MICHIGAN SUPREME COURT

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COLD-CASE PROSECUTION CHALLENGED IN CASE BEFORE STATE SUPREME COURT THIS WEEK; HUSBAND CHARGED 38 YEARS AFTER WIFE'S DEATH

LANSING, MI, May 5, 2008 – The case of a Lansing-area man who was charged with open murder 38 years after his wife's death will be argued before the Michigan Supreme Court this week. At issue is whether the case should be dismissed because of the delay – or whether the defendant must first show that the prosecutor delayed the case to get a tactical advantage.

In *People v Mercer*, the defendant was arrested in 2006 for his wife's 1968 death after a cold-case team reinvestigated her death and concluded that she died of a drug overdose. The defendant successfully argued in the trial court that the charge came too late for him to properly defend himself, since many key witnesses had died and all of the medical samples taken at the time of the his wife's death had been destroyed. But the Michigan Court of Appeals reversed, saying that the defendant must show that the arrest delay was motivated by the prosecutor's desire for a tactical advantage.

Like *People v Mercer*, the remaining six cases – which involve contract, criminal, governmental immunity, no-fault, property, and worker's compensation issues – are being heard as oral arguments on application, meaning that the Court will hear oral argument and later decide whether to grant leave to appeal in each case.

Court will be held on **May 7** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m**.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Wednesday, May 7
Morning Session Only

PEOPLE v BOND (case no. 135402)
Prosecuting attorney: Mark R. Kneisel/(734) 222-6620
Attorney for defendant Andre Farah Bond: Richard B. Ginsberg/(734) 213-0918

Trial Court: Washtenaw County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/135402/135402-Index.htm
At issue: The defendant was an adult hall monitor at a high school who made suggestive comments to female students and had physical contact with a couple of them. Was the evidence sufficient to show that the defendant used his position of authority to cause the victims' submission to the sexual contact, as required for a conviction of second-degree criminal sexual conduct pursuant to MCL 750.520c(1)(b)(iii)?
Background: Andre Bond was employed as a "community assistant" for Lincoln Consolidated Schools in Washtenaw County. Essentially, he was an adult hall monitor at the high school. Several female high school students complained that he was sexually aggressive with them; a couple said that he touched them inappropriately. Bond was charged with five counts of accosting children for immoral purposes, one count of fourth-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct. One of the accosting counts was dismissed before trial. After a four-day trial, the jury convicted Bond of all the remaining counts. Before sentencing, Bond filed a motion to vacate his convictions, which the judge denied – except as to the second-degree criminal sexual conduct conviction. The prosecutor had not adduced evidence that Bond "used [his position of] authority to coerce the victim to submit," a necessary element of the crime, the judge said. Accordingly, the judge acquitted Bond of second-degree criminal sexual conduct and substituted a count of fourth-degree criminal sexual conduct. The judge added that, if his decision was reversed on appeal, a new trial on that count would be granted. Bond was then sentenced to three-year probationary sentences on each count, with the first six months to be served in the county jail. In a two-to-one unpublished per curiam opinion, the Court of Appeals reversed, with the majority finding the evidence sufficient to show that Bond was in a position of authority over the victim and that the victim submitted to sexual contact as a result. The majority also held that the trial court erred in stating that, if its ruling was reversed, the defendant would be granted a new trial. The dissenting judge would have affirmed the trial judge because he found no evidence that Bond used his authority to cause the victim to submit to the contact. The contact was accomplished by simple force, and that the victim never "submitted," the dissenting judge reasoned. The case was remanded for resentencing. Bond appeals.

BRACKETT v FOCUS HOPE, et al. (case no. 135375)
Attorney for plaintiff Patricia D. Brackett: Margaret A. O'Donnell/(248) 362-4700
Attorney for defendants Focus Hope and Accident Fund Insurance Company of America: Gerald M. Marcinkoski/(248) 433-1414
Attorney for amicus curiae St. Paul Fire & Marine Insurance Company: Duncan A. McMillan/(616) 459-0556
Attorney for amicus curiae Michigan Association for Justice: Daryl Royal/(313) 730-0055
Tribunal: Workers' Compensation Appellate Commission
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/135375/135375-Index.htm
At issue: The plaintiff employee was disciplined for her refusal to attend a Martin Luther King, Jr. event that her employer considered to be mandatory. She suffered a major depression as a reaction to the discipline and remains totally disabled. Is the employee entitled to worker's

compensation benefits, or are benefits precluded by MCL 418.305, because her actions amounted to "intentional and wilful misconduct"?

