

# MICHIGAN SUPREME COURT



## *Office of Public Information*

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### **IS IT A FEE, OR A TAX? MICHIGAN SUPREME COURT TO HEAR *HEADLEE*-BASED CHALLENGE TO DETROIT SOLID WASTE INSPECTION FEE**

LANSING, MI, March 7, 2011 – A Detroit property owner’s claim that the city’s Solid Waste Inspection Fee amounts to a tax that was not approved by voters – and therefore violates the Headlee Amendment – will be before the [Michigan Supreme Court](#) in oral arguments this week.

In *Wolf v City of Detroit*, the Michigan Court of Appeals ruled in favor of the city, holding that the SWIF is a “valid regulatory fee, not a disguised tax.” The fee serves a regulatory purpose: “to ensure the efficient removal of solid waste products and to protect the public health,” the appellate court said. Moreover, the city’s fee is “reasonably proportionate” to the cost of the service, and is a voluntary charge, the court said; the fact that the city could put on lien on the property for nonpayment does not make the SWIF a tax, the Court of Appeals stated. The property owner argues that the facts – including the city’s inclusion of the SWIF on property tax bills – show that the SWIF is really a tax.

The Court will also hear *Duffy v Department of Natural Resources, et al.*, in which the plaintiff is suing the state of Michigan and the DNR for injuries she suffered while riding in an ATV on the Little Manistee Trail. At issue is whether the trail is a “highway” for the purposes of the Governmental Tort Liability Act, which defines “highway” as “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway.” The statute also limits the government’s liability “only to the improved portion of the highway designed for vehicular travel [which] does not include sidewalks, trailways, crosswalks, or any other installation...” Although the trial court ruled in the plaintiff’s favor, holding that she could pursue her claims because the trail fits the definition of a highway, the Court of Appeals disagreed, citing the provision in the statute that limits governmental liability to “the improved portion of the highway.”

The remaining 14 cases involve issues of contract, criminal, insurance, medical malpractice, negligence, personal injury, procedural, and worker’s compensation law.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on March **8, 9, and 10, beginning at 9:30 a.m.** each day. 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 are online at [http://www.courts.michigan.gov/supremecourt/Clerk/MSO\\_orals.htm](http://www.courts.michigan.gov/supremecourt/Clerk/MSO_orals.htm). For further details about the cases, please contact the attorneys.

**Tuesday, March 8**  
**Morning Session**

**LOWEKE v ANN ARBOR CEILING & PARTITION COMPANY, INC. (case no. 141168)**

**Attorney for plaintiffs Richard Loweke and Sherri Loweke:** Steven E. Goren/(248) 540-3100

**Attorney for defendant Ann Arbor Ceiling & Partition Company, Inc.:** Ernest R.

Bazzana/(313) 983-4798

**Attorney for amicus curiae Michigan Association For Justice:** Mark R. Granzotto/(248) 546-4649

**Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.:** Anthony F. Caffrey, III/(616) 285-3800

**Trial Court:** Wayne County Circuit Court

**At issue:** While working for a subcontractor at a construction site, the plaintiff was injured when cement boards stacked against a wall by another subcontractor’s employees fell on him. The plaintiff sued the other subcontractor for negligence, but the trial court granted summary disposition and dismissed the case, agreeing with the subcontractor that it did not owe the plaintiff a duty separate and distinct from its contractual duties. The Court of Appeals affirmed, noting in particular that the defendant had not created a “new hazard” beyond the contract’s requirements. Did the subcontractor have an independent duty to the plaintiff – an employee of another subcontractor – to exercise reasonable care?

**Background:** Richard Loweke was an electrician employed by Shaw Electric, one of the subcontractors on a construction project at Detroit Metro Airport. Ann Arbor Ceiling & Partition Company was a carpentry and drywall contractor on the project. According to Loweke, Ann Arbor Ceiling employees left sheets of cement board leaning in an unstable position against a corridor wall; while Loweke was working nearby, some of the boards fell onto Loweke’s leg, injuring him.

Loweke sued Ann Arbor Ceiling for negligence, but Ann Arbor Ceiling asked the trial court to dismiss his lawsuit. According to Ann Arbor Ceiling, Loweke’s allegations merely charged that the subcontractor had not performed its duties under the contract properly – not that it was liable to Loweke for negligence. Ann Arbor Ceiling pointed out that, under its contract, it was responsible for “unloading, moving, protecting, securing and dispensing of all materials and equipment at the Project site.” The contract also required Ann Arbor Ceiling to “arrange for delivery of its materials so as to prevent interruptions of or delay to its Work or the work of others.” Under *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004), Ann Arbor Ceiling argued, it could only be held liable for injuries resulting from a duty to Loweke that is “separate and distinct” from its contractual obligations. Loweke responded that, by stacking the cement boards, Ann Arbor Ceiling created a new hazard, for which it could be held liable in tort. The trial court disagreed, and granted Ann Arbor Ceiling’s motion for summary disposition, dismissing Loweke’s case.

Loweke challenged the trial court’s summary disposition ruling at the Court of Appeals, but the Court of Appeals affirmed in an unpublished per curiam opinion. The appeals panel agreed with Ann Arbor Ceiling that no duty separate and apart from its contract had been breached, and that Loweke’s claim of the creation of a “new hazard” was not persuasive. “The

alleged hazard was not outside of the construction zone and did not present any unique risk not contemplated by the contract,” the panel said. Loweke appeals.

**DRIVER v CARDIOVASCULAR CLINICAL ASSOCIATES, P.C., et al. (case no. 140922)**

**Attorney for plaintiffs Willie Driver and Beverly Driver:** Mark R. Granzotto/(248) 546-4649

**Attorney for defendant Cardiovascular Clinical Associates, P.C.:** Linda M. Garbarino/(313) 964-4500

**Attorney for amicus curiae Michigan Optometric Association:** Kelly M. Drake/(517) 487-2070

**Attorney for amicus curiae ProAssurance Corporation:** Noreen L. Slank/(248) 355-4141

**Attorney for amicus curiae Michigan State Medical Society:** Joanne Geha Swanson/(313) 961-0200

**Trial Court:** Wayne County Circuit Court

**At issue:** The plaintiff’s attorney sent a notice of intent to file suit, as required by MCL 600.2912b, to the defendant physician and professional corporation, and then filed a complaint. The defendants filed a notice of nonparty fault pursuant to MCL 600.2957, naming a second professional corporation. The plaintiff sent the second professional corporation an amended notice of intent to sue, and filed an amended complaint, listing it as a defendant, 39 days later. About three months after that, the professional corporation moved for summary disposition, arguing that it should be dismissed from the lawsuit because the plaintiff had not waited 182 days – as required by MCL 600.2912b – before filing the amended complaint. In the meantime, the professional corporation said, the statute of limitations had continued to run, so the plaintiff’s claim was time-barred. The trial court denied summary disposition, but the Court of Appeals reversed in a published opinion, concluding that the trial court should have dismissed the complaint against the second professional corporation under *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005). In *Burton*, the Michigan Supreme Court held that a complaint filed before the statutory (MCL 600.2912b) waiting period expires is a nullity, and does not toll the limitations period. The Court of Appeals determined that MCL 600.2301, as applied in *Bush v Shabahang*, 484 Mich 156 (2009), does not apply because this case does not involve a defective notice of intent. Does *Bush* allow for the application of MCL 600.2301 in cases involving prematurely filed complaints under MCL 600.2912b(1)? Does *Burton* retain any viability in light of *Bush*?

