

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

DETROIT COURT EMPLOYEE'S REVERSE DISCRIMINATION, RETALIATION CLAIMS AT ISSUE IN CASE BEFORE MICHIGAN SUPREME COURT NEXT WEEK Promotion decisions based on race, white probation officer asserts; employer court says other candidates more qualified, seeks to overturn jury verdict in employee's favor

LANSING, MI, November 7, 2008 – A Detroit court employee who claims he was passed over for promotions because of his race will have his case heard by the Michigan Supreme Court next week.

The plaintiff in [*Sciotti v 36th District Court*](#), a white male employed by the 36th District Court, sued the court under the Michigan Civil Rights Act, contending that he suffered race discrimination when he was denied promotions. He also claimed that the court retaliated against him for letters he wrote accusing the court of race discrimination and complaining of a lack of diversity among court staff. The 36th District Court offered evidence to show that the plaintiff was an average employee and that African-American candidates received promotions because they were better qualified than the plaintiff. But a jury awarded the plaintiff \$424,000, finding that “race [was] one of the motives or reasons which made a difference” in the treatment the plaintiff received from his employer. The Court of Appeals partially reversed, holding that there was insufficient evidence to support the plaintiff’s retaliation claims, but otherwise upheld the trial court’s rulings. The 36th District Court has asked the Michigan Supreme Court to overturn the trial verdict, arguing that the plaintiff’s evidence was insufficient and that the court presented evidence that its promotion decisions did not discriminate against him.

Also before the Supreme Court is [*Budget Rent-A-Car System, Inc. v City of Detroit*](#). Rent-A-Car is suing the city of Detroit and Detroit Police Department to be reimbursed for no-fault benefits Rent-A-Car paid to an uninsured customer. The customer, whom police observed in a suspected narcotics deal while in his rented car, first fled from a police officer, then stopped, got out of the car, and crouched between the open car door and the interior, pointing a handgun at the officer. The pursuing officer ducked down and accelerated his car, striking the driver’s side door of the rental car and injuring the suspect. Rent-A-Car argues that, under Michigan’s no-fault statute, the city and police department are responsible for paying the suspect’s no-fault benefits because he was not an “occupant” of a motor vehicle at the time of the accident and the rental car was not “involved in the accident.” Both the trial court and Michigan Court of Appeals have ruled in favor of Rent-A-Car, and the city and police department now appeal to the Michigan Supreme Court.

The Court will also consider an attorney ethics issue in [*Attorney Grievance Administrator v Cooper*](#). At issue is whether an attorney, whose retainer agreement with her client required the client to pay a non-refundable \$4,000 “minimum fee,” acted unethically when she did not return the unused portion of the fee to her client after the client terminated the representation. The attorney, who had put in some time on the case, ultimately refunded about half of the difference between the minimum fee and the amount the client owed for the hours the attorney had already worked. The Attorney Discipline Board ordered the attorney to return the entire unused balance, finding that non-refundable advance fee provisions are unethical. The ADB declined to impose further sanctions on the attorney because applicable law and ethics opinions are not clear on the issue. The attorney appeals the ADB’s decision.

The remaining five cases involve issues of contract, criminal, and insurance law.

Court will be held on **November 12 and 13** in the Supreme Court’s courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court’s oral arguments are open to the public.

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

Wednesday, November 12
Morning Session

SCIOTTI v 36TH DISTRICT COURT, et al. ([case no. 134328](#))

Attorneys for plaintiff Kenneth Sciotti: Scott E. Combs/(248) 380-5050, Gordon I. Berris/(248) 557-6995

Attorney for defendant 36th District Court: Deborah Brouwer/(313) 567-5921

Attorney for amicus curiae Michigan Association of Justice: Kathleen L. Bogas/(248) 502-5000

Trial Court: Wayne County Circuit Court

At issue: A jury found that the defendant employer either discriminated against the plaintiff employee on the basis of race, or retaliated against him after he accused his employer of race discrimination. The Court of Appeals ruled that there was insufficient evidence of retaliation, but it concluded that there was sufficient evidence of discrimination. Did the plaintiff produce viable statistical evidence of racial discrimination in support of each of his claims? Did the defendant provide a race-neutral reason for each decision? Is there a sufficient evidentiary basis to conclude that, more likely than not, each decision was a pretext for racial discrimination?