Background: When Patricia Brackett was hired by defendant Focus Hope, she was informed that it is mandatory for all Focus Hope employees to attend an annual Martin Luther King, Jr. Day celebration. In 2002, in an effort to promote Focus Hope's goal of racial reconciliation, the celebration was to be held in Dearborn, Michigan. Brackett objected to attending the celebration at that location, as did dozens of other Focus Hope employees. Brackett informed her immediate supervisor that she would not attend. After the celebration, Focus Hope's CEO, Eleanor Josaitis, disciplined Brackett for her decision. Brackett suffered a major depression as a reaction to this disciplinary action and remains totally disabled. She filed a petition for worker's compensation benefits. Focus Hope and its insurance company opposed her claim, arguing that Brackett was injured by reason of her "intentional and wilful misconduct" and therefore was not entitled to receive benefits, MCL 418.305. A worker's compensation magistrate found that Brackett's mental condition arose from actual events of employment, that her perception of these events was reasonable, that her condition had been significantly aggravated by work, and that she continued to be totally disabled. The magistrate agreed with the defendants that Brackett "actually did willfully not attend" the Martin Luther King, Jr. Day celebration. But he rejected the defendants' claim that Brackett's refusal to attend the celebration and her reaction to the ensuing disciplinary action meant that she was injured as a result of "intentional and wilful misconduct" within the meaning of MCL 418.305. Focus Hope and its insurance carrier appealed to the Workers' Compensation Appellate Commission, which affirmed the magistrate's ruling. The Court of Appeals also affirmed, in an unpublished opinion. Focus Hope and its insurance carrier appeal.

DEPARTMENT OF TRANSPORTATION v INITIAL TRANSPORT, INC., et al. (case no. 134798)

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

Attorneys for defendants Initial Transport, Inc., and Employers Mutual Insurance Company: George F. Curran, III/(313) 259-8300, Mark J. Zausmer, Carson J. Tucker/(248) 851-4111

Attorney for amicus curiae North Central Cooperative, LLC: Michael J. Guss/(810) 230-1000

Attorney for amicus curiae Insurance Institute of Michigan: Daniel S. Saylor/ (313) 446-5520

Trial Court: Wayne County Circuit Court

Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/134798/134798-Index.htm

At issue: An accident involving the defendant motor carrier's vehicle did at least $3.5 million in damage to a Michigan interstate highway. The Michigan Department of Transportation is suing to recover the full loss, even though Michigan's no-fault act contains a $1 million cap on recoverable property damages. MDOT points to the Motor Carrier Safety Act, which incorporates federal regulations requiring up to $5 million in "financial responsibility" for motor carriers of hazardous materials. Does the Motor Carrier Safety Act provide a private cause of action or remedy for third parties? Does the Motor Carrier Safety Act carve out an exception to the no-fault act's cap on recoverable property damages? Is MDOT entitled to penalty interest on delayed benefit payments not reasonably in dispute?