**Background:** Willie Driver began seeing Dr. Mansoor Naini for general medical care in 1983. Despite the fact that Driver was over 50 years old and had a family history of colon cancer, Naini never referred him for a colonoscopy, despite abnormal blood test results in 2003. In October 2005, Driver went to a gastroenterologist because of unexplained weight loss. Sometime in November 2005, Driver was diagnosed with stage IV colon cancer with metastasis to the liver.

On April 25, 2006, Driver’s attorney mailed a notice of intent to file a medical malpractice action to Naini and his professional corporation, Michigan Cardiology, pursuant to MCL 600.2912b. The notice of intent stated that it applied to Naini, Michigan Cardiology, “and their professional corporations and all agents and employees, actual or ostensible[,] who furnished treatment to Willie Driver.” The complaint alleged that Naini was an employee of Michigan Cardiology the entire time he treated Driver. On January 15, 2007, Naini and Michigan Cardiology filed a notice of nonparty fault pursuant to MCL 600.2957 and MCR 2.112(K). In that notice, the defendants asserted that, at some point during the relevant time period, Naini was an employee of Cardiovascular Clinical Associates, which may be vicariously liable. On February 1, 2007, Driver’s attorney mailed a “first amended” notice of intent to Cardiovascular Clinical

Associates; a few weeks later, Driver moved for permission to file an amended complaint adding Cardiovascular Clinical Associates as a defendant. The court granted the motion, and Driver filed his first amended complaint on March 22, 2007.

In June 2007, Cardiovascular Clinical Associates moved for summary disposition, arguing, among other things, that Driver's claim had to be dismissed because he failed to comply with the mandatory 182-day waiting period under MCL 600.2912b. Driver responded that the amended complaint was timely under the nonparty fault statute, MCL 600.2957, which provides a 91-day window for filing an amended complaint when a new party is added. The trial court agreed with Driver and denied the motion.

Cardiovascular Clinical Associates filed an application for interlocutory review in the Court of Appeals. The appeals court granted leave and, in a published opinion, the court reversed the trial court's denial of summary disposition, relying in part on *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), to conclude that Driver's complaint was time-barred as to Cardiovascular Clinical Associates. The Court of Appeals explained that, because Driver filed his first amended complaint before the notice period expired, no medical malpractice action was ever commenced with regard to Cardiovascular Clinical Associates. Because no action was properly commenced, the limitations period continued to run, and expired. This was the case, the appeals court said, because the notice of intent statute prevailed over the nonparty fault statute. The court rejected Driver's claim that *Burton* was no longer good law, finding unpersuasive Driver's argument that *Burton* had been overruled in *Bush v Shabahang*, 484 Mich 156 (2009). Driver appeals.

**EVANS v GROSSE POINTE PUBLIC SCHOOL SYSTEM (case no. 140670)**

**Attorneys for plaintiff Christopher L. Evans:** Carl J. Marlinga, Ryan Hugh Machasic/(586) 468-1783

**Attorney for defendant Grosse Pointe Public School System:** Mark W. McInerney/(313) 965-8300

**Trial Court:** Wayne County Circuit Court

**At issue:** The plaintiff served papers related to his employment discrimination suit on the defendant school system. The process server claimed that he served a summons and complaint on the executive assistant to the school's superintendent. The assistant signed a form in which she acknowledged receiving both the complaint and the summons, but she testified that she received only the complaint. The trial judge held an evidentiary hearing, and concluded that the assistant's testimony was credible and that the summons had never been served; the court granted summary disposition to the school system since the statute of limitations had expired. The Court of Appeals affirmed. Did the trial court err in granting the defendant's motion for summary disposition?

**Background:** On April 17, 2008, Christopher Evans filed a lawsuit against Grosse Pointe Public School System, claiming that GPPSS violated the Persons with Disabilities Civil Rights Act (MCL 37.1101 *et seq.*) when it terminated his employment. To include a defendant in a lawsuit, a plaintiff must serve the defendant with both the summons – a notice that the defendant is being sued – and the complaint, which describes the claims against the defendant and their legal basis.

Evans hired a process server, who delivered papers relating to the lawsuit to Janet Truance, the school superintendent's executive assistant. The process server reported that he served Truance with both the summons and the complaint, and Truance signed an acknowledgement of service stating that that she received both documents. But Truance said that she had only received the complaint, and that she did not read the acknowledgment of service when she signed it; Truance claimed that the process server told her that it was a receipt for the

papers. The school answered the lawsuit, and argued in the trial court that it had not been properly served. The trial judge held an evidentiary hearing and determined that Truance's account was credible; because there was no effective service of process, the judge granted summary disposition to the school and dismissed the lawsuit. Evans appealed to the Court of Appeals, which affirmed the trial court's ruling. In an unpublished per curiam opinion, the Court of Appeals panel held that there was no basis for concluding that the trial court's factual findings were clearly erroneous and that Evans' failure to serve the complaint was not excused. Equitable estoppel – a legal doctrine that prevents a party to a lawsuit from asserting or denying a fact, based on that party's earlier statements or conduct to the contrary – did not save Evans' lawsuit from dismissal, the appellate panel said. Evans appeals.

### *Afternoon Session*

#### **DUFFY v DEPARTMENT OF NATURAL RESOURCES, et al. (case no. 140937)**

**Attorney for plaintiff Beverly Duffy:** William G. Boyer, Jr./ (586) 731-7400

**Attorney for defendants Department of Natural Resources and State of Michigan:** Ann M. Sherman/ (517) 373-6434

**Trial Court:** Court of Claims

**At issue:** The plaintiff was injured when her all-terrain vehicle struck some partially buried wooden boards while she and others were riding on the Little Manistee Trail, a forest road that is open to vehicular traffic and maintained by the Department of Natural Resources. The plaintiff sued the DNR and the state of Michigan. The trial court ruled that the plaintiff could sue the defendants, concluding that the highway exception to governmental immunity applied because the trail was a highway within the meaning of the Governmental Tort Liability Act (MCL 691.1401 et seq.) and that the defendants were obligated to maintain the trail in reasonable repair. The Court of Appeals reversed, holding that the defendants had no duty to maintain the road under the GTLA. Is the Little Manistee Trail a "highway" within the meaning of MCL 691.1401(e)? If it is, does MCL 691.1402(1) exempt the state and the DNR from liability for maintaining a trailway that is not adjacent to any vehicular highway?

