of the M-6 project. MDOT appeals.

Afternoon Session

SMITH v KHOURI, et al. (case no. 132823)

Attorney for plaintiff Kevin Smith: Robert Gittleman/(248) 737-3600

Attorney for defendants Louie Khouri, D.D.S., Louie Khouri, D.D.S., P.C., and Advanced Dental Care Clinic, L.L.C.: Gary N. Felty, Jr./ (734) 459-0300

Attorney for amicus curiae Attorney General Michael A. Cox: Ann M. Sherman/(517) 373-6434

Attorney for amicus curiae State Bar of Michigan: Eric J. Pelton/(248) 645-0000

Attorney for amicus curiae Negligence Section of the State Bar of Michigan: Thomas W. Waun/(810) 695-6100

Trial court: Oakland County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/132823/132823-Index.htm>

At issue: In this dental malpractice case, the jury returned a verdict in favor of the plaintiff, which entitled the plaintiff to also recover case evaluation sanctions. As part of the case evaluation sanctions award, the trial court granted the plaintiff nearly \$68,000 in attorney fees, based on a \$450 per hour rate for lead counsel and a \$275 per hour rate for associate counsel. The defendants challenged the award as unreasonable, but the Court of Appeals affirmed. Did the trial court determine a reasonable hourly rate for the plaintiff’s counsel? Was the trial court’s award of attorney fees excessive?

Background: Kevin Smith sued Dr. Louie Khouri for dental malpractice. After discovery, the parties proceeded to case evaluation, pursuant to Michigan Court Rule 2.403. The three attorneys on the case evaluation panel issued an award of \$50,000 in Smith’s favor. Smith accepted the case evaluation, but Khouri rejected it, and so the lawsuit proceeded to trial. The jury found that Khouri was negligent; the jury awarded Smith \$323.36 in economic damages and \$46,331.18 in adjusted non-economic damages. Smith sought sanctions under MCR 2.403(O), which states that a party who has rejected a case evaluation “must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.” From a defendant’s perspective, a more favorable verdict is one that is “more than 10 percent below the evaluation,” the court rule provides. Because the jury’s verdict was not 10 percent below the \$50,000 evaluation that Khouri rejected, he became liable for Smith’s “actual costs.” “Actual costs” include “a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation,” the court rule provides. The trial court determined that a reasonable attorney fee was \$65,556, based on an hourly rate of \$450 for Smith’s lead counsel and \$275 per hour for associate counsel. In so finding, the court observed that Smith’s lead trial counsel has “superlative standing” in the area of dental malpractice, and achieved a favorable verdict for Smith in a difficult case. The Court of Appeals affirmed the trial court’s award of attorney fees in an unpublished opinion, finding that the trial court’s ruling was not an abuse of discretion. Khouri appeals.

IN RE EGBERT R. SMITH TRUST (case no. 133462)

Attorney for petitioners Glen Phillips and Dale Phillips: Donald J. Clark/(989) 269-6487

Attorney for respondent Betty Homer, Successor Trustee: John S. Paterson/(810) 648-2414

Attorney for amicus curiae Real Property Law Section of the State Bar of Michigan: Randolph T. Barker/(313) 496-1200

Trial court: Sanilac County Probate Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/133462/133462-Index.htm>

At issue: The petitioners leased farm land owned by the Smith testamentary trust. The lease provided them with a right of first refusal to purchase the property. The respondent, the trust's personal representative, gave the petitioners notice that she intended to accept an offer from a third party to purchase the property. Although the respondent soon after notified the petitioners that she had changed her mind and would not sell the property, the petitioners gave notice of their intent to exercise their right of first refusal. Was an enforceable contract of sale created between the parties?

Background: Glen and Dale Phillips, the petitioners in this case, leased farm land owned by the Egbert R. Smith testamentary trust. The lease provided that the petitioners had the right to match any bona fide offer to purchase the leased property. Respondent Betty Homer, the trust's personal representative, received an offer from Orville Ganstine to purchase the property for \$225,000. Homer's attorney sent a letter to the petitioners, stating "Pursuant to the lease, it is required that you have the right to match any bona fide offer presented. This letter is to inform you that Ms. Homer has a signed purchase agreement with the offer of \$225,000 for the farm. You must notify our office of your decision to exercise your option within 30 days." Less than two weeks later, Homer's attorney sent a second letter to the petitioners, stating that Homer "had declined the [Ganstine] offer," that she "will not be selling the farm at this time," and that she "will await the end of the lease term before selling the farm." Four days later, the petitioners notified Homer of their intent to exercise their right of first refusal. This notice was sent within the specified 30-day period. When Homer refused to sell the property to the petitioners, the petitioners filed a complaint for specific performance. The trial court granted Homer's motion for summary disposition, ruling that Homer had withdrawn her offer to sell before the petitioners accepted it, so no enforceable contract of sale was created between the parties when the petitioners purported to accept Homer's offer to sell. The Court of Appeals reversed in a published opinion. The Court of Appeals reasoned that, once the petitioners received notice of Ganstine's offer, their right of first refusal became an option that Homer could not revoke during the 30-day period specified in the lease. Homer appeals.

