

# MICHIGAN SUPREME COURT



## *Office of Public Information*

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FOR IMMEDIATE RELEASE

**REGISTERED SEX OFFENDER SERVED AS JUROR IN SEX ABUSE CASE;  
CONVICTED DEFENDANT ARGUES HE DID NOT GET FAIR TRIAL  
Court of Appeals overturned defendant's criminal sexual conduct conviction because felon  
served on jury; Michigan Supreme Court to hear arguments on prosecution's appeal**

LANSING, MI, September 29, 2008 – Where a registered sex offender served on a jury, was the defendant – who was himself charged with and convicted of criminal sexual conduct – deprived of his right to a fair trial? That is a question the Michigan Supreme Court will consider in its first oral arguments of the Court's new term this week.

In [\*People v Miller\*](#), the defendant was charged with forcing his girlfriend's seven-year-old daughter to perform oral sex on him. After the defendant was convicted of one count of first-degree criminal sexual conduct, his attorney learned that one of the jurors was a registered sex offender. At a post-trial hearing, the juror admitted that he concealed his convictions when he responded to a jury questionnaire, but maintained that he tried to be fair during the trial. The trial judge denied the defendant's request for a new trial, but the Court of Appeals overturned his conviction, holding that the defendant was not afforded a fair and impartial jury. The prosecutor now challenges that ruling in this appeal to the Supreme Court.

The Court will also hear [\*In re Hultgren\*](#), in which a judge faces judicial misconduct charges stemming from a meeting he had with a defendant in a debt collection case pending before another judge in the same court. The defendant told the judge that he was the victim of mistaken identity and that someone else with the same name was the real debtor. The judge – who contacted an attorney suing the litigant – contends that his actions were “an isolated good faith [attempt] by a judge to request a lawyer in a credit card collection mill to take a second look at objective facts ....” The Judicial Tenure Commission has recommended that the judge receive a public censure and be suspended without pay for 60 days. The judge opposes that recommendation, arguing that his actions were spontaneous and do not amount to misconduct.

The remaining eight cases involve consumer protection, contract, criminal, evidence, governmental immunity, no-fault, parental rights, and property issues.

Court will be held on **October 1 and 2** 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](http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm). For further details about the cases, please contact the attorneys.)*

**Wednesday, October 1**  
**Morning Session**

**IN RE ROOD, MINOR ([case no. 136849](#))**

**Attorney for petitioner Department of Human Services:** Susan Kasley Sniegowski/(231) 845-7377

**Attorney for respondent Darroll Donald Rood:** Jeffrey C. Nellis/(231) 845-1820

**Trial Court:** Mason County Circuit Court

**At issue:** A prisoner, whose parental rights to his daughter were terminated, argued that he did not receive adequate notice of the proceedings from the family court or from the Department of Human Services. DHS argued that even if it did not make adequate efforts to contact the father or place his child with him, the father's history of domestic violence, in addition to his failure to contact DHS for over a year or pursue visitation with his daughter, supported termination of his parental rights. The Court of Appeals, in a 2-1 decision, reversed and remanded the case to the trial court, finding DHS failed to make reasonable efforts to contact the father and provide him with services. Did DHS fail to prove the statutory grounds for termination by clear and convincing evidence?

**Background:** Darroll Rood was serving a jail sentence for domestic violence when the Department of Human Services (DHS) filed a petition seeking jurisdiction of his daughter Ayden. The DHS petition, which was filed on March 20, 2006, stated that Rood was in jail and alleged that Ayden and her half-sister had been abandoned by their mother. A few days later, Rood, upon learning that Ayden had been placed in foster care, contacted a protective services worker, who gave him the phone number of Ayden's foster care worker and advised Rood to call her to arrange visitation with Ayden. Rood gave the protective services worker his address and cell phone number, which she passed along to the foster care worker. Rood did not contact the foster care worker, however.