**Background:** Beverly Duffy, her husband, and some friends were riding their ATVs on a forest road commonly known as the Little Manistee Trail. Duffy's ATV ran over some exposed wooden boards that had been partially buried underground on the traveled portion of the road, causing the ATV to bounce into the air; Duffy was thrown from the vehicle and suffered spinal injuries and paralysis.

The trail is designated as an Off Road Vehicle route, which means that any motor vehicle licensed by the Secretary of State can be operated on the trail, which is owned by the state of Michigan. By statute, the DNR is obligated to maintain a recreation system for off-road vehicles and to develop a comprehensive plan for the management and maintenance of ORV routes and trails. The state funds the ORV Trail Improvement Fund; the DNR provide grants from the fund to local governments, non-profit agencies, and individuals to maintain trails, routes, and forest roads. The Little Manistee Trail is maintained by the Irons Area Tourists Association, a non-profit corporation, which receives public funds through a DNR grant.

Duffy sued the DNR and the state of Michigan, arguing that they were liable for her injuries. She contended that governmental immunity did not shield the defendants from suit because the Governmental Tort Liability Act creates an exception to governmental immunity for highways. The GTLA states in part that the governmental entity having jurisdiction over a

highway to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel (MCL 691.1402(1)).” MCL 691.1401(e) defines “highway” as “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.” MCL 691.1402(1) also limits the liability of the state and county road commissions; the statute provides that “The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.”

The governmental defendants moved for summary disposition, arguing that the trail is not a “highway” for the purposes of the GTLA; as a result, they have no duty to comply with MCL 691.1402(1) by keeping the trail in reasonable repair, the defendants maintained. But the trial court denied their motion, ruling that the trail fits the definition of a highway because MCL 691.1401(e) specifically includes trailways. The trial court also held that § 1402(1) does not exempt the defendants from the duty to maintain the trail.

The governmental defendants appealed by right to the Court of Appeals and, in an unpublished per curiam opinion, the Court of Appeals reversed. The limitation of liability in § 1402(1) applies to all trailways, not merely those adjacent to an existing highway, the appellate panel held. Duffy appeals.

**MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC., et al. (case no. 139666)**

**Attorneys for plaintiff Miller-Davis Company:** Alfred J. Gemrich/(269) 623-8533, Scott G. Graham/(269) 327-0585

**Attorney for defendant Ahrens Construction, Inc.:** Samuel T. Field/(269) 343-5581

**Attorneys for amicus curiae Associated General Contractors of Michigan:** Kevin S. Hendrick, Thomas M. Keranen, Brian P. Lick/(313) 965-8300

**Attorneys for amicus curiae Michigan Association of School Boards and Michigan School Business Officials:** Christopher J. Iamarino, Kirk C. Herald/(517) 484-8000

**Trial Court:** Kalamazoo County Circuit Court

**At issue:** The plaintiff was the general contractor for a construction project that included a natatorium. The building developed a problem due to the defendant subcontractor’s failure to build the natatorium roof to specifications, and the plaintiff ultimately fixed the problem at its own expense. The plaintiff successfully sued the defendant for breach of contract, but in a published opinion, the Court of Appeals reversed on the ground that suit was barred by MCL 600.5839, the statute of repose for “any action” against architects, engineers, or contractors to recover damages for “any injury to property, real or personal.” Does the statute of repose apply to contract actions, or only to tort claims? Does this particular case constitute an “action to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property”? When does a claim for breach of a construction contract accrue under MCL 600.5807(8) – on the date of “substantial completion” specified by the parties, the date the party in breach physically ceases work, the date the party in breach certifies that it has completed work, or some other date? Is the “occupancy of the completed improvement, use, or acceptance of the improvement” under MCL 600.5839 limited to occupancy, use or acceptance by the owner of the property?

**Background:** Miller-Davis Company was the general contractor hired to make an \$8.7 million

series of improvements, including a new natatorium, to YMCA buildings. Miller-Davis hired Ahrens Construction to install a roof system on the natatorium. Ahrens finished work in February 1999; on April 26, 1999, Ahrens certified to Miller-Davis that the work was complete. Miller-Davis paid Ahrens the next day. A temporary certificate of occupancy was issued for the whole project on June 11, 1999.

The YMCA's contract with Miller-Davis included a one-year warranty on materials and workmanship. Within the first year, when the weather turned cold, the YMCA noticed condensation in the natatorium, so severe that at times it appeared to be "raining" in the pool area. Efforts were made to resolve the problem, but it continued into 2003, when Miller-Davis' architect recommended removing the roof to determine the cause of the problem. Once the roof was removed and inspected, the architect concluded that it had been improperly installed. Ahrens disagreed, arguing that the roof was defectively designed. After unsuccessful efforts to have Ahrens perform corrective work, Miller-Davis eventually performed the corrective work itself in the fall of 2003.

On May 12, 2005, Miller-Davis sued Ahrens and another defendant. Miller-Davis brought two claims against Ahrens: breach of contract, for installing a roof that did not conform to plan specifications, and indemnity. Ahrens moved for summary disposition, alleging that the Miller-Davis lawsuit was untimely because it was filed after the expiration of the six-year period specified in the statute of repose, MCL 600.5839. That statute states: "No person may maintain any action to recover damages for any injury to property, real or personal . . . arising out of the defective and unsafe condition of an improvement to real property . . . against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . ." The trial court denied the motion.

The case proceeded to a bench trial, and the trial court ruled in Miller-Davis' favor. The court determined that Ahrens materially breached the parties' contract by performing defective work on the roof, forcing Miller-Davis to perform corrective work, resulting in damages of \$348,851.50.

Ahrens appealed by right to the Court of Appeals, raising a number of arguments, including that the judgment violated the statute of repose. In a published per curiam opinion, the Court of Appeals agreed with Ahrens on the statute of repose issue and reversed the judgment. The appeals court remanded the case to the trial court for entry of judgment for Ahrens. Miller-Davis appeals.

**BROWN v TAUBMAN COMPANY, L.L.C., et al. (case no. 140385)**

**Attorney for plaintiffs Irene M. Brown and Gary N. Brown:** Mark W. Peyser/(248) 723-0356

**Attorney for defendant Taubman Company, L.L.C.:** James W. Rose/(248) 351-3000

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

**Trial Court:** Oakland County Circuit Court

**At issue:** The plaintiff slipped and fell on an alleged patch of black ice on the walkway leading into the defendant's shopping mall. The accident occurred in January, in wintry conditions. The trial court granted summary disposition to the premises owner, concluding that the black ice was open and obvious. The Court of Appeals reversed, citing the plaintiff's testimony that it was warm out that day and that there was no snow. Are indicia of a potentially slippery condition sufficient to make black ice "open and obvious"? If so, did the Court of Appeals err by

concluding that these indicia could be counteracted by the plaintiff's own representations about weather conditions on the date of her fall, creating a question of fact about whether the alleged hazard was open and obvious?