Wednesday, December 5

Morning Session Only

JONES v OLSON (case no. 132385)

Attorney for plaintiff Douglas D. Jones: Gregory P. Jahn/(989) 386-3456

Attorney for defendants Kathleen P. Olson and Todd R. Olson: Christine D. Oldani/(313) 983-4796

Trial court: Wexford County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/132385/132385-Index.htm>

At issue: The plaintiff was injured in a car accident and suffered a fractured vertebra in his neck; he was disabled from almost all his normal activities for several months. Seven months after the accident, he returned to work and resumed his normal activities. He sued the defendants for noneconomic damages under Michigan's no-fault statute, MCL 500.3135 et seq. But the trial court determined as a matter of law that the plaintiff had not suffered a serious impairment of

body function because his injuries ultimately did not affect his ability to lead a normal life; accordingly, the plaintiff was not entitled to recover noneconomic damages, the trial court held. The Court of Appeals reversed, holding that a permanent impact on a person's life is not required to establish a serious impairment. Did the Court of Appeals err?

Background: Douglas Jones was injured in a car accident on August 1, 2003, when Kathleen Olson pulled in front of him as Jones entered an intersection where he had the right of way. Jones was taken to a hospital, where he complained of neck and back pain; doctors diagnosed him with a fractured vertebra in his neck. Jones later sued both Kathleen Olson and Todd Olson, the owner of the car. Jones, a construction worker who normally worked 40-hour weeks, testified in his deposition that he could not engage in his normal activities, including hunting, playing softball, doing yard work, or taking long walks with his girlfriend. For two months, he did not have intimate relations with his girlfriend; he had difficulty getting dressed, feeding himself, and caring for his child, he stated. After undergoing physical therapy, Jones improved; a February 12, 2004, progress report stated that he could return to heavy construction work for three hours per day on weekdays, or two days per week, increasing to full-time over the following two to four weeks. Jones did not return to work until March 2004, due to the seasonal nature of his job. When he returned to work, he was not limited by any restrictions. Jones testified that, since going back to work in March 2004, he had not taken any time off and had resumed all his normal activities. The Olsons moved for summary disposition, asserting that Jones failed to establish a genuine issue of material fact as to whether he suffered a serious impairment of body function. The trial court ruled that Jones' impairment was objectively manifested, but that he had not established a fact question as to whether the course or trajectory of his life had been affected to such an extent that he was not able to lead his normal life. But the Court of Appeals, in an unpublished opinion, reversed the trial court and remanded the case for trial. A temporary interruption of a plaintiff's ability to lead his normal life may constitute a serious impairment, the Court of Appeals stated; the totality of the circumstances supports Jones' contention that he should recover damages for the time that his life was disrupted. The Olsons appeal.

JAMES, et al. v STATE FARM FIRE & CASUALTY COMPANY, et al. (case no. 130460)
Attorney for plaintiff Safeco Insurance Company of America: Larry W. Hoskins/(248) 353-5160

Attorney for defendant State Farm Fire & Casualty Company: Cary R. Berlin/(248) 356-8590

Attorney for defendant David Gasowski: David R. Dyki/(248) 649-1330

Trial court: St. Clair County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/130460/130460-Index.htm>

At issue: Accounts differed as to which of two men was driving a jet-ski that crashed into a bridge. In the first lawsuit arising from the accident, the trial court ruled that Richard James was the driver. That lawsuit then settled, and the parties agreed in the settlement agreement that the question of the driver's identity would be litigated in a separate declaratory judgment action concerning the insurer's liability for insurance coverage. Despite this, the trial court ruled in the declaratory judgment action that collateral estoppel precluded the insurer from challenging the first lawsuit's determination of the driver's identity. Did the insurer waive its right to rely on the provision in the settlement agreement allowing further litigation of the driver's identity? Does collateral estoppel apply?

