

MICHIGAN SUPREME COURT



Office of Public Information

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PRE-EXORCISM QUESTIONNAIRE'S ADMISSIBILITY IN SEXUAL MISCONDUCT TRIAL AT ISSUE IN CASE STATE SUPREME COURT WILL HEAR THIS WEEK

LANSING, MI, October 1, 2007 – In a sexual misconduct case involving a church pastor, should a pre-ritual questionnaire – in which the complainant stated that she had been raped by a demon living in her attic and had been sexually abused by her pastor father – have been admitted into evidence?

In *People v Piscopo*, the woman filled out the questionnaire before engaging in a “deliverance,” a form of exorcism, during which she claims that she was groped by the pastor. He sought to have the questionnaire admitted into evidence at trial to show that her accusations against him were not credible. But the trial court refused, holding that the questionnaire was irrelevant to the charge and was barred by the rape-shield law, which prohibits evidence of complainants’ prior sexual activity in sexual misconduct cases. The Supreme Court will hear oral argument on whether the pastor’s criminal sexual conduct conviction should be overturned, based on the trial court’s exclusion of the questionnaire.

Also before the Supreme Court is *McDonald v Farm Bureau Insurance Co.*; at issue is a no-fault insurance contract provision which imposes a one-year limit for suits against the insurer for underinsured motorist benefits. The plaintiff in *McDonald* filed a timely claim for insurance benefits, and the insurance company denied the claim seven months later, more than one year after the accident. When the plaintiff sued and Farm Bureau sought to dismiss the case, a circuit judge ruled in part that the policy’s one-year limitations period was unreasonable and unenforceable as a matter of law, and that Farm Bureau’s failure to respond to the claim within the year barred the insurer from asserting the policy’s one-year limitation. The Court of Appeals upheld that ruling, which Farm Bureau now appeals.

The remaining cases involve governmental immunity, jurisdiction, arbitration, procedural, medical malpractice, insurance, worker’s compensation, tax, and criminal law issues.

Court will be held on **October 2, 3, and 4** in the Supreme Court’s courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

(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://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Tuesday, October 2, 2007

Morning Session

MCDONALD v FARM BUREAU INSURANCE COMPANY (case no. 132218)

Attorney for plaintiff Mary Ellen McDonald: Donald M. Fulkerson/(734) 467-5620

Attorney for defendant Farm Bureau Insurance Company: Anthony S. Kogut/(517) 351-6200

Trial court: Genesee County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132218/132218-Index.htm>

At issue: The plaintiff's no-fault insurance contract requires that any suit for underinsured motorist benefits be brought within one year of the accident. The plaintiff filed a timely claim, but the defendant did not deny the claim until more than one year after the accident. Is the one-year limitations period contained in the insurance policy tolled from the time that a claim is made until the insurance company denies the claim? Can an insurance company waive the right to enforce a contractual limitations period, or be estopped from enforcing such a limitation period?

Background: Mary Ellen McDonald was injured in a November 29, 2001 auto accident while riding in a car driven by her husband, who had auto insurance with Farm Bureau Insurance Company. The policy, which included underinsured motorist coverage, contained an endorsement stating that "[n]o claimant may bring a legal action against the company more than one year after the date of the accident." On May 10, 2002, McDonald's attorney notified Farm Bureau by mail that McDonald had a claim for underinsured motorist benefits. Farm Bureau denied the underinsured motorist claim on December 10, 2002, on the basis that the one-year period of limitations provided for in the contract had passed. McDonald then sued, seeking to recover underinsured motorist benefits. Farm Bureau asked the circuit court to dismiss the lawsuit on the basis of the statute of limitations, but the circuit court denied Farm Bureau's motion. The policy's one-year limitations period was unreasonable and unenforceable as a matter of law, the court stated. Moreover, Farm Bureau's dilatory conduct estopped it from asserting the policy's one-year limitation; in addition, the time limit was equitably tolled by May 10, 2002 letter sent by the plaintiff's attorney until Farm Bureau officially denied the claim, the court held. Also, the policy's limitations period is ambiguous, the court concluded. The Court of Appeals affirmed in an unpublished opinion. Farm Bureau appeals.

