

# MICHIGAN SUPREME COURT



## *Office of Public Information*

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FOR IMMEDIATE RELEASE

### **CERTIFICATION OF CLASS ACTION AGAINST DOW CHEMICAL COMPANY AT ISSUE IN CASE MICHIGAN SUPREME COURT WILL HEAR THIS WEEK**

#### **Class can be certified for liability issue, but not for damages, Court of Appeals has said**

LANSING, MI, March 2, 2009 – The certification of a class action lawsuit against Dow Chemical Company is at issue in a case that the Michigan Supreme Court will hear in oral arguments this week.

The plaintiffs in [\*Henry v Dow Chemical Company\*](#), who claim that Dow is responsible for dioxin contamination of their land, asked the trial court to certify a class of approximately 2,000 persons owning property within the one-hundred-year flood plain of the Tittabawassee River in Saginaw County. The property at issue, which covers about 13,000 acres, ranges from homes to factories to parkland to landfill; some of the property is not contaminated by dioxin. The Court of Appeals upheld in part a trial court's ruling granting the plaintiffs' request, but limited the class to liability issues, saying that damages must be determined on an individual basis. Among the issues the Supreme Court will consider is whether the trial court should have applied the "rigorous analysis" requirement that federal courts apply to class actions. Also at issue is whether the plaintiffs showed that they suffered injury as a class and that questions of law or fact common to the class predominated over questions affecting only individual members.

Also before the Court is [\*People v Bryant\*](#), in which the defendant raises an evidentiary challenge to his convictions for second-degree murder and other offenses. At trial, police officers testified about their questioning of a shooting victim, whose statements led to the defendant's arrest. The defendant argues that the statements are inadmissible hearsay and that their admission violated his constitutional rights, as he never had an opportunity to cross-examine the victim, who died soon after being shot.

The other cases the Supreme Court will hear include ERISA, medical malpractice, and parental rights issues. Also before the Court is a Judicial Tenure Commission proceeding and matters brought by the Attorney General against the Michigan Public Service Commission.

Court will be held on **March 3 and 4** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court's 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 in the cases are available online at [http://www.courts.michigan.gov/supremecourt/Clerk/MSC\\_orals.htm](http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm). For further details about the cases, please contact the attorneys.

**Tuesday, March 3**  
**Morning Session**

**HENRY, et al. v DOW CHEMICAL COMPANY ([case no. 136298](#))**

**Attorney for plaintiff Gary Henry and all others similarly situated:** Bruce F. Trogan/(989) 781-2060

**Attorney for defendant Dow Chemical Company:** Phillip J. DeRosier/(313) 223-3500

**Attorney for amicus curiae Brindley Plaintiff Class:** David R. Dubin/(313) 392-0015

**Attorney for amicus curiae Defense Research Institute and Michigan Defense Trial Counsel:** Mary Massaron Ross/(313) 983-4801

**Attorney for amicus curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Chemistry Council:** Dana M. Mehrer/(816) 474-6550

**Attorney for amicus curiae Michigan Manufacturers Association:** Kristin B. Bellar/(517) 318-3100

**Attorney for amicus curiae Product Liability Advisory Council, Inc.:** Jill M. Wheaton/(734) 214-7629

**Attorney for amicus curiae Michigan Chamber of Commerce:** Bruce L. Segal/(313) 465-7306

**Attorney for amicus curiae Science and Environmental Health Network, Ecology Center, Lone Tree Council, Michigan League of Conservation Voters, Michigan Environmental Council and Great Lakes Environmental Law Center:** David R. Parker/(313) 875-8080  
**Trial Court:** Saginaw County Circuit Court

**At issue:** The plaintiffs, who claim that Dow Chemical Company contaminated their property with dioxin, asked the trial court to certify a class action for all who own property within the one-hundred-year flood plain of the Tittabawassee River in Saginaw County. The Court of Appeals agreed that a class action was appropriate as to whether Dow was liable to the plaintiffs, but held that damages must be determined on an individual basis. Does the federal courts' "rigorous analysis" requirement for class certification also apply to state class actions? If so, did the trial court apply that test in certifying the class action? Do the plaintiffs meet the requirements for class certification in Michigan Court Rule 3.501(A)(1)? In particular, did they show that questions of law or fact common to the class members predominate over questions affecting only individual members? Did the plaintiffs establish that they suffered injury on a class-wide basis?

