

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

DID RAP TOUR PROMOTERS VIOLATE STATE EAVESDROPPING LAW? ISSUE BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS NEXT WEEK

Detroit officials say “Up in Smoke” tour promoters secretly taped “private discourse” without consent; defendants argue that plaintiffs had no reasonable expectation of privacy

LANSING, MI, January 13, 2011 – A dispute involving Michigan’s eavesdropping statute – and whether it was violated when rap tour promoters videotaped a meeting with Detroit officials – will come before the [Michigan Supreme Court](#) in oral arguments next week.

The plaintiffs in *Bowens, et al. v ARY, Inc., et al.* went to Detroit’s Joe Louis Arena in 2000 to express concerns about a sexually explicit video that was to be shown during the “Up in Smoke” tour performance that evening. Gregory J. Bowens, then press secretary to former Mayor Dennis Archer, was accompanied by Detroit Police spokeswoman Paula M. Bridges and police commander Gary A. Brown. According to the plaintiffs, they met with tour promoters in a backstage room and insisted on the conversation not being taped, but tour promoters videotaped them without their knowledge. Portions of that video later appeared in a “bonus track” entitled “Detroit Controversy,” which was marketed with the “Up in Smoke” tour DVD. A Michigan Court of Appeals panel split on the issue of whether the plaintiffs can proceed with their eavesdropping claim; the majority held that the plaintiffs had presented sufficient evidence to go to a jury with their claim, while the dissenting judge maintained that there was insufficient evidence to show that the plaintiffs had “a reasonable expectation that their conversation with tour officials would be private, let alone that it would not be recorded.” The defendants appealing that 2009 Court of Appeals decision include rap performer Dr. Dre, who organized and performed in the “Up in Smoke” tour.

The Court will also hear arguments in *In re Investigative Subpoenas, Grand Traverse County Prosecutor v Meijer, Inc., et al.*, in which a county prosecutor is investigating whether Meijer, Inc, violated state campaign finance laws when it promoted a recall – ultimately unsuccessful – of Acme Township Board members who opposed the construction of a new Meijer store in the area. At issue is whether the county prosecutor has the authority to investigate and prosecute violations of the Michigan Campaign Finance Act, MCL 169.201 *et seq.* A circuit judge quashed subpoenas that the prosecutor directed to Meijer and employees of the Dickinson Wright law firm, saying that only the Secretary of State and Attorney General have the power to investigate campaign finance law violations. But the Michigan Court of Appeals disagreed, finding that the campaign finance law did not contain any language expressly indicating that the legislature intended to prevent county prosecutors from “entertain[ing] the criminal prosecution of campaign finance law violators.”

The remaining 15 arguments involve issues of civil procedure, civil rights, criminal, governmental immunity, medical malpractice, property, tax, and worker's compensation law.

Court will be held on **January 19, 20, and 21**, beginning at **9:30 a.m.** each day. Oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that 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 are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Wednesday, January 19
Morning Session

PEOPLE v HAILEY (case nos. 140514-5)

Prosecuting attorney: David A. McCreedy/(313) 224-3836

Attorney for defendant Arthur Ronald Hailey, III: Douglas W. Baker/(313) 256-9833

Attorneys for amicus curiae Criminal Defense Attorneys of Michigan, National Legal Aid and Defender Association, and the Innocence Network: John R. Minock/(734) 668-2200, Stuart G. Friedman/(248) 228-3322, David A. Moran/(734) 763-9353

Trial Court: Wayne County Circuit Court

At issue: Following a traffic stop, the defendant was arrested on outstanding warrants; the vehicle that he had been driving was impounded. Four days later, he was arrested for possessing carjacked vehicles. The arresting officer directed another officer to go to the impound lot and conduct an inventory of the vehicle that had been impounded during defendant's earlier traffic stop. The search disclosed two hidden weapons, and the vehicle itself was found to have parts taken from another vehicle. The defendant was convicted of carjacking, armed robbery, two counts of receiving and concealing stolen vehicles, receiving and concealing a stolen weapon, carrying a concealed weapon, and felony-firearm. The Court of Appeals affirmed. Was trial counsel ineffective for failing to investigate two witnesses who say they, not defendant, committed the crimes? Was trial counsel ineffective for failing to move to suppress evidence seized during the search of the defendant's vehicle?

Background: Arthur Hailey was stopped for failing to signal when making a turn. When police discovered that Hailey did not have his driver's license and had outstanding arrest warrants, they arrested him and impounded the Dodge Intrepid that he was driving. Four days later, in response to an anonymous tip, police arrested eight people, including Hailey, for possessing three carjacked vehicles. Hailey had the keys to a stolen vehicle in his possession. On learning that Hailey's car was impounded, the arresting officer ordered an inventory of the vehicle; the inventory turned up firearms and stolen car parts. Two carjacking victims identified Hailey as one of the people who stole their vehicles.

Hailey was charged in three separate cases with multiple charges relating to the carjackings and robberies. The cases were consolidated and Hailey was tried before a jury; he denied taking part in the crimes. The jury acquitted Hailey of some charges, but convicted him of carjacking, armed robbery, two counts of receiving and concealing stolen vehicles, receiving and concealing a stolen weapon, carrying a concealed weapon, and felony-firearm.

Hailey filed a motion for a new trial, arguing that his lawyer was ineffective because she

had not contacted two witnesses, Hailey's brother and a friend. Hailey claimed that they committed one of the carjackings he had been convicted of; at the motion hearing, both men appeared and admitted their guilt. Hailey also argued that his attorney should have filed a motion to suppress the evidence found in his car during the inventory, which Hailey contended was an illegal search. But the trial court disagreed and denied Hailey's motion. The trial court rejected the two witnesses' testimony, noting that they had nothing to lose by admitting to the carjacking since both were already serving lengthy prison sentences. Moreover, Jerome Hailey denied that he had written a letter confessing to the carjacking. For these and other reasons, the trial court concluded that Hailey was not deprived of effective assistance of counsel.

Hailey appealed to the Court of Appeals, which affirmed in a split unpublished per curiam opinion. "[E]ffective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise," the majority noted. All three judges agreed that Hailey's attorney was not ineffective for failing to move to suppress the evidence found in Hailey's impounded car. A majority also rejected Hailey's claim that his attorney's representation fell below an objective standard of reasonableness; while the attorney admitted that she did not contact the two men, she based that decision on "her professional opinion [that] they never would have confessed at defendant's trial," the majority said. Hailey had also failed to show that there was a reasonable probability that there would have been a different outcome at trial if his trial counsel had contacted his brother and cousin, the majority said. The dissenting judge would have held that the attorney's failure to properly investigate Hailey's claim that the other two men committed the carjacking fell below an objective standard of reasonableness and prejudiced Hailey's trial. He would have reversed the trial court and granted Hailey a new trial. Hailey appeals.

BOWENS, et al. v ARY, INC., et al. (case no. 140296)

Attorneys for plaintiffs Gregory J. Bowens, Paula M. Bridges, and Gary A. Brown: Glenn D. Oliver/(313) 833-9434, David K. Tillman/(313) 832-6000

Attorneys for defendants ARY, Inc., d/b/a Aftermath Entertainment, Phillip J. Atwell, Chronic 2001 Touring, Inc., Geronimo Film Productions, Inc., and Andre Young: Herschel P. Fink/(313) 465-7400, Howard E. King/(310) 282-8989

Trial Court: Wayne County Circuit Court

At issue: This case involves the application of the Michigan eavesdropping statute, MCL 750.5398a *et seq.*, to the defendants' videotaping of a back-stage conversation that included the defendants, and city of Detroit officials. Was the videotaped conversation a "private conversation" or "private discourse" for purposes of the eavesdropping statutes, MCL 750.539a, *et seq.*? Under what circumstances does a public official or police officer possess a reasonable expectation of privacy under MCL 750.539c in conversations with private citizens in pursuit of official business?