GRACE v LEITMAN (case no. 131035)

Attorney for plaintiff Harvey Grace: Mark Granzotto/(248) 546-4649

Attorney for defendants Bruce Leitman and Bruce Leitman, P.C.: Christine D. Oldani/(313) 983-4796

Attorneys for amicus curiae Insurance Institute of Michigan, ProNational Insurance Company, and Professionals Direct Insurance Company: Jon D. Vander Ploeg/(616) 774-8000, Joseph A. Fink/(517) 371-1730

Attorneys for amicus curiae State Bar of Michigan: Noreen L. Slank, Geoffrey M. Brown/(248) 355-4141

Trial court: Oakland County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131035/131035-Index.htm>

At issue: The plaintiff sued his lawyer, and the lawyer's law firm, for legal malpractice. To support his malpractice claim, the plaintiff produced an affidavit from an expert witness who testified that the defendant lawyer breached the standard of care. The trial court granted summary disposition to the defendants and dismissed the plaintiff's case. Was the defendant lawyer's strategy reasonable as a matter of law? Or does the affidavit from the plaintiff's expert witness create a genuine issue of material fact, under the principles discussed in *Simko v Blake*, 448 Mich 648 (1995), and other applicable law?

Background: When Harvey Grace and his wife Brooke Grace divorced in 1990, they entered into a separation agreement to split their marital assets evenly; the estate's value was based on figures Harvey Grace provided. Shortly afterward, his ex-wife came to believe that she had been deceived about the value of one of the assets, and she sued Grace for fraud. In a 1998 trial, the ex-wife's expert witness testified that Grace's share in Grace & Wild Studios, Inc. – an asset Grace valued as worthless in the divorce – was probably worth \$4 million to \$6 million. Grace's attorney, Bruce Leitman, challenged the expert's credibility but did not call an expert witness to support Grace's claims that the asset had no monetary value. It is undisputed that, at the time, Leitman was aware that another expert had given a deposition in an earlier lawsuit valuing the asset at \$0; it is also undisputed that Leitman falsely told Grace that he had retained this expert. The jury ultimately ruled in the ex-wife's favor and awarded her just over \$3 million. In 2002, Grace sued Leitman and his law firm for legal malpractice, based largely on Leitman's failure to call any expert witness to counter the ex-wife's expert. The defendants moved to dismiss the case, arguing principally that Grace's theories were barred because Leitman's actions constituted a good-faith exercise of professional judgment. Grace's response included an affidavit from another attorney, who described how Leitman's actions fell below the applicable standard of care. Leitman's conduct was a direct and proximate cause of the result in the fraud case, the attorney opined. But the trial court dismissed the case, finding that Grace "failed to present evidence that [the] Defendants' actions were not in good faith or were based on anything other than an honest belief well founded in the law and in the best interest of their client." The Court of Appeals affirmed in an unpublished per curiam opinion. Grace appeals.

Afternoon Session

CITY OF DETROIT v AMBASSADOR BRIDGE COMPANY (case no. 132329)

Attorney for plaintiff City of Detroit: Linda D. Fegins/(313) 237-3022

Attorneys for defendant Ambassador Bridge Company a/k/a Detroit International Bridge Company: Jeffrey T. Stewart/(248) 353-6550, Catherine Sevckenko/(202) 429-3000

Attorney for amicus curiae Michigan Municipal League, Bagley Housing Association, Bridgewatch Detroit, Mexicantown Community Development Corporation, Ste. Anne's Catholic Church, Southwest Detroit Business Association, Inc., and People's Community Services for Metropolitan Detroit: Tiffany L. Robinson/(313) 965-9725

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132329/132329-Index.htm>

At issue: The city of Detroit denied building permits and variances that would allow Detroit International Bridge Company, the owner of the federally chartered Ambassador Bridge, to

undertake several construction projects within the federally controlled “sterile zone” where customs, immigration, and security procedures are performed. The trial court ruled that the bridge was a federal instrumentality and that the city’s local zoning ordinances did not apply to the construction projects at issue. The Court of Appeals reversed in an unpublished opinion. Is the bridge company a federal instrumentality? Does federal law preempt the city from enforcing Detroit’s zoning ordinances for construction projects within the sterile zone?

Background: Detroit International Bridge Company (DIBC) began three construction projects within the enclosed area forming a part of the approach to the Ambassador Bridge on the Detroit side of the Detroit River (the “sterile zone” or “bridge complex”). DIBC did so without first obtaining building permits and zoning variances required under Detroit ordinances; the city denied DIBC’s applications for permits and variances when DIBC did apply later. The city’s zoning ordinances do not allow toll booths and other uses ancillary to the operation of the Ambassador Bridge as a matter of right. DIBC claimed that its projects were not subject to the local ordinances, and that federal preemption applies because the projects were within the “sterile zone” of the enclosed bridge plaza that is “maintained under contract with the federal government for the essential governmental purposes of conducting customs, naturalization and border control functions.” Alternatively, DIBC claimed that the projects complied with a special zoning ordinance enacted by the city to control construction and maintenance activities concerning the bridge. The circuit court found that a trial was necessary on the issue of federal preemption. After a 12-day hearing, the court issued an interim order in DIBC’s favor, finding that the bridge was a federal instrumentality, and that the city’s zoning ordinances did not prevent DIBC from using property within the bridge complex for lawful purposes. Over three years later, the trial court issued a final order of declaratory judgment and injunctive relief in DIBC’s favor. The city appealed and the Court of Appeals reversed in an unpublished opinion. Federal law did not preempt the city’s enforcement of its zoning ordinances, the Court of Appeals stated. DIBC appeals.