Rood appeared at a court hearing on June 8, 2006, where he provided the court with his contact information. But the court continued to serve notice of proceedings at one of Rood's previous addresses. Ayden's foster care worker once tried to reach Rood by phone, but called an outdated number instead of the one he provided at the court hearing. In December 2006, the foster care worker mailed copies of the updated service plans and her business card to Rood at the address he had given the court; the mailing was returned as undeliverable. On January 24, 2007, DHS filed a supplemental petition seeking termination of Rood's parental rights; notice of a March 22, 2007 hearing on the petition was mailed to Rood at his last known address. The termination petition alleged that Rood had contributed to Ayden's unsafe and neglectful environment, and that he had demonstrated a history of criminal conduct and instability, including five criminal convictions, two of which involved domestic violence and assault of Ayden's mother in Ayden's presence. Moreover, Rood had not paid child support, had not contacted the foster care worker, had failed to participate in any services to assist him in getting

custody of Ayden, and had not contacted his daughter since she was placed in foster care, the DHS petition stated.

In May 2007, nearly 14 months after his first contact with the protective services worker, Rood contacted the foster care worker, who advised him that a termination petition had been filed and that he should immediately request appointment of an attorney. Rood appeared in court for a June 12, 2007 dispositional review hearing; a couple of days later, an attorney was appointed to represent Rood. Following an August 2007 trial, the family court held that DHS had proven by clear and convincing evidence that termination of Rood's parental rights was appropriate under both MCL 712A.19b(3)(g) (without intent, the parent failed to provide proper care and custody of the child) and (j) (the child was reasonably likely to be harmed if returned to the parent). Moreover, Rood had not shown terminating his parental rights was not in Ayden's best interests, the court concluded. Rood appealed, and in a split unpublished decision, the Court of Appeals majority reversed and remanded for further proceedings. The appeals panel agreed with Rood that DHS had failed to make reasonable efforts to contact him and provide him with services, and that consequently, DHS had not proven the statutory grounds for termination by clear and convincing evidence. The dissenting judge would have affirmed the family court's termination ruling. DHS appeals.

**ROBERSON BUILDERS, INC. v LARSON** ([case no. 132363](#))

**Attorneys for plaintiff Roberson Builders, Inc.:** Peter A. Poznak, Johanna L. Jozwiak/(989) 839-0300

**Attorney for defendant James Larson:** Mark D. Goudy/(616) 455-5200

**Trial Court:** Midland County Circuit Court

**At issue:** A contractor sued a homeowner for unpaid charges under a contract for home remodeling. The circuit court dismissed the contractor's lawsuit because the contractor did not have a residential construction license, but the case proceeded to trial on the homeowner's counterclaims against the contractor. The circuit court did allow the contractor to assert a setoff against the homeowner's claims for work the contractor performed. But the Court of Appeals ruled that the contractor was not entitled to a setoff because it was unlicensed and therefore barred from seeking "compensation" under MCL 339.2412(1). Is a claim for setoff a counterclaim or an affirmative defense? Does asserting a claim for a setoff as a defense to another party's claim amount to "bring[ing] or maintain[ing] an action in a court of this state for the collection of compensation" under MCL 339.2412(1)?

**Background:** Roberson Builders, Inc. sued homeowner James Larson for unpaid charges under a contract for home remodeling; Larson countersued for breach of contract and violation of the Michigan Consumer Protection Act, MCL 445.903 *et seq.* (MCPA). Under MCL 339.2412, a residential builder or contractor cannot "bring or maintain an action in a court of this state for the collection of compensation ... [unless the builder or contractor] was licensed ... during the performance of the act or contract." The circuit court dismissed Roberson's suit on the basis that the contractor did not have a residential construction license, but allowed the case to go to trial on Larson's counterclaims. Roberson could, as a defense to the homeowner's claims, assert a setoff based on work the contractor had performed under the contract, the trial court said. A jury determined that, while Roberson had breached the contract by failing to provide workmanlike services, the contractor had not "failed to provide the promised benefit" under the contract, so the trial court awarded no MCPA damages to Larson. In addition, the jury found that Roberson was entitled to a setoff of several thousand dollars. On appeal, the Court of Appeals ruled in an

unpublished opinion that Roberson was not entitled to a setoff because the contractor was unlicensed and therefore barred from seeking “compensation” based on its work on the remodeling project under MCL 339.2412(1). The appellate court also ruled that the issue of whether Roberson had failed to provide the promised benefit was a legal issue that should not have been submitted to the jury. The Court of Appeals remanded the case to the trial court to determine the amount of attorney fees that should be awarded to Larson under the MCPA. Roberson appeals.