**Background:** The Dow Chemical Company has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan for more than a century. The Michigan Department of Environmental Quality has concluded that there is dioxin in the soil of the river's flood plain and has identified Dow's plant as the likely principal source of the contamination. The plaintiffs, who own nearby property, sued Dow claiming that the plant is responsible for the dioxin contamination. At issue in this appeal are the plaintiffs' claims for property damage and their request for class action certification. The plaintiffs propose creating a class of all owners of real property within the river's 100-year flood plain in Saginaw County as of February 1, 2002; the

class would consist of about 2,000 persons owning 2,200 parcels of land covering roughly 13,000 acres, the plaintiffs estimate. The properties that would be covered by the class include homes, parks, golf courses, factories, and landfill. Some properties are unoccupied, and some are not contaminated by dioxin. Michigan Court Rule 3.501, which governs the certification of class actions, provides in part that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.” The trial court granted the plaintiffs’ motion to certify the proposed class; Dow appealed. In a three-opinion unpublished decision, the Court of Appeals affirmed the trial court’s class certification ruling for the purpose of resolving liability issues, but held that damages would have to be determined in individual proceedings, not in a class action. Dow appeals.

**PEOPLE v BRYANT** ([case no. 133725](#))

**Prosecuting attorney:** Jeffrey Caminsky/(313) 224-5846

**Attorney for defendant Richard Perry Bryant:** Peter Jon Van Hoek/(313) 256-9833

**Trial Court:** Wayne County Circuit Court

**At issue:** A shooting victim, discovered and questioned by police officers, told them “Rick shot me,” and described where the shooting occurred. The officers testified to those statements at trial; the defendant was convicted of second-degree murder, felon in possession of a firearm, and felony-firearm. Did the officers’ testimony constitute inadmissible testimonial hearsay within the meaning of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 157 (2004), and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006)?

**Background:** Five police officers found Anthony Covington lying on the ground next to his car at a gas station a few blocks from his home; he had been shot in the abdomen and was in considerable pain. Being questioned by each officer, Covington told them, “Rick shot me,” and described where the shooting occurred. Although Covington had not seen the person who shot him, he said that he knew “Rick” was the shooter because he recognized the shooter’s voice. When EMS arrived, the officers stopped questioning Covington; he died after being transported to the hospital. Police officers went to Richard Bryant’s home, where they discovered two bullet holes in the back door; on the back porch, they found blood, a bullet, and Covington’s eyeglasses. Covington’s wallet and military ID were also found nearby. Bryant was arrested and charged with Covington’s murder. At trial, Covington’s statements to the police were admitted into evidence. A jury convicted Bryant of second-degree murder, felony-firearm, and possession of a firearm by a felon. On appeal, Bryant claimed that Covington’s statements to the police were testimonial in nature; therefore, Bryant claimed, their admission into evidence at trial violated his constitutional rights under the confrontation clause of the U.S. Constitution. The confrontation clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross examination.” *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In an unpublished per curiam opinion, the Court of Appeals rejected Bryant’s confrontation clause argument, and affirmed his convictions. The appellate court concluded that “Covington’s statements were made in the course of a police interrogation under circumstances

objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency.” Relying on the authority of *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the Court of Appeals held that the statements made by Covington were not testimonial and not subject to the confrontation clause. Bryant appeals.