Background: On July 6, 2000, the "Up in Smoke" tour, featuring performers known as Dr. Dre (Andre Young), Snoop Dogg, Ice Cube, and Eminem, was scheduled to take place at Detroit's Joe Louis Arena. That afternoon, several Detroit officials and police representatives met backstage with the tour's organizers, expressing concern about a sexually explicit video introduction to Dr. Dre and Snoop Dogg's performances. The Detroit officials advised the tour organizers that, the video violated city ordinances, and that the city would take legal action and disrupt power to the arena if the video was played. The promoters did not play the controversial video, but, in a "bonus track" later marketed with a DVD of the tour, they used portions of a videotape of their meeting with the Detroit officials.

The Detroit officials sued the promoters and others for invasion of privacy, fraud, and eavesdropping. The eavesdropping claim is based on MCL 750.539c (eavesdropping upon private

conversation), which provides in part: “Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both.”

In 2003, the trial court granted summary disposition to the defendants and dismissed the plaintiffs’ claims, finding in part that the plaintiffs had had no reasonable expectation of privacy in the conversation. But in 2005, the Court of Appeals, in an unpublished decision, held that the trial court erred in dismissing the eavesdropping claim. The Court of Appeals remanded the case to the trial court, saying that there were outstanding questions of material fact as to whether the video was secretly taped and whether the plaintiffs had a reasonable expectation that their conversation would be private. On remand, the trial court again granted summary disposition to the defendants, finding as a matter of law that the plaintiffs had no reasonable expectation of privacy. In 2009, in an unpublished per curiam opinion, the Court of Appeals majority affirmed in part, reversed in part, and remanded for further proceedings. The majority held that there was sufficient evidence to allow the plaintiffs to move forward with their eavesdropping claim, and that “a jury must make the determination whether plaintiffs’ expectation of privacy under the circumstances presented here qualified as a reasonable one.” The dissenting judge would have affirmed the trial court in total. He concluded that “[a]n objective view of the evidence establishes no genuine issue of material fact that plaintiffs lacked a reasonable expectation that their conversation with tour officials would be private, let alone that it would not be recorded.” The defendants appeal.

LIGONS v CRITTENTON HOSPITAL, et al. (case no. 139978)

Attorneys for plaintiff Dujan Ligon, Personal Representative of the Estate of Edris

Ligon: Mark R. Granzotto/(248) 546-4649, Matthew L. Turner/(248) 355-1727

Attorney for defendant Crittenton Hospital, a/k/a Crittenton Hospital Medical Center:

James T. Mellon/(248) 649-1330

Attorney for defendants David Bruce Bauer, M.D., and Rochester Emergency Group, P.C.:

Anita L. Comorski/(313) 964-4500

Trial Court: Oakland County Circuit Court

At issue: The plaintiff filed a medical malpractice complaint, alleging that a delay in treatment by doctors at the defendant hospital caused his mother’s death. The plaintiff mailed a notice of intent to sue and then a supplemental notice; the plaintiff’s medical malpractice complaint was accompanied by two affidavits of merit. The trial court denied the defendant hospital’s motion for summary disposition, which asserted that the notices of intent and the affidavits did not meet the requirements of MCL 600.2912b and MCL 600.2912d. The Court of Appeals held in a published opinion that the plaintiff’s notices were sufficient, but that the affidavits of merit were insufficient due to a lack of a meaningful statement regarding causation. The Court of Appeals ordered that the lawsuit be dismissed with prejudice. May the plaintiff amend his affidavits of merit in light of *Bush v Shabahang*, 484 Mich 156 (2009), or MCL 600.2301? Does the recent amendment of MCR 2.118 apply to the plaintiff’s affidavits of merit?

Background: On January 22, 2002, Edris Ligon went to Crittenton Hospital’s emergency room, following four days of vomiting, diarrhea, and other problems. She was seen by Dr. David Bauer, who treated her for gastroenteritis and dehydration, then discharged her. The next day, she visited her doctor’s office complaining of severe pain. She was sent to Crittenton’s emergency room and was admitted to the hospital. On January 24, emergency surgery was performed, but it failed to save Ligon, who died on January 29, 2002.

Ligons' son Dajuan Ligons claimed that Bauer and Crittenton, and Bauer's professional corporation, Rochester Emergency Group, were liable for medical malpractice. He contended that the hospital should have admitted his mother when she visited the emergency room on January 22, 2002, and that the hospital's delay in treating her caused her death. Ligons mailed a notice of intent to sue, pursuant to MCL 600.2912b, to the three defendants; he later filed a more detailed, supplemental notice of intent. He then filed a medical malpractice complaint against the defendants, along with two affidavits of merit from doctors, as required by MCL 600.2912d. The first affidavit stated in part that Ligons died "[a]s a direct and proximate cause of the imprudent acts and omissions committed by the individuals indentified herein" The doctor who provided the other affidavit opined that "had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in [the first affidavit of merit] ... Edris Ligons would not have died."

Bauer and Rochester Emergency Group, joined by Crittenton, moved to dismiss the case pursuant to MCR 2.116(C)(7); both the notices of intent to sue and the affidavits of merit were deficient, the defendants contended. But the trial court denied the motion, ruling that the notices of intent and affidavits of merit "are substantially in compliance with the statute." In a published opinion, the Court of Appeals reversed the trial court in part. Although the notices of intent to sue were adequate, Ligons' affidavits of merit were not because neither one set forth a sufficient statement regarding proximate cause, the appellate panel said. The only available remedy was dismissal with prejudice, because the limitations period had expired, the Court of Appeals determined. The panel rejected Ligons' argument that he should be able to amend his affidavits of merit pursuant to MCR 2.118 and have the amendment relate back to the date he filed the lawsuit.

Ligons filed a motion for reconsideration, focusing on MCL 600.2301 and the Michigan Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009). MCL 600.2301 states: "The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." In *Bush*, the Michigan Supreme Court held that this statute allows defects in notices of intent to sue to be addressed by way of amendments. The Court of Appeals denied the motion for reconsideration; Ligons appeals.

Afternoon Session

HAMED v WAYNE COUNTY, et al. (case no. 139505)

Attorneys for plaintiff Tara Katherine Hamed: Elmer L. Roller/(248) 335-5000, Gary P. Supanich/(734) 276-6561

Attorneys for defendants Wayne County and Wayne County Sheriff's Department: Mark J. Zausmer, Carson J. Tucker/(248) 851-4111

Attorney for amicus curiae Attorney General Bill Schuette: B. Eric Restuccia/(517) 373-1124

Attorney for amicus curiae Michigan Association of Counties: Richard D. McNulty/(517) 372-9000

Attorney for amicus curiae Michigan Municipal Risk Management Authority: James T. Mellon/(248) 649-1330

Attorney for amicus curiae Michigan Association for Justice: Marla A. Linderman/(810) 220-0600

Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: Marcelyn A. Stepanski/(248) 489-4100

Attorney for amicus curiae Michigan Municipal League and Michigan Municipal League Liability & Property Pool: Julie McCann O'Connor/(248) 433-2000

Attorney for amicus curiae Women Lawyers Association of Michigan: Jennifer B. Salvatore/(734) 663-7550

Trial Court: Wayne County Circuit Court

At issue: The plaintiff was raped by a Wayne County deputy sheriff while in the county jail. She sued Wayne County and the Wayne County Sheriff's Department on various theories of negligence and vicarious liability; she later amended her complaint to add a claim under the Michigan Civil Rights Act. The trial court dismissed the MCRA claim, but the Court of Appeals reversed. Can the defendants be held liable for quid pro quo sexual harassment under MCL 37.2103(i)? Was the plaintiff's incarceration a public service within the meaning of MCL 37.2301(b)? Did the trial court err in permitting the plaintiff to amend her complaint to allege MCRA violations?