Background: On October 6, 2003, a semi-tractor owned by Initial Transport, Inc. struck a cement barrier on the entrance ramp from northbound I-75 to eastbound I-94. The cargo tank trailer being hauled by the semi exploded, and the resulting conflagration did enormous damage to the overpass. MDOT's repair costs, including environmental cleanup, traffic control, and highway reconstruction, came to around $3.5 million. MDOT sued Initial Transport and its insurance carrier, Employers Mutual Insurance Company, to recover these costs. At the time of the accident, Initial Transport had a $1 million property protection policy, consistent with the $1 million cap on liability established by Michigan's no-fault act at MCL 500.3121(5). MDOT asked for the full $3.5 million, citing the Motor Carrier Safety Act at MCL 480.11a, the Owner Liability Statute at MCL 257.401, and negligence/strict liability principles. The defendants responded by moving for summary disposition on the portion of the claim exceeding $1 million, citing the no-fault cap. The trial court ruled in favor of the defendants, noting that the no-fault act is the exclusive remedy available to a tort claimant for property damage caused by a motor vehicle. In a split published opinion, the Court of Appeals reversed the trial court. The majority concluded that the $1 million cap did not apply to the defendants, because the financial responsibility minimums set forth in the Motor Carrier Safety Act effectively created an exception to the no-fault cap for hauling hazardous materials. The majority also ruled that statutory interest was payable on the portion of the $1 million that the Employers Mutual had failed to immediately pay after MDOT presented adequate proof of loss. The dissenting judge agreed with the majority regarding the interest owed, but would have applied the $1 million no-fault cap. The defendants appeal.

FUNDUNBURKS v CAPITAL AREA TRANSPORTATION AUTHORITY, et al. (case no. 134408)
Attorney for plaintiff Laura K. Fundunburks: David S. Mittleman/(517) 372-1011
Attorney for defendants Capital Area Transportation Authority and Michelle Beard: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan County Road Commission Self-Insurance Pool: William L. Henn/(616) 774-8000
Trial Court: Ingham County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/134408/134408-Index.htm
At issue: The plaintiff claims that, as she was exiting a city bus, the defendant bus driver prematurely closed the doors, causing her to fall and injure both knees. Did the bus driver's actions constitute gross negligence as defined in MCL 691.1407(7)(a), so as to be actionable under the exception to governmental immunity in MCL 691.1407(2)(c)? Did the circuit court err in denying partial summary disposition to the bus driver?
Background: Laura Fundunburks was a passenger on a city bus driven by Michelle Beard. According to Fundunburks she was exiting the bus through its rear doors when the doors began to close. She fell forward onto the ground and injured both knees. Fundunburks sued Beard and one other defendant, but Beard denied that she was liable for Fundunburks' injuries and raised "governmental immunity" as a defense. Under MCL 691.1407(2), a governmental agency employee like Beard is immune from tort liability for an injury to a person caused by the employee while in the course of employment, so long as certain conditions are satisfied. If the employee's conduct amounts to "gross negligence that is the proximate cause of the injury," then the governmental immunity protections of MCL 691.1407(2) do not apply, and the employee

may be liable. "Gross negligence" means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Relying on MCL 691.1407(2), Beard filed a motion for summary disposition, arguing that she did not act in a grossly negligent manner, and that she was therefore entitled to governmental immunity. The trial court rejected Beard's governmental immunity defense, stating that it would be premature to grant a motion for summary disposition because discovery was not complete (specifically, Beard's deposition had not yet been taken). The trial court stated that the motion could be renewed at a later date. The other defendant's motion for summary disposition was also denied. Both defendants appealed to the Court of Appeals, which affirmed in an unpublished per curiam opinion. The defendants appeal.