**HUNTER v HUNTER** ([case no. 136310](#))

**Attorney for plaintiffs Robert Hunter and Lorie Hunter:** Scott G. Bassett/(941) 794-2904

**Attorney for defendant Tammy Jo Hunter:** Saraphoena B. Koffron/(248) 763-8725

**Attorney for amicus curiae American Civil Liberties Union Fund of Michigan:** Ashley E. Lowe/(248) 751-7800

**Attorney for amicus curiae Michigan Coalition Against Domestic and Sexual Violence:** Rebecca E. Shiemke/(734) 998-9454

**Attorney for amicus curiae Majority of the Family Law Section of the State Bar of Michigan:** Anne L. Argiroff/(248) 615-4493

**Attorney for amicus curiae California Women’s Law Center, Connecticut Women’s Education and Legal Fund, Northwest Women’s Law Center, and the Women’s Law Project:** Holli J. Wallace/(989) 790-8505

**Attorney for amicus curiae Center for Effective Discipline, End Physical Punishment of Children (EPOCH-USA), and the National Coalition to Abolish Corporal Punishment in Schools (NCACPS):** Karen E. Groenhout/(231) 366-4444

**Trial Court:** Oakland County Circuit Court

**At issue:** The defendant parents consented to a limited guardianship of their children with the plaintiffs; the court later appointed the plaintiffs the co-guardians of the defendants’ children. Several years later, the plaintiffs filed this custody action. The trial court found that the children’s established custodial environment was with the plaintiffs, that the defendant mother was an unfit parent, and that it was in the best interests of the children for them to remain with the plaintiffs, who were granted legal and physical custody. The Court of Appeals affirmed, with one judge dissenting. Does the standard for parental fitness in *Mason v Simmons*, 267 Mich App 188 (2005), violate a natural parent’s fundamental rights to his or her child? Did the lower courts properly apply the Child Custody Act’s presumption favoring the children’s established custodial environment, instead of the presumption in favor of biological parents? Were the trial court’s findings against the great weight of the evidence?

**Background:** In 2002, after becoming addicted to crack cocaine, Jeffrey and Tammy Jo Hunter consented to a limited guardianship of their four children by Robert and Lorie Hunter, Jeffrey Hunter’s brother and sister-in-law. In 2003, the biological parents asked the court to terminate the limited guardianship, but the court denied the couple’s request because they were again using drugs. The court appointed Robert and Lorie Hunter co-guardians of the children. The biological mother, who was imprisoned in 2004, sought visitation with her children after being released in 2005. The court granted her parenting time, eventually allowing her to have unsupervised visitation with the children. In May 2006, Robert and Lorie Hunter sued the biological parents, seeking custody of the children. The parties stipulated that the family court referee would make a preliminary finding regarding the children’s established custodial environment and the biological mother’s fitness as a parent, using *Mason v Simmons*, 267 Mich App 188, 206 (2005). The referee found that the children’s established custodial environment was with the plaintiffs and that the biological mother was an unfit parent. The trial court agreed with the referee’s findings, determined that it was in the best interests of the children for them to remain with the plaintiffs, and granted legal and physical custody to the plaintiffs. The court also ordered the biological

mother to pay child support and \$4,000 of the plaintiffs' attorney fees. In a split, unpublished decision, the Court of Appeals affirmed the custody determination, but reversed the award of attorney fees. The dissenting judge on the panel would also have reversed the custody determination, concluding that the trial court's decision regarding the biological mother's parental fitness was unconstitutional and against the great weight of the evidence. The dissenting judge said she would have remanded the case to the trial court for a finding that would take into proper consideration the biological mother's fundamental liberty interest in rearing her children. The biological mother appeals.

### *Afternoon Session*

**ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION, et al. ([case nos. 134667-69, 134671, 134673-74, 134676-77](#))**

**Attorney for appellant Attorney General of the State of Michigan:** Donald E. Erickson/(517) 373-1123

**Attorney for appellant Michigan Public Service Commission:** Daniel J. Martin/(517) 374-9100

**Attorney for appellants Michigan Environmental Council and Public Interest Research Group in Michigan:** Don L. Keskey/(517) 318-3100

**Attorney for appellant Association of Businesses Advocating Tariff Equity:** Thomas E. Maier/(517) 318-3100

**Attorney for appellee Detroit Edison Company:** Stephen J. Rhodes/(517) 381-0100

**Attorney for amicus curiae Wisconsin Electric Power Company, Wisconsin Public Service Company, Upper Peninsula Power Company and Edison Sault Electric Company:** Ronald W. Bloomberg/(517) 487-2070