**Background:** The slip-and-fall giving rise to this lawsuit occurred on January 26, 2006, at the Great Lakes Crossing Shopping Center in Auburn Hills, Michigan. According to plaintiff Irene Brown, she was on her way into the mall at about 8 p.m. when she encountered a slippery spot on a covered walkway leading to the mall entrance; Brown lost her balance and fell. When she first tried to get up, her foot again slipped from underneath her. Brown got up and went into the mall, where she reported to security that she had fallen on black ice on the walkway.

Brown and her husband sued the Taubman Company, which owns the shopping center property, and two other defendants. Evidence was presented that there had been sleet, ice, and light snow on the days before Brown's accident, and snow removal services had been called in. A weather service reported that temperatures on the day of the accident, January 26, ranged from between 22 and 32 degrees. A snow removal company employee testified that there was visible snow about two feet from where Brown claimed to have fallen. One witness confirmed the presence of an icy patch, one foot by three feet, on the walkway, but a witness who returned after Brown's fall to salt the area could not locate the icy patch. Brown testified that there was no snow on the ground, and that it was sunny and unseasonably warm on the day she fell. She testified that it was dark by the entrance, and that she did not see the ice before her fall, or while she was trying to get up, although she was able to spot it later when the area was illuminated. Once discovery was completed, all three defendants filed motions for summary disposition, which the trial court granted, dismissing Brown's claims. Regarding Taubman's motion, the judge found that "the black ice upon which plaintiff fell was open and obvious, and would've been discovered by a person of ordinary intelligence upon casual inspection . . . ." The judge observed that Brown had been to the mall many times before, that it was not unusually dark on this particular visit, and that there was "nothing unusual about the character, location or surrounding conditions of the black ice that would make it unreasonably dangerous or effectively unavoidable."

Brown appealed the trial court's summary disposition ruling in favor of Taubman, arguing that the black ice upon which she had fallen was not open and obvious, that poor lighting in the area contributed to the concealment of the black ice, and that the hazard had special aspects precluding use of the open and obvious doctrine. In an unpublished per curiam opinion, the Court of Appeals reversed the trial court's ruling. "In light of th[e] conflicting evidence, reasonable minds could differ regarding whether the black ice was open and obvious," the court held. Taubman appeals.

**Wednesday, March 9**

***Morning Session***

**WOLF v CITY OF DETROIT (case no. 140679)**

**Attorneys for plaintiff Laurence G. Wolf, d/b/a Laurence Wolf Properties:** Gregory D. Hanley, Timothy O. McMahon/(248) 544-1500

**Attorney for defendant City of Detroit:** Joanne D. Stafford/(313) 237-3069

**At issue:** The plaintiff property owner challenged the defendant city's imposition of a Solid Waste Inspection Fee; the property owner claimed that the fee amounted to a tax that had not been put to a vote of the electorate, in violation of the Headlee Amendment, Const 1963, art 9, § 31. The Court of Appeals, in a published decision, applied the factors set forth in *Bolt v City of*

*Lansing*, 459 Mich 152 (1998) to conclude that the SWIF is a “valid regulatory fee, not a disguised tax.” The court denied the plaintiff’s motions for class certification and for sanctions for vexatious proceedings. Does the SWIF serve a regulatory purpose, is it proportionate to the necessary costs of the inspection service, and is it voluntary? Do the facts, such as the city’s inclusion of the SWIF on property tax bills, support the plaintiff’s contention that the SWIF is really a tax? Did the Court of Appeals abuse its discretion when it denied the plaintiff’s motion for sanctions?

**Background:** In this original action in the Court of Appeals, a commercial property owner, Laurence Wolf, challenged the city of Detroit’s Solid Waste Inspection Fee. The SWIF was authorized by § 22-2-56 of the City Code and inaugurated by the city on May 23, 2007. Wolf claimed that, under the standards set forth in *Bolt v City of Lansing*, 459 Mich 152 (1998), the SWIF is a tax, rather than a fee, and that it violates the Headlee Amendment, Const 1963, art 9, § 31: “Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above the rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.” Wolf moved for summary disposition, arguing that there is no genuine issue of material fact that the SWIF is anything other than a tax. Wolf also sought class certification and filed a motion for sanctions. The city argued that the SWIF is a fee for a regulatory purpose, not a disguised tax.

After considering the evidence and briefs presented by the parties, the Court of Appeals held in a published opinion that the SWIF is a valid fee and not a hidden tax. The Court of Appeals applied the *Bolt* standard to conclude: (1) that the SWIF serves a regulatory purpose – “to ensure the efficient removal of solid waste products and to protect the public health by reducing blight and illegal dumping”; (2) that the SWIF is “reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged”; (3) that the SWIF is voluntary; and (4) that the defendant’s inclusion of the SWIF on the property owner’s tax bill, and the fact that the defendant may place a lien on the parcel in the amount of the fee, does not make the SWIF a tax. In a separate order, the Court of Appeals denied Wolf’s motion for summary disposition and entered summary disposition in the city of Detroit’s favor. The appellate panel also held that the motion for class certification was moot, and the court denied Wolf’s motion for sanctions for vexatious proceedings. Wolf appeals.

**PEOPLE v HUSTON (case no. 141312)**

**Prosecuting attorney:** Aaron J. Mead/(269) 983-7111

**Attorney for defendant Cecil D. Huston:** Ronald D. Ambrose/(734) 266-8250

**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Terrence E. Dean/(231) 724-6435

**Trial Court:** Berrien County Circuit Court

**At issue:** The defendant, after pleading guilty to armed robbery, was sentenced to 15 to 50 years in prison. He challenged the sentence, arguing that the sentencing judge had misscored Offense Variable 10, MCL 777.40 (exploitation of a vulnerable victim). In a published per curiam opinion, the Court of Appeals remanded for resentencing, holding that nothing on the record indicated that the victim was inherently vulnerable, and that “vulnerability” depends on the victim’s personal characteristics, not the surrounding circumstances. The prosecutor argues that, because the victim was alone and isolated, she was vulnerable. Should OV 10 be scored in this

case? In determining whether a victim is “vulnerable,” should the sentencing judge consider the circumstances surrounding the offense, or only the victim’s personal characteristics?

**Background:** Over the course of a few weeks, the 15-year-old defendant, Cecil Huston, and 16-year-old Keyon Brown went on a crime spree that consisted primarily of burglaries, but ended with the armed robbery of Jackie Flanagan at a mall. Flanagan, who was alone, was getting out of her SUV in the mall parking lot when Huston and Brown accosted her, pointing guns at her head and demanding her purse, wallet, and car keys. Flanagan turned over her cell phone and car keys, but when she had some trouble getting the purse off her shoulder, Brown knocked her to the ground and took the purse. Huston and Brown then fled in Flanagan’s car. Ultimately, Huston and Brown were arrested and Huston confessed. He was charged with armed robbery and carjacking; in six other cases, he was charged with breaking and entering various businesses.