MILJEVICH CORPORATION v NORTH COUNTRY BANK & TRUST (case no. 134780)
Attorney for plaintiff Miljevich Corporation: David M. Savu/(906) 486-8394
Attorney for defendant North Country Bank & Trust: Joseph C. Fisher/(231) 941-9660
Trial Court: Ontonagon County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/134780/134780-Index.htm
At issue: The plaintiff corporation borrowed about $1.4 million from the defendant bank. The loan note provided that the interest rate on the loan was "[o]ne and one-half percent (1½%) per annum above the 'prime' as published from time to time by the Bank as its 'prime rate'. . . ." The bank never published its prime interest rate; it said that its prime rate was the same as the Wall Street Journal's prime rate, but the bank's rate was actually higher. After the corporation refinanced and paid its loan, it sued for the difference between what the bank charged for interest, and the interest that should have been charged pursuant to the Wall Street Journal's prime rate plus 1.5 percent. Did the defendant indirectly publish its interest rate by telling the plaintiff that the Wall Street Journal prime rate was the applicable interest rate? If not, was the plaintiff damaged by the defendant's failure to publish its interest rate? What interest rate applies to the loan?
Background: Miljevich Corporation borrowed approximately $1.4 million from North Country Bank & Trust. The note provided that the interest rate on the loan was "[o]ne and one-half percent (1½%) per annum above the 'prime' as published from time to time by the Bank as its 'prime rate'. . . ." The bank never published its prime interest rate. After the loan was refinanced and paid off, Miljevich's attorney asked the bank what interest rate had been charged. The bank responded that its prime rate was the same as the Wall Street Journal's prime rate. Miljevich examined the payments that had been made, and determined that the rate charged by the bank was actually in excess of the Wall Street Journal's prime rate plus 1.5 percent. Miljevich sued the bank for the difference between what the bank had charged it for interest, and the interest payments that should have been charged pursuant to the Wall Street Journal's prime rate plus 1.5 percent. After a one-day bench trial, the trial court ruled in Miljevich's favor. The court reasoned that, because the bank had not published its prime rate, the note did not provide an interest rate. The court therefore supplied a "reasonable" interest rate based on evidence of the parties' intent – the Wall Street Journal's prime rate plus 1.5 percent – and issued a judgment of about $140,000 against the bank, representing the difference between what the bank had charged and what it should have charged using the Wall Street Journal prime rate. The Court of Appeals reversed the trial court in an unpublished per curiam opinion, ruling that the trial court should have enforced the contract as written, applying the bank's prime interest rate plus 1.5 percent as

the parties had intended. It reasoned that the bank's failure to publish its prime rate was a breach of contract, but that Miljevich did not suffer any damages as a result. The Court of Appeals remanded the case to the trial court for entry of a judgment of no cause of action in favor of the bank. Miljevich appeals.

PEOPLE v MERCER (case no. 135811)
Prosecuting attorney: Joseph B. Finnerty/(517) 483-6108
Attorney for defendant Charles William Mercer, Jr.: Linda L. Widener/(517) 351-3700
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Stuart G. Friedman/(248) 356-8320
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Janice M. Joyce Bartee/(313) 224-5764
Trial Court: Ingham County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/135811/135811-Index.htm
At issue: The defendant is accused of killing his wife by giving her an overdose of propoxyphene. She died in 1968; the defendant was arrested in 2006. By then, many key witnesses had died and all of the medical samples taken at the time of the decedent's death had been destroyed. The trial court found that the prejudice to the defendant from the delay in his arrest was too substantial to permit the case to go forward. The Court of Appeals reversed in a peremptory order, based on the legal standard that a defendant must show that the delay in arrest occurred because the prosecutor intended to achieve a tactical advantage. Did the Court of Appeals apply the proper standard? Should the charges against the defendant be dismissed due to the prearrest delay?
Background: On February 27, 1968, Sally Mercer, the wife of Charles Mercer, was found dead at their home. Law enforcement personnel became concerned that her death was unnatural, noting that her body had bruises that could be viewed as defensive injuries. However, medical testing did not support these suspicions of wrongdoing, and the examining doctor concluded that the cause of her death was bulbar polio. The medical evidence gathered during the investigation was eventually destroyed. In 1995, 27 years after Sally Mercer died, a cold-case team began to reinvestigate her death. In 2003, a search warrant was issued to exhume her remains and take tissue samples, which were sent to a laboratory for testing. A forensic toxicologist concluded that the tests revealed a lethal level of propoxyphene. The tissue testing suggested that, prior to her death, she had consumed propoxyphene over a period of approximately eight months. Based on these test results, the medical examiner determined that the cause of death was acute propoxyphene intoxication. In 2006, 38 years after Sally Mercer's death, Charles Mercer was charged with open murder pursuant to MCL 750.316. Mercer filed a motion to dismiss the charges based upon the lengthy prearrest delay; he argued that he suffered substantial prejudice because physical evidence had been lost or destroyed and several critical witnesses had either died or forgotten most details about the matter. He also suggested that the delay was caused by the prosecution's alleged bad faith and reckless conduct. The prosecution responded that the delay was due to insufficient evidence to file charges at an earlier date, and suggested that the lost evidence and witnesses would hamper the prosecution as much as the defense. The prosecution also argued that Mercer had to show not only actual and substantial prejudice, but also that the delay was a deliberate attempt on the prosecution's part to gain a tactical advantage. The trial court granted Mercer's motion to dismiss. Although he found no evidence to suggest