Background: Kenneth Sciotti, a white male, began working for the 36th District Court in 1979 as a file clerk; he was promoted several times, eventually becoming a probation officer. Between 1998 and 2003, Sciotti unsuccessfully applied for eight different supervisory positions. He sued the 36th District Court under Michigan’s Civil Rights Act, claiming that the court had discriminated against him by promoting less-qualified African-Americans to those positions.

Sciotti also asserted that the court denied him promotions in retaliation for two letters in which he complained of the lack of diversity among the court staff and accused the court of racial discrimination. At trial, Sciotti testified that he felt he was more qualified than each of the candidates who were promoted in his place. An employee of the court's human resources department – who believed that she too had suffered reverse discrimination – testified that, although she was not involved in promotion decisions, she observed several employees being promoted whom she felt were not qualified. The employee also stated that, whenever Sciotti asked human resources why he was not promoted, barriers would go up, and he did not have a fair chance to speak with the person who made the decisions. Sciotti also offered evidence of the court's uniform racial makeup, noting that, for the departments he had applied to, all but one of the supervisors were African-American, and that no white employees had been promoted to supervisory positions in those departments in the last four years. The court's probation department director testified for the defense that Sciotti was merely an average employee; other witnesses testified that the candidates who were promoted instead of Sciotti were better qualified than he. But the jury found in Sciotti's favor and awarded him \$424,000, concluding that "race [was] one of the motives or reasons which made a difference" in the 36th District Court's failure to promote Sciotti, or that the 36th District Court retaliated against Sciotti. In an unpublished per curiam opinion, the Court of Appeals reversed on the retaliation claim, holding that Sciotti did not produce sufficient evidence to sustain it. The appeals court affirmed the remainder of the trial court's rulings. The 36th District Court appeals.

GENERAL MOTORS CORPORATION v ALUMI-BUNK, INC., et al. ([case no. 135117](#))

Attorney for plaintiff General Motors Corporation: Ruben Acosta/(313) 963-3873

Attorney for defendants Alumi-Bunk, Inc., and Eric Jain: Dean M. Googasian/(248) 540-3333

Trial Court: Wayne County Circuit Court

At issue: General Motors offered to sell certain trucks at a low price to buyers who would agree to modify the vehicles and then sell them as used. The defendants participated in this program, and promised General Motors' agents that they would modify the purchased trucks before resale. But the parties' contract did not contain the modification requirement, and the defendants did not make any modifications before reselling the vehicles. General Motors sued under a variety of theories, including breach of contract and fraud. Can General Motors recover? Is there an exception to the economic loss doctrine – which provides that parties to a purely commercial dispute are limited to the remedies of the Uniform Commercial Code, MCL 440.1101 *et seq.* – for claims of fraud? If so, are the fraud claims in this case sufficiently distinguishable from the contract claims for purposes of applying this exception?

Background: General Motors Corporation offered a program in which it would sell certain trucks at a low price to purchasers who agreed to modify the vehicles in ways that were not available to General Motors and then sell them as used. Alumi-Bunk, Inc. and its vice-president Eric Jain promised General Motors' agents that they would modify the vehicles before reselling them. But the written contract of sale did not mention required modifications, and Alumi-Bunk did not modify the trucks before reselling them at a substantial profit. General Motors sued Alumi-Bunk and Jain for breach of contract and fraud, among other claims, alleging that the defendants intentionally misrepresented that they would modify the trucks while intending not to do so. The trial court granted the defendants' motion for summary disposition, concluding that the breach of contract claims were covered by the Uniform Commercial Code and that the fraud

claim must be dismissed under the economic loss doctrine. That doctrine provides that parties to a purely commercial dispute are limited to the remedies of the Uniform Commercial Code, MCL 440.1101 *et seq.* In an unpublished opinion, the Court of Appeals majority reversed in part. The court held that the fraudulent inducement exception to the economic loss doctrine applied because the fraud claim was not so interwoven with the breach of contract claims as to make the exception inapplicable. The Court of Appeals dissenting judge disagreed, and would have affirmed the trial court in total. She agreed with the trial court that the fraud claims were inextricably intertwined with the breach of contract allegations such that the fraudulent inducement exception could not be applied. The defendants appeal.