Background: While in the Wayne County jail on for alleged probation violations, Tara Hamed was raped by a Wayne County deputy sheriff. The deputy sheriff was fired and later convicted of criminal sexual conduct. Hamed sued him as well as the sheriff, Wayne County, and the Wayne County Sheriff's Department on various theories of negligence and vicarious liability. After discovery – the process by which parties to a lawsuit obtain information from their opponents and others – Hamed was permitted to amend her complaint to include claims against Wayne County and the Wayne County Sheriff's Department under the Michigan Civil Rights Act. MCRA prohibits discrimination on the basis of sex in employment, or in places of public accommodation or public service; the act defines discrimination to include sexual harassment. MCL 37.2103(i)(i), MCL 37.2103(i).

The defendants moved to dismiss Hamed's claims, arguing that MCRA did not apply because the jail is not a public accommodation or public service. The defendants also argued that they could not be held liable for the deputy sheriff's criminal conduct because he acted outside the scope of his employment. Moreover, Hamed's amended complaint should be dismissed because it was untimely filed, made new factual allegations, and was inconsistent with her own testimony, the defendants contended. The trial court granted summary disposition and dismissed the case on the ground that the defendants could not be liable for the sheriff's crime.

Hamed appealed to the Court of Appeals, which reversed in a published opinion. The Court of Appeals panel concluded that MCRA applied to the defendants and that they could be held liable for the deputy sheriff's actions based on a quid pro quo theory of sex harassment. The Court of Appeals also concluded that, because Hamed was not serving a criminal sentence in the jail, her treatment involved "public services" within the meaning of MCRA. Finally, the Court of Appeals held that the trial court did not err in permitting Hamed to amend her complaint to allege the civil rights violation. The defendants appeal.

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP v NAFTALY, et al.
([case no. 140814](#))

IRON MOUNTAIN INFORMATION MANAGEMENT, INC., et al. v NAFTALY, et al.
([case nos. 140817-24](#))

Attorneys for plaintiff Midland Cogeneration Venture Limited Partnership: John D. Pirich, Jason Conti/(313) 465-7000, Gary B. Pasek/(989) 633-7870

Attorneys for plaintiffs Iron Mountain Information Management, Inc., CVS Pharmacy, Inc., and NES Rental Holdings, Inc.: John D. Pirich, Jason Conti/(313) 465-7000

Attorneys for defendants Robert Naftaly, Douglas Roberts, Frederick Morgan, and State Tax Commission: B. Eric Restuccia, Michael R. Bell/(517) 373-3203

Attorneys for amicus curiae American Civil Liberties Union Fund of Michigan: Marshall J. Widick/(313) 496-9472, Michael J. Steinberg, Kary L. Moss/(313) 578-6824

Attorneys for amicus curiae Michigan Manufacturers Association, Michigan Chamber of Commerce and Michigan Retailers Association: Kristin B. Bellar/(517) 318-3100, Robert S. LaBrant/(517) 371-2100, James P. Hallan/(517) 372-5757

Attorney for amicus curiae Michigan Electric Cooperative Association: Sherrill D. Wolford/(517) 374-9100

Trial Courts: Midland, Oakland, Washtenaw, and Wayne County Circuit Courts

At issue: In these cases, the State Tax Commission denied the plaintiffs' requests to reclassify taxable property for tax year 2008. The plaintiffs individually sought relief in circuit court, which was granted, at least to some extent. The defendants' appeals to the Court of Appeals were consolidated. In a published opinion, the Court of Appeals ruled that the circuit courts did not have subject matter jurisdiction over the plaintiffs' claims because MCL 211.34c(6), a provision of the general property tax act, provides that there is no appeal from STC decisions regarding property classification. The Court of Appeals rejected the plaintiffs' claims that the statutory denial of an appeal violated the constitutional guarantee of appeals from administrative decisions provided for in Const 1963, article 6, § 28. Do the circuit courts have subject matter jurisdiction over appeals from a decision of the STC regarding property classification?

Background: The plaintiff in case no. 140814, Midland Cogeneration Venture Limited Partnership (Midland), owns equipment in the city of Midland that is used to generate electricity, which is then resold. The property consists of twelve gas fired turbine generators, twelve heat recovery steam generators, two steam turbines, one back pressure steam turbine and related machinery and equipment. For tax year 2008, the Midland assessor classified the property as "industrial real property." Midland Cogeneration objected and filed a protest of the classification with the local property tax Board of Review in March 2008, claiming that the property should be classified as industrial personal property. The Board of Review rejected that claim.

Midland Cogeneration appealed the board's decision by filing a petition with the State Tax Commission. Under MCL 211.34c(6), the STC "shall arbitrate the petition based on the written petition and the written recommendation of the assessor and the state tax commission staff." The STC considered the recommendations of the assessor, field staff, and the classification appeals hearing group. In two letters, an STC representative advised that the STC had determined that the property should be classified as industrial real property, because the taxpayer was a facility on leased land for utility purposes, which is properly classified as industrial real property under MCL 211.34c(3)(d)(v).

Midland Cogeneration filed suit in Midland County Circuit Court to appeal the STC's decision, and also filed an appeal with the Tax Tribunal. The Tax Tribunal, on its own motion, dismissed the appeal for lack of jurisdiction. In the circuit court case, the defendants filed a motion for summary disposition, asking the court to dismiss Midland Cogeneration's case. The court did not have subject matter jurisdiction over Midland Cogeneration's complaint because MCL 211.34c(6) precludes an appeal, the defendants argued. But the circuit court ruled that § 34c(6) conflicts with Const 1963, art 6, § 28, which guarantees an appeal from administrative decisions. Based on MCL 209.105, the court held, the STC was obligated to issue a formal order. The court further concluded that the STC had a clear duty to reclassify the property. The court issued an

order of mandamus requiring the STC to issue a formal order reclassifying the property as industrial personal property. The defendants appealed to the Court of Appeals.

In case nos. 140817-24, the plaintiffs – CVS Pharmacy, Inc., NES Rental Holdings, Inc., and Iron Mountain Information Management, Inc. – each own property subject to property tax assessment. They describe the property as machinery and equipment, furniture and fixtures that are located on industrial real property. All of the property in question was classified as commercial personal property by the assessor of the local taxing authority. The plaintiffs each petitioned the appropriate board of review to reclassify the property as industrial personal property. In each instance, the board denied the request. The plaintiffs individually petitioned the STC to reclassify the property. In letters sent to the parties, a representative of the STC advised that the STC had considered the recommendations of the assessor, field staff, and the classification appeals hearing group, and determined that the property should be classified as commercial personal property.