that the delay in prosecution was done "to ensure conviction," 38 years was a long time, the judge said. "The witnesses are dead [or] unable to testify or remember, or they are so old and frail they simply can't remember anymore," the judge stated. The judge was concerned about the destruction of the medical evidence, and the fact that those who gave medical opinions at the time of Sally Mercer's death were essentially unavailable. Moreover, the judge observed, appropriate medical tests were readily available back in the 1970s, so that the body could have been exhumed in 1971 or 1972, said the judge. This case "should have been brought many years ago," he concluded The prosecutor appealed, and the Court of Appeals peremptorily reversed the trial court's ruling, finding it erroneous as a matter of law. "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage. Where there was no evidence that the prosecutor intentionally delayed the proceedings in order to gain a tactical advantage, the circuit court erred in granting the motion to dismiss," the appellate court stated. Mercer appeals.

ZAVRADINOS v JTRB, INC., et al. (case no. 135137)
Attorney for plaintiff Dimitrios Zavradinos: Lindsay James/(248) 442-0510
Attorney for defendant Robert Probert and intervening party Liza Danielle Probert:
Robert J. Figa/(248) 743-9800
Trial Court: Oakland County Circuit Court
Link to briefs:
http://www.courts.michigan.gov/supremecourt/Clerk/05-08/135137/135137-Index.htm
At issue: The plaintiff obtained a judgment against the defendant husband and sought to garnish two securities accounts to satisfy his judgment. The accounts are designated as being held by the defendant and his wife as "JTWROS" (joint tenants with right of survivorship). The husband and wife sought to defeat the garnishment, arguing that the accounts were held as tenants by the entireties, and were not available for garnishment on a judgment solely against the husband. Are the accounts subject to garnishment? Does MCL 557.151 mean that there is a statutory presumption that property held jointly by a husband and wife is held by them as tenants by the entirety unless the title or conveyance expressly provides otherwise? If so, how can the presumption of a tenancy by the entirety be overcome?
Background: In August 2005, Dimitrios Zavradinos was awarded a judgment of $170,000 against Robert Probert. Zavradinos learned that Probert had two brokerage accounts at Solomon Smith Barney holding nearly $160,000 in assets, and sought to garnish the accounts. Probert and his wife, Liza Probert, objected to the garnishment, claiming that they held the accounts as tenants by the entirety, and that the accounts were not subject to a garnishment action for a judgment against Probert alone. Pursuant to MCL 557.551, there is a statutory presumption that property held jointly by a husband and wife is held by them as tenants by the entirety unless the title otherwise expressly provides. Zavradinos claims that the statutory presumption is rebutted in this case by evidence that the Proberts established the accounts as a joint tenancy. A financial consultant with Solomon Smith Barney who was partially responsible for managing the Proberts' accounts testified that the Proberts had set up the accounts as joint tenants with rights of survivorship, and the accounts had always been treated as such. Solomon Smith Barney documents provide that the accounts are held by "Robert and Liza Probert JTWROS," (joint tenants with right of survivorship). The trial court denied the Proberts' motion to set aside the garnishment. The trial court reasoned that the evidence established that the accounts were held as

"JTWROS" or "joint tenants with right of survivorship," and that this evidence was sufficient to overcome the statutory presumption of tenancy by the entirety. The circuit court further ruled that because Liza Probert had contributed nothing to the account, Robert Probert owned all of the money in the accounts, so all of the funds in the accounts were available to satisfy Zavradinos' garnishment. The Proberts appealed. The Court of Appeals issued a split unpublished per curiam opinion reversing the trial court. The majority reasoned that the only way to overcome the presumption of tenancy by the entirety when property is held by a married couple is to use the words "not as tenants by the entirety" when that is the intent of the conveyance. The dissenting judge would not require an explicit disclaimer of an intent to create a tenancy by the entirety in order, and would have affirmed the trial court. Zavradinos appeals.

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