**Attorneys for amicus curiae Michigan Electric and Gas Association, Michigan Electric Cooperative Association, Wolverine Power Supply Cooperative, Inc., International Transmission Company, Michigan Electric Transmission Company, American Transmission Company LLC, and ATC Management Inc.:** James A. Ault/(517) 484-7730, Christine Mason Soneral/(248) 946-3553, Brian E. Valice/(231) 775-5700

**Tribunal:** Michigan Public Service Commission

**ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION, et al. ([case no. 136431](#))**

**Attorney for appellant Attorney General of the State of Michigan:** Donald E. Erickson/(517) 373-1123

**Attorney for appellee Consumers Energy Company:** Jon R. Robinson/(517) 788-0698

**Tribunal:** Michigan Public Service Commission

**At issue:** Detroit Edison Company and Consumers Energy Company filed with the Michigan Public Service Commission separate applications to increase their rates and implement power supply cost recovery (PSCR) plans. May "transmission costs" be included in the PSCR factor, MCL 460.6j(1)(a) and (b)? Was the MPSC's decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy supported by competent, material, and substantial evidence on the whole record?

**Background:** Detroit Edison Company filed an application with the Michigan Public Service Commission for a general rate increase and for approval of a power supply cost recovery (PSCR) plan; Consumers Energy Company applied to the MPSC for approval of its own PSCR plans. The two applications proceeded as separate contested cases before the MPSC, with several

interested parties participating in each case. In the Detroit Edison case, in addition to other issues, the MPSC ruled (1) that certain costs known as “transmission expenses” could be recovered as part of Detroit Edison’s PSCR plan; and (2) that Detroit Edison could not recover in its rates any portion of the “control premium” that it paid when it purchased MCN Energy, despite Detroit Edison’s claim of significant cost savings from the purchase. Similarly, in the Consumers Energy case, the MPSC allowed Consumers to recover its transmission expenses as part of its PSCR plan. Both MPSC decisions were appealed by numerous parties, for various reasons, to the Court of Appeals. In a published opinion, the Court of Appeals affirmed the MPSC’s rulings in the Consumers Energy case; in a separate, unpublished opinion, the Court of Appeals affirmed in part and reversed in part the MPSC’s decision as to Detroit Edison’s PSCR application. In each case, the Court of Appeals agreed with the MPSC that the utility companies could recover transmission expenses as part of their PSCR plans, reasoning that those expenses are essential for delivering electricity. But the Court of Appeals reversed the MPSC’s ruling that Detroit Edison could not recover any part of the control premium it paid when it purchased MCN Energy. Several parties sought to appeal the two Court of Appeals decisions. In the Consumers Energy case, the Supreme Court granted leave to consider the MPSC’s ruling regarding transmission expenses. In the Detroit Edison case, the Court agreed to consider the transmission expenses issue and the control premium issue. The Court ordered that the appeals in both cases be argued and submitted together.

**SELFLUBE, INC. v JJMT, INC., et al. ([case no. 136377](#))**

**Attorney for fourth-party plaintiff H.S. Die & Engineering, Inc.:** Michael E. Stroster/(616) 831-1700

**Attorney for fourth-party defendants JJMT, Inc., and James A. DeHaan:** Neil P. Jansen/(616) 632-8000

**Trial Court:** Kent County Circuit Court

**At issue:** An employer obtained a default judgment against its employee, who had been convicted of fraud against the employer. Before the court entered the default judgment, the employee applied to withdraw the funds held in his name in the employer’s 401(k) plan. The circuit court ruled that the employee had to deposit any funds that he received from the plan into an account selected or approved by the employer. The Court of Appeals reversed. Is the injunction prohibited by ERISA’s anti-alienation provision, 29 USC 1056(d)(1)? Is the injunction prohibited by 29 USC 1104(a)(1)(D), which provides that a fiduciary of an ERISA plan shall discharge its duties with respect to the plan solely in the interests of the participants and beneficiaries, and in accordance with the documents and instruments governing the plan? Is this case distinguishable from *State Treasurer v Abbott*, 468 Mich 143 (2003)?