CVS filed an action in Oakland County Circuit Court seeking mandamus to have the STC issue a properly promulgated order and to have the court reverse the STC ruling on the merits. The circuit court issued an order of mandamus requiring the STC to issue a formal order reclassifying the property as industrial personal property.

NES and Iron Mountain filed actions in Wayne County Circuit Court and Washtenaw County Circuit Court respectively, seeking the same relief CVS had requested. The Washtenaw County court granted mandamus relief, and ordered the STC to issue a formal order reclassifying the property as industrial personal property. The Wayne County court granted mandamus relief, but declined to consider the merits of the cases. The defendants appealed each order to the Court of Appeals.

The Court of Appeals consolidated all the appeals and, in a published per curiam opinion, reversed the circuit courts in each case. The Court of Appeals held that MCL 211.34c(6) bars an appeal to the courts from the STC's classification decisions. The Court of Appeals found no constitutional infirmity in this provision. Although the statute precludes appeal for the year of the petition, it does not preclude review by other mechanisms, such as filing for a refund once property taxes are paid and pursuing such a claim with the Tax Tribunal and then through the courts, the appellate panel reasoned. Based on its holding, the Court of Appeals found it unnecessary to consider the question of whether the letters were valid orders of the STC. The plaintiffs appeal.

Thursday, January 20
Morning Session

PEOPLE v SLAUGHTER (case no. 141009)

Prosecuting attorneys: Thomas R. Grden, Rae Ann Ruddy/(248) 858-0656

Attorney for defendant Mark Slaughter: Randall P. Upshaw/(248) 569-7776

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792

Trial Court: Oakland County Circuit Court

At issue: After the defendant's neighbor called the fire department to report that water was running down the inside of a wall that she shared with the defendant's apartment and coming out in her basement over her fuse box. In response, a firefighter entered the defendant's home without a search warrant to see if a dangerous condition existed. While there, the firefighter saw marijuana plants and reported this to the police, who obtained a search warrant and seized the plants. Criminal charges were brought against the defendant. The trial court suppressed the evidence,

finding that the defendant's Fourth Amendment rights were violated by the firefighter's illegal entry. The Court of Appeals affirmed. Do the actions of the firefighters fall under the "community caretaker" exception to probable cause requirements? Does the "emergency aid" aspect of the community caretaker exception apply in this case? Did the Court of Appeals err when it held that the record did not establish that the firefighters acted reasonably in this case?

Background: Firefighters entered Mark Slaughter's townhouse unit after receiving a call from his next-door neighbor; the neighbor had discovered water running between her wall and his. The neighbor knocked at Slaughter's door, but after receiving no response, she contacted the property management company, who told her they did not have a key or contact number for Slaughter, but suggested she call the fire department. The firefighters first knocked on Slaughter's door, then, when no one answered, entered his unit through an open window to investigate the water issue. A firefighter went to the basement to turn off the water in Slaughter's apartment and discovered marijuana plants; after leaving the apartment, the firefighter informed the police. Officers obtained a search warrant, executed it, and seized the marijuana.

Slaughter was charged with "manufacturing" more than 20 but less than 200 marijuana plants. He brought a motion to suppress the evidence, arguing that the firefighter unlawfully entered his apartment without probable cause, and that his Fourth Amendment rights were violated. The prosecutor responded that the search was justified under the "community caretaker" exception to the Fourth Amendment's probable cause requirement. Under the community caretaker doctrine, where police officers discover evidence of a crime while performing "caretaking" functions, such as aiding people in distress, that evidence is often admissible despite the lack of a search warrant; *People v Davis*, 442 Mich 1, 20; 497 NW2d 910 (1993).

After holding an evidentiary hearing, the trial court dismissed the charges. The evidence should be suppressed, the court said, because the community caretaker exception to the search warrant requirement did not cover "anything related to the investigation of a possible fire hazard."

The prosecutor appealed to the Court of Appeals, arguing that the firefighter's actions were clearly within the community caretaker exception, and that the trial court erred in suppressing the evidence. The Court of Appeals affirmed in a split, unpublished opinion. The majority concluded that searches performed by firefighters might fit within the scope of the community caretaker exception, but that there was not adequate information in the record to conclude that the firefighters acted reasonably in entering Slaughter's apartment. The dissenting Court of Appeals judge would have held that the firefighters acted reasonably and within the parameters of the community caretaker exception. The prosecutor appeals.

PEOPLE v JONES (case no. 139833)

Prosecuting attorney: Thomas M. Chambers/(313) 224-5749

Attorney for defendant John Vincent Jones: John F. Royal/(313) 962-3738

Trial Court: Wayne County Circuit Court

At issue: The defendant absconded on bond pending appeal after he was sentenced but before he was taken into custody by the Michigan Department of Corrections. He was arrested years later on the outstanding warrant by federal authorities, who also held him to answer for federal crimes. Ultimately, the defendant was brought before the state trial court; the defendant claimed he should receive jail credit for the time he was in federal custody. The trial court granted credit for all time the defendant had served between his arrest on the outstanding warrant and the date of the hearing. But the Court of Appeals reversed, holding that the defendant was not entitled to credit for time served while awaiting his federal sentence; the appellate panel stated that he was entitled to credit for time served on the federal sentence itself. Is the defendant entitled to credit for all time served

in federal custody after federal authorities arrested him on the outstanding Michigan warrant in this case? In light of the concurrent nature of the federal and state sentences, should the amount of credit the defendant receives in this case depend on (a) whether the defendant has been sentenced for the federal offense; and (b) whether the defendant has received or might receive credit toward his federal sentence from the federal courts?

Background: After his 1996 conditional guilty plea to possession of between 225 and 650 grams of cocaine, and after being sentenced, John Jones was granted bond pending appeal. He remained free on bond throughout much of the lengthy appellate process. But he fled in 2002, shortly after the Court of Appeals issued an order directing the trial court to immediately revoke Jones' bond and remand him to the custody of the Michigan Department of Corrections.

A warrant for Jones' arrest issued immediately. Four years later, in May 2006, Jones was apprehended on the outstanding warrant by federal authorities, who also sought to try him for federal drug crimes. Over the next year, Jones was lodged in various Michigan jails while federal authorities maintained custody of him for trial on the federal charges. Federal authorities made no effort to notify Michigan authorities that Jones had been apprehended on the warrant, and declined writs of habeas corpus from the state circuit court once that court discovered that Jones had been apprehended. Ultimately, Jones was brought before the circuit court and, in 2008, the trial court held a hearing on whether he was entitled to jail credit for this period of federal custody. The trial court granted his motion and awarded him 675 days of credit.

The prosecution sought leave to appeal to the Court of Appeals, arguing that Jones should not receive credit on both his state and federal sentences for the time he was in federal custody. The prosecutor cited 18 USC 3585(b), which provides that "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences-- (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence."

On leave granted, the Court of Appeals reversed in an unpublished per curiam opinion, vacating the amended judgment of sentence and remanding for a determination of whether Jones has been, or will be, given credit against his federal sentence for time served since his arrest on May 12, 2006. The appellate court said that "it is untenable for this Court to affirm the trial court's order without knowing whether defendant has received credit on his federal sentence for the time he spent in federal custody before his federal sentence." Jones appeals.