**PEOPLE v SHAHIDEH** ([case no. 135495](#))

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

**Attorneys for defendant Amir Aziz Shahideh:** Neil H. Fink, Kimberly W. Stout/(248) 258-3181

**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Timothy K. McMorrow/(616) 632-6710

**Attorney for amicus curiae Criminal Defense Attorneys of Michigan:** John Minock/(734) 668-2200

**Trial Court:** Oakland County Circuit Court

**At issue:** The defendant was charged with first-degree murder after beating his girlfriend to death with a baseball bat. His attorney asked the court to permit an independent psychological examination of the defendant, but the court denied the motion because the defendant had not first filed a notice of intent to assert an insanity defense as required by MCL 768.20a. Did the trial court err? Should the court have allowed the independent examination on the basis that the defendant’s counsel was merely exploring a possible defense?

**Background:** Amir Aziz Shahideh was charged with first-degree murder after he beat his girlfriend, Leila Armin, to death with a baseball bat in her home. The next day, as police officers began securing the area, Shahideh approached one of them and admitted killing Armin. Shahideh was charged with first-degree murder and held without bond in the county jail. His lawyer filed a pre-trial motion seeking access to Shahideh so that a privately retained psychologist could examine him, with the goal of determining whether Shahideh could validly assert an insanity defense. The trial court denied the motion because Shahideh had not complied with MCL 768.20a, which requires a defendant to file a notice of intent to assert an insanity defense, and to undergo an examination at the center for forensic psychiatry, before seeking an independent examination. A jury convicted Shahideh of first-degree premeditated murder, and he was sentenced to the mandatory term of life imprisonment. The Court of Appeals reversed the conviction in a split published opinion, holding that the trial court erred by denying Shahideh’s pre-trial motion because he was merely exploring the possibility of asserting an insanity defense. Thus, because he had not yet determined whether to proceed with that defense, MCL 768.20a did not apply, the Court of Appeals majority said. The majority remanded the case to the trial court with directions to provide Shahideh with the opportunity to be evaluated by a privately retained psychologist “for the purpose of ascertaining his mental condition at the time of the charged offense.” The appeals court further held that, if the independent psychologist and defense counsel found a triable issue concerning Shahideh’s sanity at the time of the murder, then the trial court must vacate Shahideh’s conviction and conduct a new trial. One judge dissented, concluding that the trial court properly denied Shahideh’s pre-trial motion because he failed to comply with the requirements of MCL 768.20a. The prosecutor appeals.

*Afternoon Session*

**ODOM v WAYNE COUNTY, et al. ([case no. 133433](#))**

**Attorneys for plaintiff Amanda Jean Odom:** Raymond S. Sakis, Jason R. Sakis/(248) 649-1160

**Attorneys for defendant Christine Kelly:** Mark J. Zausmer, Carson J. Tucker/(248) 851-4111

**Attorney for amicus curiae Michigan Association of Police Organizations:** John A. Lyons/(248) 524-0890

**Attorney for amicus curiae Michigan Municipal League Liability and Property Pool and Michigan Municipal League:** Mary Massaron Ross/(313) 983-4801

**Attorney for amicus curiae Michigan Municipal Risk Management Authority:** Karen M. Daley/(734) 261-2400

**Attorney for amicus curiae Wayne County Prosecutor's Office:** Timothy A. Baughman/(313) 224-5792

**Trial Court:** Wayne County Circuit Court

**At issue:** The defendant, a deputy sheriff, arrested the plaintiff for disorderly conduct after suspecting her of prostitution. The plaintiff sued the defendant for false imprisonment and false arrest. The deputy sheriff sought to have the case dismissed on the basis of governmental immunity under MCL 691.1407, but the trial court denied her motion and the Court of Appeals affirmed. Where a government employee is being sued for the intentional torts of false imprisonment and malicious prosecution, can the employee assert governmental immunity?