The prosecutor offered to let Huston plead guilty to the armed robbery count in exchange for dismissal of the carjacking count, all of the burglary charges, and a couple of other juvenile court cases. In addition, Huston would be required to testify against Brown. Huston accepted the offer and offered a guilty plea. As to sentencing, Huston argued that Offense Variable 10, MCL 777.40 (exploitation of vulnerable victim), was incorrectly assessed at 15 points for predatory conduct. In *People v Cannon*, 481 Mich 152 (2008), the Supreme Court held that, in order to assess 15 points for predatory conduct, the sentencing judge must find that the offender’s pre-offense conduct was directed at one or more specific victims who suffered from a “readily apparent susceptibility to injury, physical restraint, persuasion, or temptation.” The statute is aimed at pre-offense conduct where victimization is the primary purpose, the Supreme Court said. The legislature did not intend that “predatory conduct” include run-of-the-mill planning to commit a crime or escape without detection; rather, the *Cannon* Court said, the focus of OV 10 is on the exploitation of “vulnerable victims.”

In Huston’s case, the trial judge determined that lying in wait to assault the victim constituted predatory conduct, and that OV 10 was properly scored at 15 points. Huston’s minimum guidelines range was calculated by the court at 108 to 180 months. The court sentenced Huston at the top of the guidelines, imposing a 15- to 50-year sentence.

Huston filed an application for leave to appeal in the Court of Appeals, arguing that OV 10 had been improperly scored. The Court of Appeals denied the application in a standard order, citing lack of merit in the grounds presented. The Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. In a published per curiam opinion, the Court of Appeals held that OV 10 had been misscored and that Huston was entitled to resentencing. “On the basis of the characteristics of vulnerability listed in *Cannon*, the focus being on characteristics of the victim, rather than the victim’s circumstances, and on the basis of the record before this Court, we conclude that OV 10 was improperly scored at 15 points. It should have been scored at zero points,” the appellate panel stated. The prosecutor appeals.

**BRN SON METHODIST HOSPITAL v ALLSTATE INSURANCE COMPANY (case no. 140301)**

**Attorney for plaintiff Bronson Methodist Hospital:** Richard E. Hillary, II/(616) 831-1700

**Attorney for defendant Allstate Insurance Company:** P. Kelly O’Dea/(248) 377-1700

**Attorney for amicus curiae Auto Club Insurance Association:** James G. Gross/(313) 963-8200

**Attorney for amicus curiae Coalition Protecting Auto No-Fault:** Liisa R. Speaker/(517) 482-8933

**Trial Court:** Kalamazoo County Circuit Court

**At issue:** Bronson Methodist Hospital provided medical care to the claimant, but waited almost a year to submit its claim to the Michigan Assigned Claims Facility. By the time the Assigned Claims Facility assigned the claim to Allstate Insurance Company and notified Bronson of the assignment, a year and two days had elapsed since the last date of treatment, so Allstate denied the claim under the one-year-back rule. Bronson filed a timely lawsuit, but the circuit court agreed that the one-year-back rule precluded recovery, and the Court of Appeals affirmed. Does the no-fault act's one-year-back rule, MCL 500.3145, bar Bronson from recovering its medical charges?

**Background:** Lemuel Brown was injured in a single vehicle accident while driving a borrowed, uninsured motor vehicle on December 30, 2006. He was treated at Bronson Methodist Hospital between December 30, 2006, and January 5, 2007; the charges totaled \$37,465.01.

Bronson determined that Brown did not have any available no-fault insurance coverage, so the hospital filed a claim with the Michigan Assigned Claims Facility on December 14, 2007, a little more than two weeks before expiration of the one-year application deadline prescribed by MCL 500.3145 and MCL 500.3174. The Assigned Claims Facility assigned the claim to Allstate Insurance Company on January 7, 2008, more than a year after Bronson's last date of service. Bronson received notice that Allstate was the servicing insurer on January 15, 2008, and requested payment from Allstate, which declined, relying on the one-year back rule of MCL 500.3145. That statute states, in part, that: "(1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." Bronson sued Allstate on February 6, 2008. Allstate moved for summary disposition, relying on the one-year back rule. The trial court granted Allstate's motion and dismissed the hospital's claim.

Bronson appealed, but in a published opinion, the Court of Appeals affirmed the trial court's ruling. MCL 500.3145(1)'s one-year-back rule precluded Bronson's recovery, the appellate panel said. Bronson appeals.

### *Afternoon Session*

#### **PEOPLE v HILL (case no. 141122)**

**Prosecuting attorney:** Randy L. Price/(989) 790-5330

**Attorney for defendant Naykima Tinee Hill:** Gail O. Rodwan/(313) 256-9833

**Trial Court:** Saginaw County Circuit Court

**At issue:** The three victims identified the defendant as the woman who, while wearing a brown parka with fur around the hood, forced her way inside their house, assaulted, and threatened them. Police dog tracking led police to a coat and knife that matched those described by the victims; it also led to a house where the defendant was found. All three victims identified the defendant as their assailant before she was taken to the police station. The defendant claimed that she was misidentified. A jury convicted the defendant of first-degree home invasion, assault and battery, unlawful imprisonment, extortion, and three counts of armed robbery, based in part on a police detective's testimony that an out-of-court declarant told him that the defendant had been wearing

a brown-hooded coat with fur around it. The Court of Appeals reversed the defendant's convictions, holding that the admission of the out-of-court statement was a preserved constitutional error that the court could not conclude was harmless beyond a reasonable doubt. Was the out-of-court statement harmless beyond a reasonable doubt? Was the dog tracking testimony admitted in error?

**Background:** On the morning of March 7, 2007, Sherry Crofoot and her 13-year-old daughter were at their home in Saginaw, along with Crofoot's 80-year-old grandmother. A woman wearing a brown coat with fur-trimmed hood knocked at the door, asking to use the phone and to get a ride. When Crofoot refused and tried to shut the door, the woman pushed her way in, knocking Crofoot into the room. Once inside, the woman punched the grandmother several times in the face, then grabbed a knife, demanding money. Eventually, after Crofoot gave her some money and the grandmother's purse, the woman left.

A Michigan State Police trooper responded; with his police tracking dog, he followed a trail that led first to a nearby house. When police later investigated the house, they found a brown coat with a knife in the pocket; both the knife and the coat matched descriptions given by Crofoot, her daughter, and her grandmother. The trail then led to another house; Saginaw police were already there responding to complaints of a "loud and boisterous" woman, Naykima Tinee Hill. Hill was arrested; before going to the police station, Hill was taken to the Crofoot home, where all three victims identified her as their attacker.

All three victims testified at trial. In addition, police witnesses testified about the dog's tracking and their investigation. One officer testified that an out-of-court witness told him that Hill was wearing a brown hooded coat with fur around it on the day in question. Hill testified in her own defense and denied being at Crofoot's house, claiming that the victims were mistaken in identifying her. The jury found Hill guilty of first-degree home invasion, assault and battery, unlawful imprisonment, extortion, and three counts of armed robbery. She received concurrent prison terms of 25 to 60 years for the armed robberies; 20 to 30 years each for the home invasion and extortion; 14 to 22 years for the unlawful imprisonment; and three months for the assault and battery.