**Background:** James DeHaan, the purchasing manager for H.S. Die & Engineering, was convicted of fraud against his employer. The trial court entered a temporary restraining order, prohibiting DeHaan from transferring, encumbering, disposing or concealing his interest in H.S. Die’s 401(k) plan, which is a qualified plan under the Employee Retirement Income Security Act, 29 USC 1001 *et seq.* The trial court then entered a preliminary injunction that preserved DeHaan’s right, title and interest in his 401(k) money, but also required him to notify H.S. Die before withdrawing any funds, and to coordinate any withdrawal with H.S. Die. After this, the trial court entered a default judgment in favor of H.S. Die and against DeHaan for approximately \$1.7 million. But before the court entered judgment against him, DeHaan filed a motion to set aside the preliminary injunction and withdraw his 401(k) funds. He argued that the preliminary injunction violated ERISA’s anti-alienation provision, 29 USC 1056(d)(1), which provides that

“[b]enefits provided under the plan may not be assigned or alienated.” H.S. Die argued that DeHaan’s motion should be denied pursuant to *State Treasurer v Abbott*, 468 Mich App 143 (2003). The Michigan Supreme Court held in *Abbott* that a court did not violate ERISA by ordering a prisoner to have his monthly ERISA benefits deposited in his prison account, where the funds would be used to help reimburse the state for his imprisonment costs. After a hearing on DeHaan’s motion, the trial court entered a permanent injunction barring DeHaan from transferring, disposing of, encumbering, taking a distribution of, or liquidating his interest in the 401(k) plan without 30 days prior written notice to H.S. Die. Any transfer or distribution of funds should be deposited into an account at a financial institution selected by his former employer, the court ordered. DeHaan appealed; in a published opinion, the Court of Appeals vacated the permanent injunction, concluding that it violated ERISA’s anti-alienation provision. The Court of Appeals stated that “to the extent that the injunction conflicts with ERISA, it is preempted.” The Court of Appeals also concluded that ERISA preempted the permanent injunction because the injunction did not allow the plan to be administered as written. H.S. Die appeals.

**Wednesday, March 4**  
**Morning Session**

**POTTER v MCLEARY, et al. ([case no. 136336](#))**

**Attorneys for plaintiff Brian Potter:** Mark Granzotto/(248) 546-4649, J. Martin Bartnick/(248) 356-4508

**Attorney for defendants Kristyn H. Murry, M.D. and Huron Valley Radiology, P.C.:** Brian J. Richtarcik/(248) 644-6326

**Trial Court:** Washtenaw County Circuit Court

**At issue:** In this medical malpractice case, the Court of Appeals held that the plaintiff’s notice of intent to sue did not comply with the requirements of MCL 600.2912b as to defendant Huron Valley Radiology, P.C. Is Huron Valley Radiology a “health facility or agency” which a plaintiff is required to notify under MCL 600.2912b(1)?

**Background:** A plaintiff may not file a medical malpractice lawsuit “unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.” MCL 600.2912b. The notice of intent must state: (a) the factual basis for the claim, (b) the applicable standard of care, (c) the manner in which the standard of care was breached by the health professional or health facility, (d) the alleged action that should have been taken to comply with the standard of care, (e) the manner in which it is alleged that the breach of the standard of care was the proximate cause of the injury, and (f) the names of all health professionals and health facilities receiving the pre-suit notice. Brian Potter sued several defendants for medical malpractice, including Huron Valley Radiology, P.C. Huron Valley moved to dismiss the claims against it, arguing that Potter’s notice of intent did not state what standard of care applied to Huron Valley, Although the trial court refused to grant summary disposition in favor of Huron Valley, the Court of Appeals held in a published opinion that Potter’s notice of intent to sue failed to “satisfy all the statutory requirements with regard to defendant Huron Valley Radiology” Accordingly, Huron Valley should be dismissed from the case without prejudice, the appellate court said. Potter appeals.