**Background:** Christine Kelly, a Wayne County deputy sheriff, was conducting an official surveillance for the Wayne County Sheriff's Department Morality Unit in a stretch of Woodward Avenue frequented by prostitutes. Kelly observed Amanda Jean Odom walking in the area and suspected her of prostitution. Odom entered a car in a parking lot, was taken to a store, returned to the car after exiting the store, and left in the car. Other officers stopped the car at Kelly's direction. Although the car contained three women and a baby, and Odom was allegedly wearing her American Red Cross identification badge because she had just left work, Kelly gave Odom a ticket for disorderly conduct. The charge was later dismissed, and then reissued, and then dismissed again. Odom sued Kelly, the city of Detroit, and Wayne County for false imprisonment and malicious prosecution; the city and county were dismissed on governmental immunity grounds shortly after the suit was filed. Kelly moved for summary disposition under MCR 2.11(C)(7), contending that she too was entitled to have the case against her dismissed on the basis of governmental immunity. Kelly cited MCL 691.1407(2), which provides that, "each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service" if the employee believes that she is acting within the scope of her authority, the governmental agency is engaged in the exercise of a governmental function, and the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(3) states that subsection (2) "does not alter the law of intentional torts as it existed before July 7, 1986." The trial court denied Kelly's motion, concluding that the facts relating to whether she had probable cause to arrest Odom were in dispute. Kelly filed an interlocutory appeal, and the Court of Appeals affirmed the trial court ruling in an unpublished per curiam opinion. The appeals court concluded that Odom's complaint alleged that Kelly committed intentional torts. Therefore, the relevant standard was whether Kelly's intentional acts were objectively reasonable under the circumstances, the

appellate panel reasoned. Given the conflicting accounts of the incident, the Court of Appeals said, the trial court could not determine as a matter of law that Kelly's conduct was "objectively reasonable." Kelly sought leave to appeal to the Supreme Court, which initially denied leave to appeal, but then granted Kelly's motion for reconsideration and granted leave to appeal.

**UNITED STATES FIDELITY INSURANCE & GUARANTY COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, et al. ([case nos. 133466, 133468](#))**

**Attorneys for plaintiff United States Fidelity Insurance & Guaranty Company:** Jeffrey C. Gerish, Gregory Gromek/(248) 901-4031

**Attorney for defendant Michigan Catastrophic Claims Association:** Joseph K. Erhardt/(734) 214-7629

**Attorney for defendant Michael Migdal, Individually and as Conservator for the Estate of Daniel Migdal, a Protected Person:** Milea M. Vislosky/(248) 945-1040

**Attorneys for plaintiff Hartford Insurance Company of the Midwest:** Janet Callahan Barnes, John H. Cowley, Jr./ (248) 851-9500

**Attorney for defendant Michigan Catastrophic Claims Association:** Ava K. Ortner/(248) 641-9955

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

**Attorney for amicus curiae Commissioner of the Office of Financial and Insurance Regulation:** William A. Chenoweth/(517) 373-1160

**Attorney for amicus curiae State Farm Mutual Automobile Insurance Company:** John P. Lewis/(616) 257-3900

**Attorney for amicus curiae Insurance Institute of Michigan:** John A. Lydick/(248) 646-5255  
**Trial Court:** Oakland County Circuit Court

**At issue:** Does § 3104 of the no-fault act (MCL 500.3104) require the Michigan Catastrophic Claims Association to indemnify the plaintiff insurers for 100 percent of the actual loss amounts above the \$250,000 statutory threshold that the insurers were obligated to pay in PIP benefits, without regard to whether the payments were reasonable?