PEOPLE v BONILLA-MACHADO (case no. 140510)

Prosecuting attorney: Mark G. Sands/(517) 373-4875

Attorney for defendant Johnny Bonilla-Machado: Matthew L. Posner/(231) 271-4990

Trial Court: Ionia County Circuit Court

At issue: The defendant threw toilet water on two different corrections officers in two separate incidents. He convicted of assault on a prison employee with respect to each incident, and sentenced to concurrent terms of 30 to 90 months in prison. Was the defendant deprived of his right to testify? Did the trial court understand that it had the discretion to impose less than the enhanced maximum sentence under the habitual offender statute, MCL 769.10? Did the trial court err in scoring the minimum sentencing guidelines (particularly Offense Variable 13, continuing pattern of criminal behavior)?

Background: Johnny Bonilla-Machado was serving prison terms for unarmed robbery and attempted carjacking in the Bellamy Creek Correctional Facility in Ionia County. While in prison,

Bonilla-Machado caused his toilet to overflow onto the floor of his cell and then splashed water onto Corrections Officers Shawn Fuller and Ryan Kohl. Bonilla-Machado was charged, as a second habitual offender, with two counts of assaulting a prison employee. He was tried before a jury; Fuller and Kohl testified for the prosecution. At the close of the prosecution's case, the trial judge asked if Bonilla-Machado wanted to testify. After being advised by his attorney that anything that he said could be used against him, Bonilla-Machado told the trial judge that he did not intend to testify. The jury convicted Bonilla-Machado as charged.

At sentencing, Bonilla-Machado raised several objections; among other things, he argued that the trial court improperly scored Offense Variable 13, (MCL 777.43, continuing pattern of criminal behavior), for which the court assessed 10 points toward the sentence. The trial court overruled the objections and sentenced Bonilla-Machado to concurrent prison terms of 2.5 to 7.5 years, consecutive to the prison terms that he was already serving. Bonilla-Machado objected to the sentence, and the trial judge responded: "Well, you're getting 2 years and 6 months to 7 years and 6 months. That's the sentence. That's what the statute says it has to be."

Bonilla-Machado appealed by right to the Court of Appeals, claiming that he had been misinformed about his right to testify at trial. He also challenged the scoring of two offense variables, including OV 13, and argued that the trial court did not understand that it had some discretion with regard to his sentencing. Finally, he claimed that his trial attorney provided constitutionally ineffective counsel. But, in an unpublished per curiam opinion, the Court of Appeals affirmed Bonilla-Machado's convictions, finding no error in the handling of defendant's right to testify. With respect to the maximum sentence, the Court of Appeals accepted the prosecutor's recommendation to remand the case to the trial court to clarify whether the judge understood that he had discretion with respect to the habitual-offender enhanced maximum sentence. The Court of Appeals directed that, if the judge had not understood that he had discretion regarding sentencing, the judge was to resentence Bonilla-Machado. The Court of Appeals agreed with Bonilla-Machado that the trial court improperly scored OV 13 and should resentence – but on its own motion, the appellate court determined that OV 13 should be scored at 25 points rather than 10 points, as the trial court had done. The 25-point assessment was appropriate because assaulting a prison employee is a crime against a person, despite the statutory categorization of this crime as a crime against public safety, the appellate court said. Bonilla-Machado appeals.

PLUNKETT v DEPARTMENT OF TRANSPORTATION (case no. 140193)

Attorney for plaintiff Jerome Plunkett, as Personal Representative of the Estate of Holly

Marie Plunkett: Victor S. Valenti/(248) 355-5555

Attorney for defendant Department of Transportation: John P. Mack/(517) 373-1470

Attorney for amicus curiae Michigan County Road Commission Self-Insurance Pool:

William L. Henn/(616) 774-8000

Trial Court: Ingham County Circuit Court

At issue: The plaintiff's decedent died when her van hydroplaned on a rutted section of US-127 in Clare County. The defendant's motion for summary disposition on grounds of governmental immunity was denied. The defendant appealed by right, and the Court of Appeals majority reversed in part, remanding for dismissal with prejudice, with one judge dissenting. Does the highway exception to governmental immunity, MCL 691.1402(1), apply to this case?

Background: Holly Marie Plunkett was killed after she lost control of her vehicle while driving on southbound US-127 and struck a tree. According to the police report, "it was raining hard at the time, [and] there was some standing water in the roadway where the vehicle tires traveled." Her

husband, Jerome Plunkett, sued the Michigan Department of Transportation, alleging that Holly Plunkett “suddenly and unexpectedly lost control of her vehicle due to the dangerous and defective conditions which existed on/at the actual physical structure of the roadbed surface of the highway at issue” The lawsuit further alleged that, as a direct and proximate result of MDOT’s failure to maintain the highway in reasonable repair and in a condition reasonable safe and fit for travel, defects in the roadway allowed rainfall to accumulate, causing Holly Plunkett’s van to hydroplane. MDOT filed a motion for summary disposition, arguing, among other things, that it was entitled to governmental immunity under MCL 691.1402. The governmental immunity act provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function. One exception to this rule is for claims arising from an unsafe highway, MCL 691.1402(1). The highway exception to governmental immunity provides that “each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover damages suffered by him or her from the governmental agency.”

The trial court denied MDOT’s motion, but the Court of Appeals reversed in a published per curiam opinion. The panel concluded that Plunkett’s claim could be broken down into two parts: (1) that a design defect (relating to the cross-slope of the highway) allowed water to collect on the roadbed and did not adequately allow water to drain off the roadbed; and (2) that the rutting defects in the road, along with the pooled water, caused the accident. The Court of Appeals held that the first aspect of Plunkett’s claim should have been dismissed, because MDOT is immune from liability for claims related to the construction and design of a highway, including making sure that the highway has a specific geometry or cross-slope. The second aspect of Plunkett’s claim should also be dismissed, the panel explained, because a defect that simply causes the accumulation of ice, snow, or water is not sufficient to sustain an action under the highway exception, citing *Haliw v City of Sterling Heights*, 464 Mich 297, 308 (2001). The Court of Appeals remanded the case to the trial court for entry of an order granting the city’s motion for summary disposition. Plunkett appeals.

Afternoon Session

LAWRENCE M. CLARKE, INC. v RICHCO CONSTRUCTION, INC., et al. (case no. 140683)

Attorney for plaintiff Lawrence M. Clarke, Inc.: Christopher G. Bovid/(517) 540-1700

Attorney for defendants Richco Construction, Inc., Ronald J. Richards, Jr., and Thomas Richards: John D. Staran/(248) 731-3080

Trial Court: Monroe County Circuit Court

At issue: The plaintiff sued the defendant construction company for breach of contract, and the two individual defendants, its shareholders and corporate officers, for fraud. Although the company’s Wayne County office had been abandoned, corporate records on file with the state listed that address for the company. The circuit court allowed service of the lawsuit by mail and posting at the abandoned address, and by publishing in a newspaper in Monroe County where the construction work occurred. The defendants failed to respond to the lawsuit, and the plaintiff obtained a default judgment. After the individual defendants’ personal property was seized from their homes, they filed a motion to set aside the default judgment, which was denied. The Court of

Appeals affirmed. Did the circuit court have personal jurisdiction over any or all of the defendants? If so, did the circuit court abuse its discretion in denying the motion to set aside the default judgment?

Background: Lawrence M. Clarke, Inc. was hired to supply labor and material for a project in Ash Township, Monroe County to develop a residential subdivision known as Carleton Crossings. In the summer of 2003, Clarke hired Richco Construction, Inc. as a subcontractor to work on the water, storm, and sanitary sewer systems for the project. The principals and apparently the sole shareholders of Richco were Ronald J. Richards, Jr., and Thomas A. Richards. Clarke sued Richco, claimed that construction and repair work was not properly performed, and that Clarke incurred considerable expense in rebuilding the infrastructure that Richco was supposed to build; Clarke's complaint alleged breach of contract by Richco and fraud by Ronald and Thomas Richards. But Clarke's complaint was dismissed after it could not serve the defendants: Richco abandoned its registered corporate office with no forwarding address, and Clarke could not find a current address for either shareholder.