**IN RE HUDSON\MORGAN, MINORS ([case no. 137362](#))**

**Attorney for petitioner Department of Human Services:** Mary C. Pino/(989) 224-5260

**Attorney for respondent Melanie Morgan:** Vivek S. Sankaran/(734) 763-5000

**Attorney for amicus curiae Children’s Law Section of the State Bar of Michigan:** Jodi M. Latuszek/(517) 482-8933

**Trial Court:** Clinton County Circuit Court

**At issue:** The trial court terminated the respondent-mother’s parental rights to her three sons, after she made certain admissions in response to a Michigan Department of Human Services’ petition concerning her family. The mother argued in the Court of Appeals that she did not make those admissions knowingly, voluntarily, and understandingly. She also argued that the trial court failed to timely provide her with an attorney. The Court of Appeals denied relief on those issues, but vacated the order terminating the mother’s parental rights. The appellate court concluded that DHS failed to present clear and convincing evidence that termination of the mother’s parental rights was warranted. Did DHS present clear and convincing evidence of statutory grounds for terminating the mother’s parental rights? Did DHS present clear and convincing evidence that termination was not contrary to the children’s best interests? Should the Supreme Court address the issues the mother raised in the Court of Appeals? Were those issues properly decided?

**Background:** The Michigan Department of Human Services became involved with Melanie Morgan’s family due to allegations of substance abuse, an improper home environment, improper supervision of children, and poor parenting skills. DHS ultimately asked the trial court to terminate Morgan’s parental rights to her children, aged 16, eight, and five. There was testimony at the termination trial that Morgan’s parenting skills improved over the course of DHS’s involvement with her family. Witnesses indicated that Morgan’s children were bonded to her, but that she continued to have financial and emotional problems, and periodically tested positive for drugs. The trial court terminated Morgan’s parental rights, finding statutory grounds for termination under MCL 712A.19b(c),(g), and (j); the court also concluded that termination would not be contrary to the children’s best interests. Morgan appealed, arguing that the trial court’s order should be vacated because the trial court failed to provide her with a lawyer until 14 days before the termination trial. Moreover, her admissions to DHS’ original petition, which gave the trial court jurisdiction over her family, was not made knowingly, voluntarily, and understandingly, because the trial court failed to advise Morgan that her admissions could ultimately result in the termination of her parental rights, Morgan contended. The Court of Appeals denied relief on those issues in an unpublished per curiam opinion. The Court of Appeals observed that, at the termination trial, DHS did not rely on Morgan’s admissions, but presented a protective services worker’s testimony to establish the factual basis for jurisdiction. As to the counsel issue, Morgan failed to ask the trial court to appoint an attorney for her, the appellate panel observed. But the Court of Appeals reversed the termination of parental rights, stating that the trial court erred in finding clear and convincing evidence of statutory grounds for termination; there was, the panel concluded, “an obvious dearth of evidence supporting any of the statutory grounds” that the trial court invoked. The trial court also clearly erred in finding that termination was not contrary to the children’s best interests, the Court of Appeals said. DHS appeals.

**IN RE SERVAAS** ([case no. 137633](#))

**Attorney for petitioner Judicial Tenure Commission:** Paul J. Fischer/(313) 875-5110

**Attorney for respondent Judge Steven R. Servaas:** James S. Brady/(616) 831-1700

**Tribunal:** Judicial Tenure Commission

**At issue:** The Judicial Tenure Commission has recommended that Judge Steven R. Servaas of the 63<sup>rd</sup> District Court be removed from office and ordered to pay costs associated with the JTC proceedings. The JTC found in part that the judge vacated his judicial office by moving outside his election district, and that he lied under oath during the JTC proceedings. Should the Supreme Court accept the JTC's recommendations?