Hill appealed, and the Court of Appeals reversed her convictions, holding that the admission at trial of the out-of-court statement was a preserved constitutional error that the court could not conclude was harmless beyond a reasonable doubt. A defendant has a constitutional right to be confronted with the witnesses against him, the panel explained. The United States Supreme Court's decision in *Crawford v Washington*, 541 US 36, 53-54 (2004), clarified that this right is violated when the testimonial statements of a witness who did not testify at trial are admitted against the defendant, unless the witness was unavailable and defendant had a prior opportunity to cross-examine the witness. In this case, the Court of Appeals held, admission of the out-of-court witness' statement violated *Crawford*. Without the out-of-court statement, the panel said, it was possible that the jury might have concluded that the victims made a mistake in identifying Hill as their assailant. "Because we cannot say that the error was harmless beyond a reasonable doubt, we reverse and remand for a new trial." The Court of Appeals did not find merit to Hill's claim that the trial court erred in qualifying a police officer as an expert in dog handling. The prosecutor appeals.

**PEOPLE v PELTOLA (case no. 140524)**

**Prosecuting attorney:** Joel D. McGormley/(517) 373-4875

**Attorney for defendant Drew James Peltola:** Jacqueline J. McCann/(313) 256-9833

**Trial Court:** Dickinson County Circuit Court

**At issue:** MCL 333.7413(2) states that an individual convicted of a second or subsequent controlled substance offense may be “imprisoned for a term not more than twice the term otherwise authorized . . . .” When a defendant’s minimum and maximum sentences are doubled pursuant to MCL 333.7413(2), should the trial court score prior record variables (PRVs) to calculate the minimum sentence?

**Background:** On April 19, 2008, a confidential informant told a law enforcement drug team that heroin was being sold from a residence in Kingsford, Michigan. With money provided by law enforcement, the informant purchased \$40 worth of heroin from the drug house; Drew Peltola, who was on parole for a drug charge, was one of several people involved in the sale. When Iron Mountain police stopped Peltola later that night, he had nearly \$600 on his person, including the \$40 from the informant. As police began arresting others involved in the heroin sale, the suspects began talking, and it became clear that Peltola and a friend were acting as the local distributors for a down-state heroin supplier.

A jury found Peltola guilty as charged of delivering less than 50 grams of heroin and conspiracy to deliver less than 50 grams of heroin. Peltola’s minimum sentence guideline range was calculated at five to 23 months; the statutory maximum for his crime was 20 years. Because this was Peltola’s second conviction for a drug crime, the judge doubled his minimum and maximum sentences pursuant to MCL 333.7413(2), and imposed concurrent sentences of to 46 months to 40 years for each conviction. The court stated that the sentence was not a departure from the guidelines.

Peltola appealed to the Court of Appeals. He argued in part that the trial court had improperly doubled both the minimum and maximum sentences under MCL 333.7413(2). While Peltola’s appeal was pending, the Michigan Supreme Court issued its decision in *People v Lowe*, 484 Mich 718 (2009). *Lowe* held that MCL 333.7413(2) authorizes the trial court to double both the minimum and maximum sentences when doubling a defendant’s term. The Court of Appeals affirmed Peltola’s convictions and sentences in an unpublished per curiam opinion, relying on *Lowe* to reject Peltola’s claim that the trial court improperly doubled the minimum sentence. Peltola then filed a motion for reconsideration, conceding that *Lowe* authorized the doubling of the minimum sentence, but arguing that *Lowe* also held that, when a minimum sentence is doubled under MCL 333.7413(2), the trial court should not score the prior record variables. Peltola points to a passage in the *Lowe* opinion stating that the legislature intended that, when MCL 333.7413(2) was at issue, the “minimum sentence guidelines range to be calculated without respect to the underlying offense’s repeat nature.” The Court of Appeals denied the motion for reconsideration. Peltola appeals.

**Thursday, March 10**  
**Morning Session Only**

**GREEN v PIERSON, et al. (case no. 140808)**

**Attorney for plaintiff Paul G. Green II, as Personal Representative of the Estate of Paul Gerald Green, Deceased:** Ramona C. Howard/(313) 961-4400

**Attorney for defendants Charles Pierson, M.D., Barbara Carlson, M.D., and Southwestern Medical Clinic, P.C.:** Timothy P. Buchalski/(616) 575-2060

**Attorney for defendant Richard Kammenzind, M.D.:** Marcy R. Matson/(517) 853-2929

**Attorney for defendants Thomas Pow, M.D., and Great Lakes Heart & Vascular Institute, P.C.:** Karl E. Hannum/(248) 250-7800

**Attorney for defendant Lakeland Medical Center St. Joseph:** Jon D. Vander Ploeg/(616) 774-8000

**Attorney for amicus curiae Michigan Association for Justice:** David R. Parker/(313) 875-8080  
**Trial Court:** Berrien County Circuit Court

**At issue:** In this medical malpractice case, the trial court determined, on its own motion, that the plaintiff's notice of intent did not comply with the requirements of MCL 600.2912b(4) because the notice did not include an adequate statement as to how the defendants' alleged negligence proximately caused the decedent's injury. Because of that finding, the trial court granted summary disposition to the defendants and dismissed the complaint. The Court of Appeals affirmed in an unpublished per curiam opinion. Should the plaintiff have been allowed to amend his notice of intent? Does MCL 600.2301 apply to cases initiated before MCL 600.5856 was amended in 2004?

**Background:** Paul Green died after being cared for by the defendant physicians and hospital. The plaintiff, as personal representative of Green's estate, sued the defendants for medical malpractice. The defendants filed motions for summary disposition, arguing that the lawsuit was not timely filed and that the mandatory pre-suit notice of intent to sue was not properly filed. (Under MCL 600.2912b, a plaintiff in a medical malpractice suit must file an NOI 182 days before filing the complaint.) The trial court ruled that the complaint was not timely filed as to some of the defendants. The trial court also held that the plaintiff's NOI was inadequate because the statement of proximate causation was not specific enough. MCL 600.2912b(4)(e) provides that an NOI must state "the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." Green's NOI, which stated that "[t]imely and proper compliance with the standard of care would have prevented [the decedent], from untimely demise," did not satisfy the statute, the court said. Accordingly, the trial court entered an order granting the defendants' motions for summary disposition and dismissing the plaintiff's claims with prejudice.

The plaintiff appealed as of right to the Court of Appeals. In an unpublished per curiam opinion, the Court of Appeals affirmed, holding that the defendants did not waive their statute of limitations defense, and that the trial court had authority under MCR 2.116(I) to decide sua sponte (on the court's own motion) whether the proximate cause statement in the NOI was sufficient. The Court of Appeals also rejected the plaintiff's argument that *Bush v Shabahang*, 484 Mich 156 (2009) applied to this case. In *Bush*, the Michigan Supreme Court ruled that a timely-filed but defective NOI tolls the period of limitations and that, under MCL 600.2301 and upon a showing of a good-faith effort to comply with MCL 600.2912b, the plaintiff is entitled to amend to notice of intent. But the Court of Appeals held that *Bush* did not apply in Green's case because *Bush* involved the post-amendment version of MCL 600.5856, while the pre-amendment version of MCL 600.5856 applied to this case. Finally, the Court of Appeals affirmed the trial court's ruling that the statement of proximate cause in the NOI was not specific enough. The plaintiff appeals.