**Background:** The Michigan Catastrophic Claims Association (MCCA) was created by the Legislature to serve as a "reinsurer" for insurance companies offering automobile insurance in Michigan. The MCCA reimburses insurers for amounts paid on no-fault personal injury protection claims (commonly known as PIP benefits) in excess of \$250,000. In these two consolidated cases, the MCCA seeks review of claims made by two insurance companies. In the first case, the United States Fidelity Insurance & Guaranty Company (USF&G) entered into a consent judgment with an insured, agreeing to pay no-fault PIP benefits to cover the costs of attendant care provided to Daniel Migdal, who had been involved in an automobile accident that left him severely and permanently injured. USF&G agreed to pay \$17.50 an hour for nursing care services, with yearly increases of 8.5 percent compounded annually, so long as Daniel resided in the family home. By July 2003, USF&G had paid over \$7 million in PIP benefits on Daniel's behalf, and was paying \$54.84 an hour for Daniel's nursing care services. USF&G submitted these claims to the MCCA for reimbursement. The MCCA reimbursed USF&G \$22.05 an hour for nursing care services, which it considered a reasonable rate of reimbursement, instead of the hourly rate set forth in the consent judgment. USF&G sued the MCCA, seeking reimbursement of all the amounts that it paid under the consent judgment. The trial court ruled in USF&G's favor, and the MCCA appealed. In the second case, Hartford Insurance Company of

the Midwest agreed in a consent judgment to pay \$30 an hour for attendant care for Robert Allen, who was severely and permanently injured in an automobile accident. The MCCA refused to reimburse Hartford for more than \$20 an hour. Hartford sued the MCCA, but in this case, the trial court refused to rule that the insurance company's position was correct as a matter of law. The court concluded that a question of material fact existed concerning the reasonableness of the amounts paid by Hartford on Allen's behalf. Hartford appealed, and the Court of Appeals granted leave to appeal and consolidated the two cases. In a published opinion, the Court of Appeals ruled that the MCCA is required to reimburse insurers for the actual amount of PIP benefits paid in excess of the statutory threshold, regardless of the reasonableness of the payments. The appellate court affirmed the trial court's ruling in the USF&G case and reversed the trial court's ruling in the Hartford case. The MCCA appeals.

**Thursday, October 2**  
**Morning Session**

**TOMECEK v BAVAS, et al. ([case no. 134665](#))**

**Attorneys for plaintiffs Frank J. Tomecek, Jr., and Janis H. Tomecek:** John J. Bursch, Matthew T. Nelson/(616) 752-2000

**Attorneys for defendants Andrew Lucian Bavas, et al.:** Jeffery V. Stuckey, Phillip J. DeRosier/(517) 371-1730

**Attorney for amicus curiae Walloon Lake Association:** Steven D. Weyhing/(517) 371-1400

**Attorney for amicus curiae Michigan Lake & Stream Associations, Inc.:** Clifford H. Bloom/(616) 459-1171

**Trial Court:** Berrien County Circuit Court

**At issue:** The plaintiffs and individual defendants are lot owners in the same plat. The plaintiffs seek to build a house on a lot and need utilities to do so; they sought a utility easement under their drive easement. The plaintiffs argued that an easement for utilities was an easement by necessity and also that the defendants used the only other easement in the plat for both a drive easement and a utilities easement. The trial court ordered a revision of the plat to allow for an easement for utilities to occupy the same space as the drive easement. The Court of Appeals affirmed. Does the Land Division Act provide a court with the power to make substantive changes to property rights? Did the plaintiffs establish an easement by necessity?