DAVIS v FOREST RIVER, INC., et al. ([case no. 136114](#))

Attorney for plaintiff Keith Gayle Davis: Jonathan A. Green/(248) 932-3500

Attorney for defendant Forest River, Inc.: Donald H. Robertson/(810) 579-3600

Attorney for amicus curiae Attorney General Michael A. Cox: Jason R. Evans/(517) 335-0855

Attorney for amicus curiae Chrysler LLC: Cheryl A. Bush/(248) 822-7800

Attorney for amicus curiae Ford Motor Company: Bart P. O’Neill/(586) 447-3700

Attorney for amicus curiae General Motors Corporation: Frank M. DeLuca/(248) 952-5100

Attorney for amicus curiae Michigan Manufacturers Association and the Alliance of Automobile Manufacturers, Inc.: David D. Grande-Cassell/(517) 318-3100

Attorney for amicus curiae RVIA and NMMA: Michael D. Dolenga/(248) 478-9922

Attorney for amicus curiae Consumer Law Section of the State Bar of Michigan and the Michigan Association for Justice: Dani K. Liblang/(248) 540-9270

Trial Court: Ingham County Circuit Court

At issue: The plaintiff experienced multiple repair problems with a recreational vehicle he bought from a dealer. He sued the RV’s manufacturer, seeking to return the vehicle and recover the purchase price. A jury found in part that the manufacturer breached its express warranty and its implied warranty of merchantability, and that the plaintiff was entitled to revoke his acceptance of the RV. The manufacturer argued that revocation of the contract was not the right remedy because the manufacturer was not a party to the purchase contract. But the Court of Appeals affirmed, finding that the plaintiff could rescind the contract even if he and the manufacturer were not in “privity of contract.” Is there a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract? Do the Uniform Commercial Code (UCC) and the economic loss doctrine apply? If the UCC applies, are a breach of warranty claim and revocation of acceptance available under the UCC in the absence of privity?

Background: Keith Davis bought a recreational vehicle from a dealer. After the RV was plagued by repair problems, Davis sued both the dealer and Forest River, the RV’s manufacturer, under various theories of liability; Davis sought to revoke the RV’s purchase and compel the defendants to pay the purchase price to him. The dealer accepted a case evaluation and was dismissed from the case; Davis and Forest River proceeded to trial. The jury found in part that Forest River had breached its express warranty and its implied warranty of merchantability, and that Davis was entitled to revoke his acceptance of the RV. The trial court entered judgment for Davis in the amount of the purchase price of approximately \$70,000; alternatively, the court ordered that, if an appellate court held that revocation of acceptance was not an available remedy under the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, then Davis

was entitled to his damages of approximately \$44,000. The Court of Appeals, in a split, published decision, affirmed the trial court's judgment, with a clarification. The majority held that "revocation of acceptance" is a Uniform Commercial Code remedy and not available to Davis because he and Forest River, the RV manufacturer, were not in "privity of contract." In other words, because the purchase contract was between Davis and the dealer, Davis could not revoke the contract as against Forest River. But, the majority said, Davis had the common-law equitable remedy of "rescission" – the annulment or voiding of a contract. The majority noted that "Michigan law has, for half a century, unambiguously afforded the remedy of rescission to purchasers against remote, out-of-privity manufacturers on a theory of breach of implied warranty." The dissenting judge disagreed, arguing that rescission cannot be available in the absence of privity. Forest River appeals.

Afternoon Session

PEOPLE v WATKINS ([case no. 135787](#))

Prosecuting attorney: Timothy A. Baughman/(313) 224-5792

Attorney for defendant Lincoln Watkins: Richard L. Cunningham/(313) 527-2165

Attorney for amicus curiae Attorney General Michael A. Cox; Livingston County

Prosecutor David L. Morse; and Oakland County Prosecutor David G. Gorcyca: Mark G. Sands/(517) 373-4875

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-4801

Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Randy E. Davidson/(313) 256-9833

Attorney for amicus curiae Ralph Parish: Michael A. Roth/(269) 324-6000

Trial Court: Wayne County Circuit Court

At issue: The defendant is charged with six counts of criminal sexual conduct involving a minor; the prosecutor seeks to call two witnesses at trial who will testify regarding their allegedly similar experiences with the defendant. The trial court ultimately ruled that their testimony was inadmissible, but the Court of Appeals held that one of the witnesses – who was a minor at the time of the alleged events – could testify under MCL 768.27a. That statute applies in criminal sexual conduct cases involving minors and governs the admissibility of certain evidence relating to other criminal sexual acts allegedly committed by the defendant on other minors. The appeals court found that this statute conflicts with MRE 404(b), the evidentiary rule that generally governs the admissibility of other-acts evidence, but held that its analysis should be guided by the statute. Does MCL 768.27a conflict with MRE 404(b)? If it does, does the statute prevail over the evidentiary rule? Does MCL 768.27a interfere with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1?