Clarke later filed a second complaint with a motion for alternate service. In the motion Clarke explained its prior, unsuccessful efforts to locate the defendants. The trial court granted the motion, allowing Clarke to serve the defendants by posting the documents at Richco's registered address, sending the documents to the individual defendants by U.S. mail to the same address, and publishing a copy of the order in a Monroe County newspaper pursuant to Michigan Court Rule 2.106. None of the defendants responded to the complaint; ultimately, following an evidentiary hearing, Clarke obtained a default and judgment of \$371,598 against Richco and the two shareholders. Several months later, Clarke located the individual defendants and began to execute on their personal assets. The defendants filed an emergency motion to set aside the default judgment; the trial court denied their motion, largely because the defendants failed to provide an affidavit of meritorious defense (although one was offered during the motion hearing). The court also denied the defendants' motion for reconsideration (supported by affidavits) and their motion to stay enforcement of the judgment.

The defendants appealed to the Court of Appeals, which affirmed in an unpublished per curiam opinion. The Court of Appeals held that the alternate service was reasonably calculated under the circumstances to notify the defendants of the lawsuit, and that Clarke had conducted a diligent search to find the defendants. The Court of Appeals also held that the trial court had personal jurisdiction over the defendants, and that the trial court properly denied the motion to set aside the default judgment because the defendants did not file an affidavit in support of the motion. The defendants appeal.

PEOPLE v BRANDT (case no. 140744)

Prosecuting attorney: Jerrold E. Schrottenboer/(517) 788-4283

Attorney for defendant Terry Lee Brandt: Valerie R. Newman/(313) 256-9833

Trial Court: Jackson County Circuit Court

At issue: The defendant, the chief financial officer of a credit union, was convicted by a jury and sentenced to prison for five to 20 years for embezzlement over \$100,000, consecutive to six months in jail for embezzlement from a financial institution. The Court of Appeals affirmed the convictions, but remanded for resentencing, holding that the trial court erred in assessing 10 points for Offense Variable 10, MCL 777.40(3)(c) and (d) (exploitation of a vulnerable victim). May points for abuse of authority status against a vulnerable victim be assessed for Offense Variable 10, where the defendant was a financial officer for a credit union and embezzled funds from that financial institution?

Background: Terry Brandt, the chief financial officer for Cascades Community Credit Union, was charged with two counts of felony embezzlement. According to trial testimony, Brandt was in charge of keeping track of the books and investments. The credit union's chief executive officer discovered several unauthorized wire transfers to day-trading accounts in Brandt's name. When confronted, Brandt acknowledged that he had transferred the money to his accounts. He explained that he had a "gambling addiction" when it came to playing options in the stock market. It was ultimately determined that Brandt had stolen about \$340,000.

Brandt was charged with embezzlement of more than \$100,000 by an agent of the victim, and embezzlement from a financial institution. A jury found Brandt guilty of both charges. At sentencing, defense counsel raised several objections, including one to the scoring of Offense Variable 10, MCL 777.40(3)(c) and (d) (exploitation of a vulnerable victim). With regard to OV 10, the trial court found that Brandt's fiduciary relationship placed him in a position of trust, and that the variable was properly scored. The trial court imposed consecutive sentences. First, Brandt was to spend 180 days in jail for embezzlement from a financial institution (waived on payment of \$5,000 to cover the credit union's insurance deductible), and then he would transfer to a prison term of five to 20 years for embezzlement over \$100,000.

Brandt appealed by right. In an unpublished per curiam opinion, the Court of Appeals affirmed Brandt's convictions, but remanded the case to the trial court for resentencing. The Court of Appeals held that OV 10 should not have been scored because Brandt did not "abuse his authority status" to exploit the credit union. The prosecutor appeals.

POLLARD v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (case no. 140322)

Attorney for plaintiff William Pollard: Joseph H. Howitt/(248) 350-3700

Attorney for defendant Suburban Mobility Authority for Regional Transportation, d/b/a SMART: Hal O. Carroll/(248) 312-2800

Attorney for amicus curiae John A. Braden: John A. Braden/(231) 924-6544

Attorney for amicus curiae Wayne County: Robert S. Gazall/(313) 224-6290

Attorney for amicus curiae Michigan Department of Transportation: Patrick F. Isom/(517) 373-1479

Attorney for amicus curiae Michigan Association of Counties: Richard D. McNulty/(517) 372-9000

Attorney for amicus curiae Board of Trustees of Michigan State University: Michael J. Kiley/(517) 353-1798

Attorney for amicus curiae Michigan County Road Commission Self-Insurance Pool: William L. Henn/(616) 774-8000

Attorney for amicus curiae Michigan Association for Justice: Barry J. Gates/(734) 769-5855

Trial Court: Wayne County Circuit Court

At issue: When a Detroit bus lurched forward shortly after he boarded, the plaintiff fell and broke his hip. The fall occurred on August 5, 2007. The first notice that the defendant received of the injury was service of the complaint on November 14, 2007. The defendant filed a motion for partial summary disposition, arguing that the 60-day notice provisions of MCL 124.419 barred the negligence claim. The trial court denied the motion. In an unpublished opinion per curiam, the Court of Appeals reversed and remanded for further proceedings consistent with its opinion. Is the plaintiff's claim barred by the 60-day notice provision? Should this Court reconsider *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007)?

Background: William Pollard boarded a Detroit bus on the morning of August 5, 2007. When the

bus lurched forward, Pollard fell and was injured. The bus driver called an ambulance, which transported Pollard to a hospital. Pollard was treated for a hip fracture, and also suffered a heart attack. After the incident, an agent of Suburban Mobility Authority for Regional Transportation sent Pollard a claim form. Pollard did not complete and return the form; instead, he sued SMART on November 7, 2007, claiming that the bus driver negligently operated the bus, causing him to fall. He also claimed that he was entitled to no-fault benefits. The complaint was served on SMART on November 14, 2007.

SMART filed a motion for partial summary disposition, arguing that the negligence claim was barred by MCL 124.419 and *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007). MCL 124.419 provides: “All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority.” In *Rowland*, the Michigan Supreme Court held that a different statutory notice provision, at MCL 691.1404, must be enforced as written. SMART argued that, under MCL 124.419 and *Rowland*, the negligence claim must be dismissed due to Pollard’s failure to comply with the statutory notice requirement. The trial court denied SMART’s motion for partial summary disposition, but the Court of Appeals reversed in an unpublished per curiam opinion. The panel agreed with SMART that, under the language of the statute, Pollard was obligated to give SMART notice of his claim within 60 days, and that he did not do so. Pollard appeals.