**Background:** The plaintiffs, Frank and Janis Tomecek, have owned Lot 2 of the Plat of O. T. Henkle for many years. They now wish to build a house on this lot but, in order to do so, must have access to utilities. A restrictive agreement relating to the property provides that "no building, structure or dwelling shall be constructed on Lot 2 of said plat unless and until a municipal sanitary sewer line is made available to the premises." The defendants argue that there is no sewer line available because there is no sewer easement; therefore, no building can be constructed on Lot 2, they contend. The plaintiffs argue that there is a sewer line available and that the only question is how to access it. The trial court granted the plaintiffs' motion for summary disposition, finding that a pre-existing "central drive easement" provides a right of passage, including for utilities, over the easement. However, the court refused to establish an easement by necessity for public utilities. The plaintiffs were entitled to a revision of the plat under the Land Division Act, MCL 560.101, *et seq.*, to provide for the changed use of the "central drive easement," the trial court said. The Court of Appeals affirmed the trial court in a split published opinion. The drive easement was meant only for ingress or egress from the

property, but under the Land Division Act, the court could revise the plat to allow for the use of the drive easement for utilities, the Court of Appeals majority said. Moreover, the majority reasoned, the Land Division Act's language for "vacating, correcting, or revising a plat" was designed not just to alter the plat map, but to alter the underlying property interests reflected in the map. The Court of Appeals majority also found that the trial court could be affirmed on an alternate basis, because there should be an easement by necessity for public utilities. The dissenting judge stated that, because the definition of "plat" in the Land Division Act referred to a map, the only thing that could be changed was the map if the map was in error. He did not conclude that the underlying property rights could be affected. The defendants appeal.

**PEOPLE v MILLER ([case no. 135989](#))**

**Prosecuting attorney:** Gregory J. Babbitt/(616) 846-8215

**Attorney for defendant Michael Allen Miller:** Gary L. Kohut/(248) 680-8870

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

**Attorney for amicus curiae Wayne County Prosecutor's Office:** Timothy A. Baughman/(313) 224-5792

**Trial Court:** Ottawa County Circuit Court

**At issue:** The defendant was convicted by a jury of first-degree criminal sexual conduct (CSC). Before sentencing, the defendant's attorney learned that one of the jurors had two prior CSC convictions, but had concealed that fact during jury selection. The trial court denied the defendant's motion for a new trial, finding no evidence that the defendant suffered actual prejudice as a result of the juror's involvement; the Court of Appeals reversed, saying that the defendant was entitled to a new trial. Did the defendant have to show that he was prejudiced by the juror's misconduct? Should the juror's failure to identify himself as a felon – which would disqualify him from serving on a jury – constitute structural error that would require reversal of his conviction?

**Background:** Michael Allen Miller was charged with forcing his girlfriend's seven-year-old daughter to perform oral sex on him; he was convicted of one count of first-degree criminal sexual conduct (CSC) following a two-day jury trial. Miller's attorney later learned that a juror on the case – who denied ever having been a defendant in a criminal case in his jury questionnaire – was a registered sex offender. At a hearing on Miller's request for a new trial, the juror acknowledged that he had two CSC convictions and was required to register with the Michigan Public Sexual Offender Registry; one of his victims was his sister and the other was his adopted child. The juror also admitted that he gave false answers in his jury questionnaire, but claimed that he tried to be fair during the trial, and that he never tried to persuade the jury in any particular way due to his personal history. At the conclusion of the evidentiary hearing, the trial judge denied Miller's motion for a new trial, stating "There is no evidence presented at this hearing or anything from any other source that [the juror's] presence on the jury resulted in actual prejudice to the defendant." In an unpublished per curiam opinion, the Court of Appeals reversed. The appellate court held that Miller was not afforded a fair and impartial jury, and suffered prejudice as a result; the court remanded the case to the trial court for a new trial. The prosecutor appeals.

**IN RE HULTGREN ([case no. 136880](#))**

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

**Attorney for respondent Judge William C. Hultgren:** Philip J. Thomas/(313) 821-2600

**Tribunal:** Judicial Tenure Commission

**At issue:** A judge met with a defendant in a collection case that that was pending before another judge in the same court; the defendant claimed that a different person with the same name had incurred the debt. The judge then communicated with the office of an attorney involved in that case, including writing to the attorney on court stationery and asking the lawyer to “look into the matter and take whatever action is appropriate.” Did the judge violate judicial ethics rules?