Background: Lincoln Watkins was charged with five counts of first-degree criminal sexual conduct (CSC), and one count of second-degree CSC; the sexual offenses were allegedly committed against a minor. At Watkins' first trial, two witnesses testified that he committed other sexual acts with them; the trial court ruled that this evidence was admissible under the other-acts evidentiary rule, MRE 404(b). This evidentiary rule provides that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of" the defendant, but may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme,

plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material” The jury could not reach a verdict, and the trial judge declared a mistrial. Just before the second trial, the trial court revisited the question and, this time, concluded that the other-acts evidence from these witnesses was inadmissible under MRE 404(b). The prosecutor then asked the trial court to rule that the evidence was admissible under MCL 768.27a. MCL 768.27a states that, “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” But the trial court was not persuaded that the evidence should be admitted under the statute. The prosecutor appealed to the Court of Appeals, which ultimately affirmed in part and reversed in part in a published opinion. The Court of Appeals upheld the trial court’s ruling that one witness could not testify, but concluded that the other witness’ testimony, which described offenses allegedly committed against a minor, was admissible under MCL 768.27a. The Court of Appeals remanded the case to the trial court to determine which aspects of the witness’ testimony related to acts falling within the scope of MCL 768.27a. The appeals court explained that, in its view, there was a conflict between MRE 404(b), which requires exclusion of the evidence, and MCL 768.27a, which allows the evidence to be presented to the jury. The Court of Appeals concluded that the statute controlled the analysis. Watkins appeals.

BUDGET RENT-A-CAR SYSTEM, INC. v CITY OF DETROIT, et al. ([case no. 133887](#))

Attorney for plaintiff Budget Rent-A-Car System, Inc.: Nicolette S. Zachary/(248) 593-1440

Attorney for defendants City of Detroit and Detroit Police Department: Jeffrey S.

Jones/(313) 237-5065

Attorney for amicus curiae Michigan Association for Justice: Milea M. Vislosky/(248) 945-1040

Trial Court: Wayne County Circuit Court

At issue: A rental car company sued the city of Detroit and the Detroit Police Department to recover no-fault benefits the company paid to one of its customers, a man who fled from police in the rental car and was injured while hiding behind the car’s open door and pointing a handgun at a police officer. The trial court ruled that the city and police department were obligated to pay for the no-fault benefits; the Court of Appeals affirmed that ruling. Did the individual’s bodily injury arise out of the “ownership, operation, maintenance or use of a motor vehicle as a motor vehicle,” under MCL 500.3105(1)? Was the bodily injury accidental, under MCL 500.3105(4)?

Background: Detroit police observed Mark Hurt in a suspected narcotics transaction; at the time, Hurt was operating a 2004 Monte Carlo he had rented from Budget Rent-A-Car. A Detroit police officer stopped Hurt, but as the officer approached on foot, Hurt sped away. The officer followed in his car; Hurt stopped, got out of the rental car, and crouched between the open car door and the car interior, pointing a handgun at the officer. The officer, who was still in his car, ducked down, accelerated, and crashed into the driver’s side door of the rental car, injuring Hurt and damaging the car. Hurt was then taken into custody. Hurt, who did not have no-fault insurance, received no-fault benefits of \$129,864.19 from Budget Rent-A-Car for his injuries. Budget Rent-A-Car then sued the Detroit Police Department and the city of Detroit, seeking reimbursement for the no-fault benefits it paid Hurt, plus \$12,170.00 in damages for the rental car. Budget Rent-A-Car argued that, under MCL 500.3115(1), the defendants were responsible for paying Hurt’s benefits because Hurt was not an “occupant” of a motor vehicle at the time of the accident and the rental car was not “involved in the accident.” The trial court agreed, and

granted summary disposition. The Court of Appeals affirmed in an unpublished per curiam opinion. The defendants appeal.