Friday, January 21
Morning Session Only

IN RE INVESTIGATIVE SUBPOENAS (case nos. 140297, 140299)

Attorney for petitioner Grand Traverse County Prosecutor: Alan R. Schneider/(231) 922-4600

Attorneys for respondent Meijer, Inc.: John D. Pirich, Andrea L. Hansen/(517) 377-0712

Attorneys for respondents Dickinson Wright Employees: Eugene Driker, Sharon M. Woods/(313) 596-9304

Attorney for amicus curiae League of Women Voters of Michigan and Michigan Campaign Finance Network: John P. Mayer/(734) 558-5593

Attorney for amicus curiae Concerned Citizens of Acme Township: Michael H. Dettmer/(231) 946-3008

Attorney for amicus curiae Secretary of State Terri Lynn Land: Heather S. Meingast/(517) 373-6889

Attorneys for amicus curiae Michigan Education Association, Michigan Teamsters, Michigan Chamber of Commerce, Michael D. Bishop, Senate Majority Leader, Michael Prusi, Senate Democratic Leader, Michigan Retailers Association, and Michigan Association of Realtors: Arthur Przybylowicz/(517) 332-6551, Kevin O’Neill/(313) 359-9888, Robert S. LaBrant/(517) 371-2100, Alfred H. Hall/(517) 373-3330, Catherine L. McClure/(517) 373-1029, James P. Hallan/(517) 372-5757, Gregory McClelland/(517) 482-4890

Trial Court: Grand Traverse County Circuit Court

At issue: Does a county prosecutor have the authority to investigate and prosecute violations of the Michigan Campaign Finance Act, MCL 169.201 *et seq*? The trial court agreed with the respondents that the MCFA specifically vests the Secretary of State and Attorney General with the exclusive jurisdiction to investigate campaign finance law violations, and dismissed, for lack of jurisdiction, the petitioning county prosecutor's motion to compel the respondents' compliance with investigative subpoenas issued pursuant to MCL 767A.2(1). The Court of Appeals reversed the trial court in a published opinion.

Background: On February 7, 2007, Acme Township held an election to determine whether any township trustees should be recalled. About a year later, the county prosecutor filed a petition in the Grand Traverse County Circuit Court, seeking authorization to issue investigative subpoenas pursuant to MCL 767A.2(1), which states, "A prosecuting attorney may petition the district court, the circuit court, or the recorder's court in writing for authorization to issue 1 or more subpoenas to investigate the commission of a felony as provided in this chapter." The petition stated that the county prosecutor was investigating an alleged violation of the MCFA, MCL 169.254, which prohibits corporations, their agents, and certain others from making election campaign contributions. The circuit court authorized the investigative subpoenas, finding "reasonable cause to believe a felony has been committed and those persons who are the subject of the petition may have knowledge regarding the felony." Two subpoena recipients, respondents Meijer, Inc., and the Dickinson Wright employees, refused to produce information sought by the subpoenas. The prosecutor then filed a motion to compel their compliance.

Meijer and the Dickinson Wright employees moved to quash the subpoenas and to dismiss the proceeding for lack of jurisdiction. Their argument focused on MCL 169.215, which provides an enforcement mechanism for MCFA. The statute permits complaints to be filed with the Secretary of State, and states, at subsection (9), that "[t]he secretary of state shall investigate the allegations under the rules promulgated under this act" Meijer and the Dickinson Wright employees argued that, because the MCFA vests the Secretary of State with the exclusive jurisdiction to investigate and enforce campaign finance law violations, the county prosecutor had no legal basis for seeking the subpoenas and the circuit court did not have authority to issue or enforce the subpoenas. The circuit court agreed, and granted the motion to quash the subpoenas. The circuit judge concluded that the legislature "clearly intended to vest exclusive jurisdiction for enforcement of the MCFA in the Secretary of State and, upon her request, in the Attorney General."

The prosecutor appealed to the Court of Appeals, which reversed the lower court in a published opinion. The Court of Appeals held that MCFA did not contain any language expressly indicating that the legislature intended to divest county prosecutors of their general authority to prosecute felonies. Although the act authorizes the Secretary of State to "correct" and "prevent" violations, MCL 169.215(1), the Court of Appeals explained, "nothing in the MCFA supplies the secretary with the power to prosecute *criminal* infractions." The panel added: "Had the Legislature intended that civil enforcement by the Secretary of State would preclude all related criminal prosecutions, it would not have incorporated in the MCFA an admonition that '[a] civil fine is in addition to, but not limited by, a criminal penalty prescribed by this act.' MCL 169.215(14). Absent a clear and unambiguous expression that the Legislature intended to limit a prosecutor's authority, we divine in MCL 169.215 no intent to divest the circuit court of jurisdiction to entertain the criminal prosecution of campaign finance law violators." Meijer and the Dickinson Wright employees appeal.

FERDON v STERLING PERFORMANCE, INC., et al. (case no. 140723)

Attorney for plaintiff Mary A. Ferdon: Ronald D. Glotta/(313) 963-1320

Attorney for defendants Sterling Performance, Inc. and West American Insurance Company: Gerald M. Marcinkoski/(248) 433-1414

Tribunal: Workers' Compensation Appellate Commission

At issue: The Workers' Compensation Appellate Commission dismissed the plaintiff's appeal because she failed to file all transcripts of the proceedings at the Board of Magistrates and failed to provide sufficient cause to excuse this lapse. Did the Commission abuse its discretion in dismissing the plaintiff's appeal for her failure to file a seven-page transcript that contained no substantive information? If the Commission abused its discretion, what less harsh action would have been appropriate?

Background: After a magistrate denied Mary Ferdon's claim for worker's compensation benefits, Ferdon appealed that decision to the Workers' Compensation Appellate Commission. In order to pursue her appeal, Ferdon was obligated to file a copy of "the transcript of the hearing" within 60 days, pursuant to MCL 418.861a(5). Subsection (5) provides that, "[f]or sufficient cause shown, the commission may grant further time in which to file a transcript." There were two hearings on the record before the magistrate: the first on May 7, 2008, the original date set for trial, where an adjournment was entered to allow the parties more time to try and reach a settlement, and the second on June 3, 2008, when the full-fledged trial took place. Ferdon ordered and paid for both transcripts. The May 7 transcript was seven pages long; the June 3 transcript was 194 pages long.

The WCAC received the June 3 transcript within the 60-day filing period, but not the May 7 transcript. When Ferdon did not make a timely request for an extension to file the May 7 transcript, the WCAC sent her a 14-day show cause order, explaining that "because [Ferdon] has failed to timely file a complete transcript for all proceedings or a timely request for an extension of time, the Commissioner believes that [Ferdon] is required to show cause why the claim for review should not be dismissed." In response to this order, Ferdon's attorney submitted an affidavit signed by Ferdon, stating that she had ordered, paid for, and received both transcripts. The affidavit acknowledged that the May 7 transcript was "the missing transcript," asserted that the May 7 transcript "contains no substantive information," and that "the defendants . . . were not unduly harmed by the omission of the May 7, 2008 transcript." Ferdon also provided a copy of the May 7 transcript. The WCAC, in a split vote, concluded that this claim of good cause was not persuasive and dismissed Ferdon's appeal. The WCAC majority advised, "Appellant is obligated to submit all transcripts on a timely basis, not just those that counsel deems 'relevant'." The dissenter concluded that "[d]ismissal is too harsh a remedy for appellant's transgression."

Ferdon moved for reinstatement of her appeal, but the WCAC denied the motion for reconsideration. Ferdon sought review in the Court of Appeals, but that court denied leave to appeal for lack of merit in the grounds presented. Ferdon appeals.