Background: David Gasowski and Richard James were riding on a jet-ski that crashed into a bridge; Gasowski was seriously injured. The jet-ski was owned by Mario Sylvestri, who was insured under a policy issued by State Farm Fire & Casualty Company. The insurance policy covered Sylvestri and any other person driving the jet-ski with his permission. The police interviewed James and prepared a report that stated that Gasowski was the driver; however, James later said that he was the driver. Gasowski sued James and Sylvestri for negligence, and the trial court ruled that James was the jet-ski's driver. James then filed this declaratory action against State Farm, Gasowski and Sylvestri; James sought to obtain a determination that he, as the jet-ski's driver, was covered by the State Farm policy. The parties eventually settled Gasowski's lawsuit under a "Release and Settlement Agreement," which dismissed that lawsuit but permitted the driver's identity to be litigated in James' declaratory action. Gasowski then moved for summary disposition based on collateral estoppel, a legal doctrine which prevents a party from raising an issue which was already decided in a previous lawsuit. Because the trial court in the first suit had determined that James was the driver of the jet-ski, that determination could not be challenged in the declaratory action, Gasowski argued. State Farm disagreed, arguing that collateral estoppel did not apply as to State Farm because it was not involved in the first lawsuit. State Farm also contended that the parties to the first lawsuit could be colluding to provide coverage for James; the insurer presented evidence suggesting that Gasowski was the driver. But the trial court ruled in James' favor, holding that State Farm was barred from further litigating the question of who was driving the jet-ski. It had already been determined that James was the driver and that James was covered under the State Farm policy, the trial court said. The Court of Appeals affirmed in an unpublished per curiam opinion. State Farm appeals.

RAMANATHAN v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, et al.
(case no. 133170)

Attorney for plaintiff Chathapuram S. Ramanathan: Ann Curry Thompson/(313) 961-7363

Attorney for defendant Wayne State University Board of Governors: Susan Healy
Zitterman/(313) 965-7905

Attorney for amicus curiae Blue Cross Blue Shield of Michigan: Ernest R. Bazzana/(313)
983-4798

**Attorney for amicus curiae Concurrence of City of Detroit, Meijer, Inc., and Michigan
Municipal League Liability & Property Pool:** Ernest R. Bazzana/(313) 983-4798

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/133170/133170-Index.htm>

At issue: The plaintiff, an Asian Indian professor, sued Wayne State University and the Dean of the School of Social Work, alleging violations of Michigan's Civil Rights Act. Did the plaintiff present sufficient evidence to sustain his claims?

Background: Chathapuram Ramanathan, an Asian Indian professor, was hired by Dean Leon Chestang in August 1992. Ramanathan felt that subsequent comments made by a fellow professor and by staff, including Chestang's references to a Sitar and curried lamb at two 1993 faculty meetings, were insensitive and showed an anti-Asian Indian animus. Also in 1993, Chestang informed Ramanathan that his teaching contract would not be renewed at the conclusion of a one-year extension. When Ramanathan applied for tenure, the School Promotion & Tenure Committee voted 3 to 1 to grant tenure, although Chestang disagreed, finding Ramanathan's work to be second-rate. In April 1995, the university Provost, who made the final

decision, informed Ramanathan that he would not be receiving tenure. In 1998, Ramanathan sued Wayne State University and Chestang; Ramanathan claimed that he had suffered discrimination based on race and national origin, in violation of Michigan's Civil Rights Act. Ultimately, the Court of Appeals determined, in an unpublished opinion, that Ramanathan could support his claim by presenting evidence of the comments Chestang made at the 1993 faculty meetings. Wayne State argued that the comments are not admissible evidence because they were made five years before Ramanathan filed this lawsuit, and therefore fall outside the three-year limitations period for Civil Rights Act claims. The university contended that the arguments were supported by the Michigan Supreme Court's recent decision in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263 (2005), amended 473 Mich 1205 (2005). But the Court of Appeals said that it did not read the *Garg* opinion "so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period." Accordingly, the Court of Appeals held that evidence of Chestang's 1993 remarks "is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court." The Court of Appeals panel also rejected the defendant's argument that the evidence, even if admissible, was insufficient to sustain Ramanathan's claim of retaliation and discriminatory animus. Wayne State appeals.

BEAVERS v BARTON MALOW COMPANY, et al. (case no. 133294)

Attorney for plaintiff Rick Beavers: Mark R. Bendure/(313) 961-1525

Attorney for defendants Barton Malow Company, Jomar Building Company, Inc., Spillis Cardella, Dmjm, a/k/a Dmja, Inc., and Robert Smith: Janet Callahan Barnes/(248) 851-9500

Attorney for amicus curiae State Bar of Michigan's Appellate Practice Section: Liisa R. Speaker/(517) 482-8933

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/133294/133294-Index.htm>

At issue: The plaintiff filed a claim of appeal, but his appeal was dismissed by the Court of Appeals because he did not file his brief on time. The plaintiff then filed a delayed application for leave to appeal, pursuant to Michigan Court Rule 7.205(F)(3). The delayed application was filed 11 months after the first appeal was dismissed, but 14 months after the trial court order that the plaintiff sought to appeal. Did the Court of Appeals properly hold that the delayed application was not timely filed within 12 months of the entry of the order to be appealed as required by MCR 7.205(F)(3)? Or was the 12-month period tolled while the plaintiff's first appeal was pending?