**HARRIS v GENERAL MOTORS CORPORATION (case no. 140241)**

**Attorney for plaintiff Alesia Harris, Personal Representative of the Estate of Henry J.**

**Harris, Deceased:** Michael J. Cantor/(248) 353-7750

**Attorney for defendant General Motors Corporation:** Gerald M. Marcinkoski/(248) 433-1414

**Attorney for amicus curiae Michigan Self-Insurers' Association and the Michigan Manufacturers Association:** Martin L. Critchell/(248) 593-2450

**Tribunal:** Workers' Compensation Appellate Commission

**At issue:** A General Motors employee fell and struck his head on the floor of a men's room at a GM factory; he died a few days later. The cause of his fall was never determined. The employee's widow brought a worker's compensation claim. A magistrate held that the plaintiff failed to establish a connection between the employee's work and his injury. The plaintiff appealed to the Workers' Compensation Appellate Commission, claiming that the magistrate misunderstood the evidence and that his decision was not supported by sufficient evidence. In a split decision, the WCAC found that the magistrate's factual errors were harmless and that his decision was supported by the evidence. The Court of Appeals affirmed. Did the Court of Appeals err when it affirmed the WCAC's ruling?

**Background:** While at work at a General Motors Corporation factory, Henry Harris fell back and struck his head on the tile floor of a men's room; he died a few days later. The only other person in the men's room did not see Harris fall, and there was conflicting testimony about whether Harris was moving when he fell.

Alesia Harris, Harris' widow, filed a claim for worker's compensation benefits. After hearing from three expert witnesses as to the circumstances of Harris' fall and death, the magistrate concluded that the plaintiff had failed to establish a connection between Harris' work at General Motors and his injury, saying that Harris "passed out for some unknown cause of a purely personal nature and fell as if in a dead faint striking his head, without any evidence of a work inducement, such a fumes, sticky or slippery floor, etc." Based on these findings, the magistrate concluded that the case was governed by the law of idiopathic falls set forth in *Ledbetter v Michigan Carton Co*, and *McClain v Chrysler Corp*, and that the plaintiff was not entitled to benefits.

The plaintiff appealed to the Workers' Compensation Appellate Commission, arguing that the magistrate's decision was not supported by competent, material, and substantial evidence. The overall record, the plaintiff argued, established that Harris suffered a work-related injury. But the WCAC affirmed the magistrate in a divided opinion. The WCAC majority agreed with the plaintiff that the magistrate had made a couple of factual errors, but these errors were harmless, the majority said. The magistrate's decision to accept the testimony of General Motors' expert was reasonable, the majority concluded.

The dissenting commissioner agreed with the plaintiff that the magistrate's factual errors were not harmless, and concluded that the magistrate erred in analyzing the case as an "idiopathic" fall rather than an "unexplained" fall. The dissent concluded that, while idiopathic falls on a level floor are not compensable, an unexplained fall generally is compensable. The dissent would have remanded the case to the magistrate to have him explain why he concluded that the fall was idiopathic.

The Court of Appeals affirmed the WCAC in an unpublished per curiam opinion. In the absence of fraud, if there is "any competent evidence" in the record, the WCAC's findings of fact are conclusive, the appellate court said. If it appears that the WCAC carefully examined the record, was aware of the deference to be given to the magistrate's decision, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record, "the judicial tendency should be to affirm." Questions of law, however, are reviewed de novo, the Court of Appeals explained. The panel held that the WCAC "did not commit an error of law by finding that plaintiff had to show a causal relationship

between a work-related event and decedent's injury or that decedent's injury was somehow aggravated by the conditions at work." The panel explained that an injury is "not compensable simply because it occurred while the employee was in the course of employment on the employer's premises." An injury does not arise out of employment, the Court of Appeals held, where the predominant cause of the harm was attributable to personal factors, and where employment circumstances did not significantly add to the risk of harm. The panel stated that the magistrate's factual findings were conclusive because the record contained competent evidence in support of them. The plaintiff appealed to the Michigan Supreme Court which first denied leave to appeal but then, on reconsideration, granted oral argument on the application.

**FARMERS INSURANCE EXCHANGE v YOUNG, et al. (case no. 141571)**

**Attorney for plaintiff Farmers Insurance Exchange:** Patrick W. Bennett/(248) 244-8931

**Attorney for defendant Rufus Young:** Carl L. Collins, III/(313) 341-4100

**Trial Court:** Wayne County Circuit Court

**At issue:** The trial court ruled that the defendant – who was injured in a car accident while driving someone else's uninsured vehicle – was ineligible for no-fault personal protection insurance benefits under MCL 500.3113(a) because his driver's license was suspended. Since his operation of the uninsured vehicle was unlawful, he had no reasonable belief that he was entitled to take and use the vehicle merely because the person who had been operating it – but was too drunk to drive – had consented to his driving the car, the trial court said. The Court of Appeals affirmed in a split decision. Did the courts below err in concluding that the defendant could not have had a reasonable belief that he was entitled to take and use the car?

**Background:** This case involves an auto accident in which one of the drivers, Rufus Young, was injured while driving an uninsured Kia; his driving privileges had been suspended since 1983. At issue is whether Young may recover personal protection insurance benefits.

The Kia belonged to Nicole Williams, who was away on vacation at the time of the accident. Williams had asked her cousin Lynda Lee to stay at her house and take care of Williams' seven-year-old son Jalin. Before leaving, Williams told Lee that the Kia was uninsured. There is a dispute as to whether Williams used the Kia.

While Williams was away, Lee drove the Kia to a party store to buy beer, and then drove with Jalin to Young's workplace, where she stayed for about 45 minutes drinking beer. When it was time for Lee to leave, she and Young believed that she was too drunk to drive. Young, whose driver's license had been suspended since the early 1980s, agreed to drive Lee and Jalin to Williams' home. On the way there, another driver collided with the Kia, injuring Lee and Young and killing Jalin. The other driver was charged criminally and Young received no citation for the accident. None of those involved in the accident, nor their vehicles, were insured.

Young acknowledged that Williams did not give him permission to drive the Kia before she left for her vacation. He testified that, in light of his past driving record, Williams probably would not have allowed him to use the Kia. At trial, however, he testified that he thought that Williams would have approved of his driving the car in light of Lee's intoxication. Young said he did not know whether Lee had permission to drive the Kia.

Young applied for personal protection insurance benefits for his injuries through the assigned claims facility, and his claim was assigned to Farmers Insurance Exchange. Farmers denied benefits because Young had used Williams' vehicle without her consent and without a reasonable belief that he was entitled to use the vehicle, owing to his lack of an operator's license. Farmers filed a complaint for declaratory relief. After a bench trial, the trial court ruled in

Farmers' favor, holding that Young was not lawfully entitled to drive the vehicle because he was unlicensed, and that he was therefore disqualified for benefits under MCL 500.3113(a). MCL 500.3113(a) states that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed: (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."