PEOPLE v BREIDENBACH (case no. 140153)

Prosecuting attorney: Donald A. Kuebler/(810) 257-3248

Attorney for defendant Anthony James Breidenbach: Jonathan B. D. Simon/(248) 433-1980

Trial Court: Genesee County Circuit Court

At issue: The defendant exposed himself to a woman at a bookstore; he was charged with "indecent exposure as a sexually delinquent person." At trial, the prosecutor presented testimony related to two prior similar convictions, and the defendant's parole agent testified about his criminal history of related offenses. The jury convicted him as charged, and the judge sentenced him to one day to life in prison. The defendant appealed. The Court of Appeals granted the

defendant's motion to remand, retaining jurisdiction. On remand, the trial judge granted the defendant's motion for a new trial on the basis of *People v Helzer*, 404 Mich 410 (1978), which holds that the criminal delinquency aspect of the charge must be tried separately, before a different jury. The prosecutor argued in the Court of Appeals that *Helzer* was incorrectly decided and, in the alternative, that the defendant had waived the *Helzer* issue. The Court of Appeals denied relief. Should *People v Helzer*, 404 Mich 410 (1978), be reconsidered? Did the defendant waive or forfeit his right to a second jury's determination of his status as a sexual delinquent? Was any error harmless?

Background: Anthony Breidenbach was charged with "indecent exposure as a sexually delinquent person" after he exposed himself to a woman at a Flint Township bookstore; at the time, he was on parole from prison for a similar offense. At trial, the prosecutor presented specific testimony related to Breidenbach's two prior convictions for similar crimes, and his parole agent testified about his extensive criminal history of related offenses. The jury convicted Breidenbach as charged, and the judge sentenced him to one day to life in prison.

Breidenbach appealed to the Court of Appeals and filed a motion to remand the case to the trial court so that it could consider his motion for a new trial. Breidenbach contended that the trial court had violated MCL 767.61a and *People v Helzer*, 404 Mich 410 (1978), and that he had been denied the effective assistance of trial counsel. MCL 767.61a establishes the procedures that apply to a charge of sexual delinquency: "In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. . . . Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense." In *Helzer*, the Michigan Supreme Court held that a charge of sexual delinquency must be tried separately before a different jury. Breidenbach contended that, under *Helzer*, he should have been tried on the exposure charge and then had a new trial on the sexual delinquency charge. The Court of Appeals granted the remand motion, retaining jurisdiction. On remand, the trial judge granted Breidenbach's motion for a new trial, agreeing that he was entitled to relief under *Helzer*. The Court of Appeals then remanded the case to the trial court for a new trial, finding Breidenbach's application to be moot. The prosecutor appeals.

DRAKE, et al. v CITY OF BENTON HARBOR, et al. (case no. 140685)

Attorney for plaintiffs Carol Drake and Clellen Bury: Scott W. Howard/(231) 946-0044

Attorney for defendant City of Benton Harbor: Pamela Chapman Enslin/(269) 381-7030

Attorney for defendant Harbor Shores Community Redevelopment Corporation: John G. Cameron, Jr./ (616) 458-1300

Attorney for amicus curiae Friends of Michigan Parks: Barry D. Malone/(248) 540-7400

Attorney for amicus curiae Boys & Girls Clubs of Benton Harbor, Michigan and the First Tee of Benton Harbor: Mark A. Miller/(269) 983-1000

Attorney for amicus curiae Southwestern Michigan Tourist Council: Andrew W. Barnes/(269) 983-0551

Attorney for amicus curiae Ronald J. Taylor: Mark A. Miller/(269) 983-1000

Attorney for amicus curiae Saugatuck Dunes Coastal Alliance, Defense of Place, Preserve The Dunes, West Michigan Environmental Action Council, and Great Lakes Environmental Law Center: Nicholas J. Schroeck/(313) 820-7797

Attorney for amicus curiae Michigan Municipal League: Eric D. Williams/(231) 796-8945

Trial Court: Berrien County Circuit Court

At issue: In 1917, 90 acres of land were conveyed to the city of Benton Harbor. The deed provided that “said lands and premises shall forever be used by [the city] for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as said [city] may make and adopt.” The city developed a park on the land. In 2003, the city announced that part of the park would be used for residential development. The plaintiffs sued, alleging that the proposed use violated the deed restrictions. That lawsuit was settled pursuant to a consent judgment that allowed the residential development, but provided that the remainder of the park would not be used for any purpose other than a bathing beach, park purposes, or another related public purpose. In 2005, the city announced its plan to lease twenty-two acres of the park to a corporation that would develop three holes of an eighteen-hole championship Jack Nicklaus golf course. The plaintiffs sued, challenging the city’s plan. The circuit court ruled in the city’s favor, and the Court of Appeals affirmed. Does the city’s proposal violate the deed or the consent judgment?

Background: In 1917, J.N. and Carrie Klock conveyed 90 acres of land to the city of Benton Harbor. The deed states that the land is “conveyed to [the City] upon the express condition, and with the express covenant that said lands and premises shall forever be used by said [City] for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as said [City] may make and adopt.” The city accepted the Klocks’ gift by city resolution on May 7, 1917, which expressly recognized that the land was accepted “subject to the conditions set forth in said Deed.” The city developed the land into Jean Klock Park, which included a bathing beach, lagoons, a lakefront boulevard and park amenities, and a water treatment facility.

In 2003, the city announced that, because of financial difficulties, the city would sell an underutilized portion of Jean Klock Park to Grand Boulevard Renaissance, LLC, which intended to construct a residential development on the property. The plaintiffs, residents of Benton Harbor, filed a lawsuit challenging the city’s right to convey the property, asserting that such a conveyance violated the deed’s covenants and restrictions. The case was settled, and the parties agreed to a consent judgment that allowed the sale of a portion of Jean Klock Park to the private developer in exchange for an injunction against further privatization or conversion of the park. The consent judgment stated that Jean Klock Park shall not be used “for any purpose other than a bathing beach, park purposes, or other public purpose related to bathing beach or park use; provided, however, that there shall be no recreational vehicle park campsites.... The restrictions in this paragraph 3 shall run with the land and shall be binding upon the City and its successors.”

In July 2005, the city and Harbor Shores Community Redevelopment Corporation announced that they wished to use a portion of Jean Klock Park for a golf course that would be part of a privately-owned mixed-use development consisting of commercial and retail buildings, residences, the golf course, a marina, and other recreational uses. The project would use twenty-two acres of park land for three holes of an 18-hole Jack Nicklaus championship golf course. The city would lease the necessary land to Harbor Shores for a period of up to 105 years.

On July 8, 2008, the plaintiffs sued, seeking enforcement of the restrictions in the deed and the consent judgment. The plaintiffs argued that the consent judgment’s intent was to require that the Jean Klock Park continue to be used for passive recreational use – the same way it had been used since 1917. Harbor Shores and the city responded with motions for summary disposition, which were granted. The plan language of the deed and the consent judgment did not support the plaintiffs’ allegation that the intent of the consent judgment was to require that the park continue

to be used only for passive recreation, the court stated. A golf course is a park purpose, the judge ruled, or certainly a public purpose related to a park use. The circuit court further held that, because the city itself is empowered to use the park land as a golf course, the deed and consent judgment are not violated if the city leases the land to another party to do the same thing.

The plaintiffs appealed, but in an unpublished per curiam opinion, the Court of Appeals affirmed the circuit court. The deed restricted the city's use of the land, not its right to convey or otherwise assign its right to use the property, the appellate panel reasoned. The proposed use of the land for a golf course did not violate the deed or consent judgment's requirement that the land be used for "public" purposes or for a "public park purpose," the Court of Appeals concluded. The plaintiffs appeal.

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