Background: Rick Beavers sought to appeal a trial court's January 7, 2005 order dismissing his lawsuit. He filed a timely claim of appeal on January 26, 2005, which was dismissed by the Court of Appeals on April 13, 2005, due to Beavers' failure to file a timely brief on appeal. Beavers then filed a motion to reinstate his appeal, which was denied on April 28, 2005. On March 13, 2006, Beavers filed an application for leave to file a delayed appeal pursuant to Michigan Court Rule 7.205(F)(3)(a), which states that such an application shall not be granted if it is filed "more than 12 months after . . . entry of a final judgment or other order that could have been the subject of an appeal of right" On July 11, 2005, the Court of Appeals granted Beavers' delayed application, directing the parties to brief whether the limitation period set forth in MCR 7.205(F)(3) should be tolled in this case. Beavers argued that the filing period was tolled while his first appeal was pending, citing in support of his argument *Riza v Niagara Machine &*

Tool Works, Inc., 411 Mich 915 (1980), and *People v Kincade (On Remand)*, 206 Mich App 477, 483 (1994). On January 18, 2007, the Court of Appeals issued an unpublished per curiam opinion dismissing Beavers' appeal. The Court of Appeals reasoned that it did not have jurisdiction to consider the appeal under MCR 7.205(F)(3), because the twelve-month period that rule allows for filing a delayed application was not tolled while Beavers' first appeal was pending. Beavers appeals.

COMMUNITY RESOURCE CONSULTANTS, INC. v PROGRESSIVE MICHIGAN INSURANCE COMPANY (case no. 133416)

Attorney for plaintiff Community Resource Consultants, Inc.: Harold A. Perakis/(586) 778-7778

Attorney for defendant Progressive Michigan Insurance Company: Caryn Anne Gordon/(313) 446-5552

Trial court: Ingham County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/12-07/133416/133416-Index.htm>

At issue: Under the Michigan's no-fault act's one-year back rule, a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1). In this case, the plaintiff company sued to recover payment for services the plaintiff provided to a seriously injured man who was insured by the defendant. The defendant no-fault insurer argued that, under the one-year back rule, the plaintiff could not recover for any services that were rendered more than one year before the plaintiff's lawsuit was filed. The plaintiff disagreed, arguing that its accounting and billing practices created a dispute of fact as to when "the loss" at issue occurred. The trial court and the Court of Appeals ruled in the plaintiff's favor. Did the lower courts decide this issue correctly?

Background: Richard Fero was seriously injured in a 1997 automobile accident. He was insured under a no-fault policy issued by Progressive Michigan Insurance Company. Over the years, Community Resource Consultants, Inc. provided rehabilitation and case management services to Fero. Progressive generally paid for these services but, in 2004, Community Resource alleged that a substantial unpaid balance had accrued. On June 18, 2004, Community Resource sued Progressive, seeking to recover \$58,808.96 for services rendered to Fero. Based on the customer balance detail provided by Community Resource, Progressive argued that \$19,684.64 of the \$58,808.96 that Community Resource sought was for services provided more than one year before Community Resource filed its lawsuit on June 18, 2003. Progressive argued that Community Resource was barred from recovering this amount by the no-fault act's one-year back rule, which provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." Community Resource contended that the parties' established billing arrangement created a dispute of fact, because Progressive customarily waited until it had received multiple invoices before making a payment. Although Progressive would identify which invoices each check was intended to cover, because some invoices were only partially paid, Community Resource would apply the incoming payment to the oldest outstanding invoices. Community Resource argued that this was standard practice among parties with an "open account" billing arrangement. Because of this billing arrangement, the one-year back rule did not apply, Community Resource argued. The trial court agreed and the Court of Appeals affirmed in a divided, unpublished opinion. The Court of Appeals majority held, as did the trial court, that there was a disputed issue of fact as to the effect

of the parties' billing practices on the one-year back rule. The dissenting judge contended that the focus should be on the date upon which the treatment or service was provided. Because the services at issue were provided before June 18, 2003, the dissenting judge concluded that they were barred by the one-year back rule of MCL 500.3145(1). Progressive appeals.

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