The Court of Appeals affirmed in a split unpublished per curiam opinion. The evidence established that Young took the vehicle unlawfully for purposes of MCL 500.3113(a), the majority said. Young did not have Williams' express or implied consent to take the car, and he could not have reasonably believed that he was entitled to use it; accordingly, Young was excluded from personal protection insurance benefits, the majority concluded. The dissenting judge contended that the statutory language "taken unlawfully" would bar Young from benefits only if he intended to take the car for some unlawful use, such as stealing or joyriding. Because the facts suggested that Young drove the car only to take an intoxicated acquaintance home Young was therefore entitled to personal protection insurance benefits, the dissent reasoned. Young appeals.

**PEOPLE v DUNCAN (case no. 141672)**

**Prosecuting attorney:** Janet A. Napp/(313) 224-5741

**Attorney for defendant Robert William Duncan:** Mark M. Haidar/(248) 374-1200

**Trial Court:** Wayne County Circuit Court

**At issue:** The defendant was convicted by a jury of three counts of third-degree criminal sexual conduct for having an affair with a 14-year-old friend of his daughters. He filed a motion for new trial claiming that the improper admission of hearsay testimony and ineffective assistance of counsel led to his conviction. The trial judge agreed, and ordered a new trial. Following the prosecutor's appeal, the Court of Appeals affirmed in a split unpublished opinion. Did the trial court abuse its discretion in granting the defendant a new trial, for the reasons stated in the Court of Appeals dissenting opinion?

**Background:** Robert Duncan was charged with three counts of third-degree criminal sexual conduct for sexual encounters he allegedly had with a 14-year-old friend of his daughters. At trial, the girl testified that she and Duncan had had sexual relations, but Duncan denied any wrongdoing. After deliberating for several hours, the jury found Duncan guilty as charged.

Duncan filed a motion seeking judgment notwithstanding the verdict or a new trial. He argued, among other things, that there were numerous instances where hearsay evidence was placed before the jury and that his trial counsel was ineffective. While rejecting Duncan's other arguments, the trial judge agreed that a number of hearsay statements – for example, the girl's testimony that she told Duncan's daughter that rumors of a sexual affair between herself and Duncan were true – should not have been admitted into evidence. The judge also held that testimony regarding Duncan's prior felony conviction for drug possession was improperly admitted, and that defense counsel was ineffective for failing to object to the repeated admission of hearsay evidence. The defense attorney's failure to object, combined with other mistakes at trial, served to deny Duncan a fair trial, the judge concluded. The judge rejected Duncan's argument that he was entitled to a new trial on the basis of an affidavit from a recanting witness, but added that the witness' statements "are legitimate areas of cross exam inquiry which may shed light on her credibility."

The prosecutor filed a delayed application for leave to appeal in the Court of Appeals, contending that the trial court abused its discretion; the alleged hearsay testimony was properly admitted, defense counsel was not ineffective, and the “new evidence” offered by the recanting witness was ineffectual, the prosecutor maintained. Over the dissent of one panel member, the Court of Appeals majority affirmed the trial court in an unpublished per curiam opinion. The majority agreed that hearsay testimony had been “repeatedly and erroneously” admitted at trial, and that defense counsel was ineffective. The improperly admitted evidence “only served to bolster the victim’s credibility and her version of events, and to damage defendant’s credibility,” the majority said. The dissenting judge did not agree that any errors were outcome determinative, and would have reversed the trial court’s grant of a new trial. The prosecutor appeals.

**PEOPLE v IVEY (case no. 141795)**

**Prosecuting attorney:** Jon P. Wojtala/(313) 224-5796

**Attorney for defendant Franklin Edward Ivey:** Michael B. Skinner/(248) 693-4100

**Trial Court:** Wayne County Circuit Court

**At issue:** The defendant was acquitted of first-degree murder and felony-firearm, but was convicted of felon in possession of a firearm after claiming self-defense at a jury trial. He was sentenced to three years of probation, with 12 months in jail. In calculating the sentence guidelines for the offense of felon in possession of a firearm, the trial court assessed 100 points under Offense Variable 3, MCL 777.33 (physical injury to a victim), because “[a] victim was killed.” The Court of Appeals affirmed, but one judge dissented with regard to the scoring of OV 3. Did the trial court err in assessing 100 points under OV 3 where the defendant successfully argued at trial that the killing was in self-defense?

**Background:** On August 17, 2008, Franklin Ivey shot and killed Kerry Booker in Detroit. Ivey was charged with first-degree murder, felon in possession of a firearm, and felony-firearm; he was tried before a Wayne County jury in late February and early March 2009. Ivey admitted that he killed Booker, but claimed that he did so in self-defense. The jury acquitted Ivey of first-degree murder and felony-firearm, but found him guilty of being a felon in possession of a firearm.

At sentencing, over defense counsel’s objection, the trial court assessed 100 points under Offense Variable 3, MCL 777.33 (physical injury to a victim). Under MCL 777.33(1)(a), 100 points should be scored under OV 3 if “[a] victim was killed.” Under MCL 777.33(2)(b), 100 points should be scored “if death results from the commission of a crime and homicide is not the sentencing offense.” Ivey argued that, because the jury acquitted him of the murder charge, the jury accepted his claim of self-defense, and therefore he should not be sentenced as if he shot a “victim” or caused a “victim’s” death. The prosecutor argued that, even if the verdict shows that the jury concluded that Ivey acted in self-defense, the trial court was obligated to score 100 points for OV 3. The trial court agreed, and sentenced Ivey as a second habitual offender to three years of probation, with the first year in jail and credit for 203 days already spent in jail. The trial court allowed Ivey to post a bond that has allowed him to remain out of jail while he pursues this appeal.

Ivey appealed as of right. The Court of Appeals affirmed in a split unpublished per curiam opinion. The majority explained that, for purposes of OV 3, a victim includes “any person harmed by the criminal actions of the charged party.” Ivey was convicted of the felon-in-possession charge, and the decedent died as a result of Ivey’s possession of a firearm; accordingly, there was sufficient evidence that the decedent was a “victim,” the majority said. Moreover, that the

prosecutor had established that the decedent's death "resulted from" the commission of a crime, which is sufficient to support a 100 point score under MCL 777.33(2)(b). "There is no question here that defendant factually caused the decedent's death, regardless of whether the specific act of killing was in self-defense." The dissenting judge did not agree that a "victim" was killed or that the death resulted from the commission of "a crime." The jury found that Ivey acted in self-defense, so his firearm possession was justified at the time of the shooting, the dissenting judge reasoned. Ivey's possession of the firearm only became wrongful when Ivey failed to rid himself of the firearm after the shooting. Because Ivey's possession of the firearm was justified, the dissenting judge would have held that the decedent was not a victim for purposes of OV 3. Ivey appeals.

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