Thursday, November 13
Morning Session only

BENEFIEL v AUTO-OWNERS INSURANCE COMPANY ([case no. 135778](#))

Attorney for plaintiff Robert E. Benefiel: Mark R. Granzotto/(248) 546-4649

Attorney for defendant Auto-Owners Insurance Company: Allen J. Philbrick/(734) 761-9000

Attorney for amicus curiae Coalition Protecting Auto No-Fault: Steven A. Hicks/(517) 394-7500

Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: John J. Bursch/(616) 752-2000

Trial Court: Livingston County Circuit Court

At issue: The plaintiff, who was injured in a 2002 car accident, sued for noneconomic benefits under Michigan's no-fault statute, later settling the case. He filed a second lawsuit after he was again injured in a 2003 accident. In both lawsuits, the plaintiff claimed he was entitled to non-economic benefits because he had suffered a serious impairment of a bodily function. But the trial court determined that the plaintiff did not suffer a serious impairment of body function as a result of the 2003 accident because he was already impaired by the 2002 accident. The Court of Appeals reversed, holding that the relevant time frame included the plaintiff's pre-2002 life. Did the Court of Appeals properly hold that the plaintiff established a serious impairment as a matter of law? Did the Court of Appeals correctly instruct the trial court that, if the jury finds it impossible to differentiate between the damages caused by the first and second accidents, the defendant must be deemed responsible for all the plaintiff's injuries and damages?

Background: Robert Benefiel was injured in a 2002 car accident. He began treatment with a physician for neck injuries, and was restricted to "ultra-light-duty" at work. Benefiel sued the driver of the vehicle that hit him, claiming he suffered a serious impairment of a body function and was entitled to recover non-economic damages under Michigan's no-fault statute, MCL 500.3135 et seq.; that case was settled. In 2003, Benefiel was injured in a second car accident. He continued to feel pain in his neck and ultimately underwent an MRI that revealed a herniated disc; he had surgery to correct this injury later that year. Following surgery, Benefiel was off work for three and a half months, and continued to complain of pain. He sued Auto-Owners Insurance Company for noneconomic injuries from the second accident. According to his testimony, before his 2002 accident, Benefiel golfed once or twice a week, water-skied three or four times a year, rode horseback a few times a year, and occasionally rode a bicycle. He was unable to resume any of those activities before the second accident. Auto-Owners moved to dismiss the case, arguing that Benefiel's general ability to lead his normal life was not affected by the second accident. The trial court granted Auto-Owners' motion, stating that "nothing indicates that the course or trajectory of his life has been affected by the second accident." But the Court of Appeals reversed in a published opinion. The panel held that, in determining the plaintiff's "normal lifestyle," the time frame includes Benefiel's life before the first accident. Benefiel had established that the course of his normal life was affected by the injuries he sustained in the second accident, the appellate court found. The Court of Appeals remanded the case to the trial court, instructing the trial judge that, if the jury finds it impossible to differentiate

between the damages caused by the first and second accidents, Auto-Owners must be deemed responsible for all the injuries and damages sustained by Benefiel. Auto-Owners appeals.

GRIEVANCE ADMINISTRATOR v COOPER ([case no. 135053](#))

Attorney for petitioner Grievance Administrator, Attorney Grievance Commission, State of Michigan: Robert L. Agacinski/(313) 961-6585

Attorney for respondent Patricia Cooper: Donald D. Campbell/(248) 355-4141

Attorney for amicus curiae Michigan Chapter of the American Academy of Matrimonial Lawyers: Frederick G. Buesser, III/(248) 258-1309

Attorney for amicus curiae Varnum, Riddering, Schmidt & Howlett LLP and John W. Allen: John W. Allen/(616) 336-6000

Attorney for amicus curiae Majority of the Family Law Section of the State Bar of Michigan: Carlo J. Martina/(734) 254-1140

Tribunal: Attorney Discipline Board

At issue: A client hired an attorney and entered into a fee agreement that required her to pay the attorney a nonrefundable \$4,000 minimum fee, and stated that the attorney would bill the client at an hourly rate. The attorney spent several hours on the case before the client terminated their relationship and demanded a refund of the difference between the minimum fee and the amount owed for the hours the attorney had already worked. Taking the position that the minimum fee was nonrefundable, the attorney nevertheless refunded half of the difference. The Attorney Discipline Board found that the attorney acted unethically. Did either the fee agreement or the attorney's partial retention of the minimum fee violate the Michigan Rules of Professional Conduct?