**Background:** The Judicial Tenure Commission (JTC) filed a formal complaint against Judge William C. Hultgren of the 19<sup>th</sup> District Court, asserting that he committed judicial misconduct. The complaint arose from a meeting, arranged by a mutual acquaintance, that Judge Hultgren had with Hussein Dabaja and two other men in the fall of 2006. At that meeting, Dabaja stated through an interpreter that he was a defendant in a debt collection case pending in the 19<sup>th</sup> District, but asserted that a different person with the same name had incurred the debt. To prove his claim, Dabaja showed the judge his passport and social security number. The court docketing system showed that the case had been assigned to another judge and that a default judgment had been entered against Dabaja. Judge Hultgren first attempted to call the attorney pursuing the claim against Dabaja, then sent a follow-up letter to the lawyer in which the judge described Dabaja’s claims and asked the attorney to “look into the matter and take whatever action is appropriate.” When Judge Hultgren’s involvement came to the attention of the judge presiding over the collection matter, he asked Judge Hultgren to explain his actions. Judge Hultgren provided a written response in which he said that his actions were “an isolated good faith by a judge to request a lawyer in a credit card collection mill to take a second look at objective facts ...” In its complaint, the JTC alleges that Judge Hultgren committed misconduct in office and acted in a manner that was clearly prejudicial to the administration of justice. The JTC also alleges that Judge Hultgren violated several canons of the Code of Judicial Conduct. After a two-day hearing, a special master concluded that Judge Hultgren committed the acts alleged by the JTC, but that while Judge Hultgren used “poor judgment” at times, he did not commit judicial misconduct. In a written opinion, the JTC accepted the master’s factual findings, but concluded that Judge Hultgren did commit judicial misconduct. The JTC majority recommended that, based on the nature of the misconduct, Judge Hultgren receive a public censure and be suspended without pay for 60 days. The dissenters concurred in the findings of fact, conclusions of law, and public censure, but recommended that Judge Hultgren be suspended without pay for one year. Judge Hultgren seeks review of the JTC’s decision and recommendation in the Michigan Supreme Court.

### *Afternoon Session*

**PEOPLE v PARKS** ([case no. 126509](#))

**Prosecuting attorney:** B. Eric Restuccia/(517) 373-1124

**Attorney for defendant Ricky Allen Parks:** Jonathan R. Sacks/(313) 256-9833

**Attorney for amicus curiae Wayne County Prosecuting Attorney:** Timothy A. Baughman/(313) 224-5792

**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Herbert R. Tanner, Jr./ (517) 334-6060

**Trial Court:** Shiawassee County Circuit Court

**At issue:** The defendant in this criminal sexual conduct case sought to introduce evidence that his accuser, his nine-year-old stepdaughter, had also accused her grandfather of sexual abuse when she was four or five years old. Is this evidence admissible, or is it barred by the rape shield statute, MCL 750.520j? Must the defendant be allowed to introduce the evidence of the child's prior accusations in order to preserve his constitutional right of confrontation and to present a defense?