**Background:** The Judicial Tenure Commission charges that Judge Steven R. Servaas effectively vacated his judicial office under Article 6, § 20 of the 1963 Michigan Constitution: "Whenever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office." At a hearing before a special master, the judge acknowledged that he was elected to serve in the first division of the 63<sup>rd</sup> District, and that he began to reside in the second division of the 63<sup>rd</sup> District in 2005; he moved back to the first division in 2008. The judge contends that he is only required to live within the district where his court sits, and not within a particular division; even if in error, his interpretation of the law on that point is reasonable, especially given the lack of legal precedent, the judge argues. The JTC also alleges that the judge acted in ways that demeaned female staff, while the judge maintains that these were isolated, trivial events and that he did not mean to offend anyone. The JTC further contends that the judge "lied under oath on multiple occasions before and during these proceedings in an effort to conceal his misconduct and the circumstances regarding the location of his residence beyond the geographic limits of the territory from which he was elected." The judge argues that the JTC denied him procedural due process and erred in finding that he gave false testimony and moved out of his election division in 2000 rather than 2005. The JTC asks the Supreme Court to remove the judge from office and to order him to pay \$8,364.38 in costs. The judge, who was re-elected in November, asks the Supreme Court to reject or modify the JTC's recommendation of discipline.

### *Afternoon Session*

#### **IN RE LEE, MINOR ([case no. 137653](#))**

**Attorney for petitioner Department of Human Services:** Kayla Lee Pelter-Nixon/(906) 643-7329

**Attorney for respondent Cheryl Lynn Lee:** Nancy B. Lucas-Dean/(231) 436-5481

**Attorney for intervening respondent Sault Ste. Marie Tribe of Chippewa Indians:** Eric G. Blubaugh/(906) 635-6050

**Attorney for amicus curiae Attorney General of the State of Michigan:** H. Daniel Beaton, Jr./ (517) 373-7700

**Attorney for amicus curiae American Indian Law Section of the State Bar of Michigan:** William J. Brooks/(231) 723-1101

**Attorney for amicus curiae Children's Law Section of the State Bar of Michigan:** Jodi M. Latuszek/(517) 482-8933

**Trial Court:** Mackinac County Circuit Court

**At issue:** The child who is the subject of this termination of parental rights proceeding is an "Indian child," as defined in the Indian Child Welfare Act, 25 USC 1903(4). The trial court granted the Department of Human Services' petition to terminate respondent's parental rights to the child; the Court of Appeals affirmed. Does the term "active efforts" in 25 USC 1912(d) require a showing that there have been recent rehabilitative efforts designed to prevent the family's breakup? Does the statute's "beyond a reasonable doubt" standard require

contemporaneous evidence that the continued custody of the Indian child by the Indian parent or custodian is likely to result in serious harm to the child before parental rights may be terminated?

**Background:** Cheryl Lee and her son, Jaden Lee, are both enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians. As such, Jaden is an “Indian child” as defined in the Indian Child Welfare Act, 25 USC 1903(4). Lee was 16 years old – and in foster care herself due to delinquency and child abuse and neglect – when she gave birth to Jaden on June 13, 1999. On July 9, 2007, the Michigan Department of Human Services sought termination of Lee’s parental rights to Jaden, citing Lee’s history with protective services. A 2000 petition resulted in Jaden being placed in foster care for several years, DHS noted, and Lee’s parental rights to three other children had been terminated. DHS cited MCL 712A.19b(3)(b)(i), which provides that “The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following . . . (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances . . . (i) The parent’s act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent’s home.” Section 1912(d) of the ICWA provides that any party seeking termination of parental right to an Indian child under state law “shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” The trial court terminated Lee’s parental rights to Jaden, finding that the criteria of MCL 712A.19b(3)(b)(i) had been satisfied. The court then concluded that “there is insufficient proof on this record for the Court to make a finding that termination is not in the best interests of the child.” Finally, the court considered the requirements of MCR 3.980(D), which addresses “American Indian Children,” and requires that “the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.” The court held that MCR 3.980(D) had also been satisfied. Lee appealed, and the Court of Appeals affirmed the lower court in a split, unpublished opinion. While the majority concluded that the trial court did not clearly err in its findings, the dissent disagreed that DHS had complied with the “active efforts” requirement of 25 USC 1912(d). Moreover, the evidence did not prove beyond a reasonable doubt that Lee’s continued custody of Jaden “is likely to result in serious emotional or physical damage to the child,” the dissenting judge said. Lee appeals.

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