Background: Kaisra Sheikh hired attorney Patricia Cooper to represent her in a divorce action. Sheikh signed a retainer agreement stating that she would pay Cooper "a MINIMUM FEE OF \$4,000.00" and that Cooper's hourly rate was \$195. The retainer agreement also provided that the client "understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances." After Cooper invested approximately 6.4 hours in the case, Sheikh terminated the attorney-client relationship, saying that she and her husband had reconciled. Sheikh requested a refund of the unused portion of the \$4,000 minimum fee. Cooper concluded that she was not obligated to refund any portion of the fee, but nevertheless decided to return half of the remaining balance, or \$1,385.75, to Sheikh. Sheikh objected to the partial reimbursement, and complained to the Attorney Grievance Commission, which then served Cooper with a request for investigation and filed a formal complaint against her. The complaint alleged that Cooper charged and collected an illegal or clearly excessive fee, and failed to refund the unearned portion of fees paid by Sheikh, in violation of MCR 9.104(A)(1)-(4), and MRPC 1.5(a), 1.15(b), 1.16(d), and 8.4(a)-(c). After a hearing, an Attorney Discipline Board panel dismissed the complaint against Cooper, finding that she did not act unethically. The Grievance Administrator then filed a request for review with the Attorney Discipline Board, arguing that non-refundable fees are unethical. The Attorney Discipline Board agreed, concluding that the \$4,000 minimum fee was actually an "advance fee," and that non-refundable advance fee provisions are unethical. By failing to return the fee, Cooper violated Michigan Rules of Professional Conduct 1.16(d) and 1.15(b), the ADB said. But, while the ADB ordered Cooper to pay Sheikh the remaining \$1,385.75, it declined to impose discipline against her, noting that the law and ethics opinions on the issue were not clear, and that Cooper had attempted to resolve the matter with her client. Cooper appeals.

PEOPLE v SIERRA ([case no. 135772](#))

Prosecuting attorney: Rae Ann Ruddy/(248) 858-0656

Attorney for defendant Christian Sierra: Sanford A. Schulman/(313) 963-4740

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Donald A. Kuebler/(810) 257-3854

Trial Court: Oakland County Circuit Court

At issue: The defendant and his brothers are charged with conducting a large-scale drug-dealing operation. A witness testified at the defendant's brother's trial that she was regularly involved in the operation, but did not know the defendant. She offered similar testimony at the defendant's first trial, but then invoked her 5th amendment rights. The jury could not reach a verdict in that case, and the trial court declared a mistrial. The witness remains unavailable to testify, and the trial judge has ruled that her prior testimony will be inadmissible on retrial. Is her prior testimony admissible?

Background: Christian Sierra was charged along with his two brothers with selling drugs in Waterford, Michigan. At one brother's 1999 trial, witness Lisa Vega testified that she was involved in the drug operation, but did not know Christian Sierra; she gave similar testimony in Sierra's trial in 2006. But, after defense counsel in the 2006 trial elicited some of the same testimony that Vega gave in the 1999 trial, it became clear that Vega was incriminating herself. Accordingly, the court appointed an attorney to represent her; Vega invoked her Fifth Amendment right to be free from self-incrimination and did not testify further. The parties agreed that Vega, having invoked the Fifth Amendment, was unavailable to testify, and argued over whether her 1999 testimony would be admitted under Michigan Rule of Evidence 804(b)(1). Out-of-court statements, offered to prove the truth of the matters asserted, are generally inadmissible as hearsay under MRE 801 and 802. One exception is described by MRE 804(b)(1): "Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." This exception applies only if the declarant is unavailable to testify; a witness who invokes the Fifth Amendment to avoid testifying is deemed to be "unavailable." The prosecutor sought to exclude Vega's 1999 testimony, contending that the prosecution in that trial did not have a sufficient motive to develop Vega's testimony as it would pertain to Sierra. The trial court disagreed and allowed the testimony to go to the jury. The jury ultimately failed to reach a unanimous verdict, and the judge declared a mistrial. Before the defendant's retrial, the trial court changed course and ruled that Vega's 1999 testimony would be inadmissible because the prosecution did not have sufficient opportunity and motive to examine her then. Sierra appealed to the Court of Appeals, but, in a split unpublished per curiam opinion, the Court of Appeals affirmed the trial judge's decision, holding that MRE 804(b)(1) precluded Vega's 1999 testimony. Sierra appeals.

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