**Background:** Ricky Allen Parks was charged with criminal sexual conduct (CSC) against his mentally handicapped nine-year-old stepdaughter after the child told a teacher about the alleged sexual abuse. The girl testified that no one other than Parks had ever touched her in a "bad" way. The prosecution moved, pursuant to the rape-shield statute, to bar any reference at trial to allegations of sexual abuse the girl had made against her grandfather when she was four or five years old. The child had no memory of making any such claims, the prosecutor indicated. Parks' counsel told the trial court that, assuming the child denied accusing her grandfather of sexual abuse, he might have witnesses come forward with a "contrary indication." But the trial court prohibited the defense from making any reference to prior allegations of sexual abuse, ruling that such evidence was barred by the rape-shield statute, MCL 705.520j. Parks was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC). Parks then challenged the trial court's rape shield ruling on appeal, claiming that his constitutional right to confrontation and cross-examination had been violated because he was not allowed to present evidence of the girl's alleged earlier claims against her grandfather. In an unpublished opinion, the Court of Appeals concluded that the trial court erred by barring the evidence. Past decisions indicate that evidence of prior false accusations of sexual abuse is admissible because it directly bears on the credibility of the victim and his or her accusations, the appellate panel said; excluding such evidence would unconstitutionally abridge a defendant's right to confrontation. But the appellate court upheld Parks' convictions, stating that the trial court's error did not require a reversal because Parks failed to make a satisfactory offer of proof under the rape shield statute, MCL 750.520j(2). Because Parks' counsel failed to present any details of the alleged prior false accusations, the trial court did not abuse its discretion in granting the prosecutor's motion, the Court of Appeals concluded. Parks appealed to the Supreme Court, which remanded the case to the trial court for an evidentiary hearing "affording the defendant the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person." The trial court was asked to "determine if there is any such evidence." On remand, the trial court held an evidentiary hearing, and then issued an order stating "this Court finds no evidence that the complainant made a prior false allegation of sexual abuse against another." After reviewing the trial court's ruling, the Supreme Court ordered oral argument on Parks' application for leave to appeal.

#### **MOORE v SECURA INSURANCE** ([case no. 135028](#))

**Attorney for plaintiffs Hattie Moore and James Moore:** Peter M. Bade/(810) 244-5862

**Attorney for defendant Secura Insurance:** Megan K. Cavanagh/(313) 446-1530

**Trial Court:** Genesee County Circuit Court

**At issue:** In this first-party no-fault case, a jury rendered a verdict in favor of the plaintiffs and the trial court awarded the plaintiffs close to \$80,000 in attorney fees and costs. The Court of Appeals affirmed. Did the trial court err in awarding the plaintiffs attorney fees under MCL 500.3148(1)? Did the trial court err in determining the amount of attorney fees?

**Background:** Hattie Moore was driving her automobile on I-475 in Genesee County when she

was struck by a hit-and-run driver. As a result of the accident, Moore sustained an acute fracture of her right kneecap. Secura Insurance was Moore's no-fault insurer. Before the accident, Moore had been seeing an orthopedic surgeon for pain in both knees related to osteoarthritis. Moore was able to work without restrictions as a custodian before the automobile accident. After the accident, Moore was not able to return to work. Secura began paying work loss benefits, as well as other no-fault benefits, to Moore. Several months after the accident, Moore had surgery on her right knee, but she remained off work even after the surgery. Secura continued to pay no-fault benefits until a physician who performed an independent medical evaluation (IME) at Secura's request concluded that Moore did not need any further treatment for her orthopedic complaints related to the automobile accident. Secura then terminated Moore's no-fault benefits. Moore sued Secura, seeking first-party no-fault benefits and uninsured motorist benefits. The jury awarded \$50,000.00 in noneconomic losses in relation to Moore's uninsured motorist claim. The jury also awarded Moore \$42,775.00 in work loss benefits and \$98.71 in penalty interest (pursuant to a statute that allows interest to be awarded for payments not made within 30 days after the insurance company has received reasonable proof of the fact and the amount of the claim). Moore then filed a post-judgment motion for no-fault attorney fees and costs under MCL 500.3148(1). That statute states: "An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." The motion was granted, and Moore was awarded \$79,415.00 in no-fault attorney fees and costs. Secura appealed. The Court of Appeals affirmed the trial court's award of no-fault attorney fees and costs in a split published opinion. The majority acknowledged Secura's argument that the jury's award of \$98.71 in penalty interest was suggestive of a finding that Secura unreasonably delayed payment of only one week of benefits. Nevertheless, the majority declined "the invitations to speculate regarding why the jury so found, or to conclude that this is such a *de minimis* amount so as to be tantamount to a finding that no payments were overdue." According to the majority, the jury found at least some of the benefit payments were overdue and the majority refused to "second-guess" that finding. The dissenting judge disagreed with this analysis, and concluded that Moore failed to satisfy MCL 500.3148(1)'s requirement that the benefits be overdue. Secura appeals.

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