MULLINS v ST. JOSEPH MERCY HOSPITAL, et al. (case no. 131879)

Attorney for plaintiff Mary Mullins, Personal Representative of the Estate of Nina F.

Mullins, Deceased: Allan Falk/(517) 381-8449

Attorney for defendants St. Joseph Mercy Hospital, d/b/a St. Joseph Mercy Health System,

Jason White, M.D., Rafael J. Grossman, M.D., and Kimberly Stewart, M.D.: Michael L.

Van Erp/(517) 349-3200

Attorney for amicus curiae Michigan Health and Hospital Association: Susan Healy

Zitterman/(313) 965-7905

Attorneys for amicus curiae Botsford Hospital: Linda M. Garbarino, Anita Comorski/(313)

964-6300

Attorney for amicus curiae Michigan Trial Lawyers Association: Mark Granzotto/(248) 546-

4649

Trial court: Washtenaw County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131879/131879-Index.htm>

At issue: The original personal representative in this case filed his medical malpractice complaint more than two years after his appointment and six months after serving the defendants with a notice of intent to file suit. The defendants moved for summary disposition pursuant to *Waltz v Wyse*, 469 Mich 642 (2004). The trial court denied summary disposition. After

convening a conflict panel, the Court of Appeals ruled that *Waltz* applies retroactively. Does *Waltz* apply retroactively?

Background: The original personal representative in this medical malpractice case filed suit more than two years after his appointment and six months after serving the defendants with a notice of intent to file suit. The defendants moved for summary disposition, citing *Waltz v Wyse*, 469 Mich 642 (2004). In *Waltz*, the Supreme Court held that the two-year savings period for filing suit under the wrongful death savings act, MCL 600.5852, is not tolled by the filing of a notice of intent under MCL 600.5856 because it is a savings provision and not a statute of limitations or repose. In this case, the defendants argued that the complaint had to be dismissed as untimely under *Waltz*, because it was not filed within two years of the personal representative's appointment, as required by MCL 600.5852, and the statute of limitations had expired. But the trial court denied the defendants' motion for summary disposition. The defendants sought leave to appeal to the Court of Appeals. Instead, the Court of Appeals issued an order remanding the case to the trial court for reconsideration in light of the Court of Appeals' decision in *Ousley v McLaren*, 264 Mich App 486 (2004), which held that *Waltz* applies retroactively. The trial court again denied summary disposition, finding both *Waltz* and *Ousley* to be distinguishable from this case. Although the Court of Appeals initially held that *Ousley* was wrongly decided, a majority of a seven-judge panel, convened to resolve the conflict between that decision and the *Ousley* ruling, reaffirmed *Ousley* in a published opinion. The plaintiff appeals.

Wednesday, October 3, 2007

Morning Session

KUZNAR v RAKSHA CORPORATION, et al. (case no. 132203)

Attorneys for plaintiffs Judith Kuznar and Joseph Kuznar: Lesley F. Knapp, Robert J. Kanter/(734) 421-2610

Attorney for defendants Raksha Corporation, d/b/a Crown Pharmacy, and Valerie Randall: Jeffrey R. Clark/(734) 261-2400

Attorney for amicus curiae Michigan Justice Association: Mark R. Bendure/(313) 961-1525

Attorney for amicus curiae Michigan Pharmacists Association: Jesse C. Vivian/(517) 484-1466

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132203/132203-Index.htm>

At issue: The plaintiffs sued a pharmacy and its employee for ordinary negligence after the employee refilled a prescription with the wrong pills. The defendants moved to dismiss the case, arguing that the plaintiffs' actual claim was for medical malpractice and was barred by the two-year statute of limitations. The trial court denied the motion and the Court of Appeals affirmed. Is a pharmacy a "licensed health facility" under MCL 600.5838a? In light of MCL 333.17741, is the pharmacist a necessary party to a claim against a pharmacy for dispensing the wrong drug?

Background: Judith Kuznar was injured when Valerie Randall, a pharmacy technician who is not a licensed pharmacist and was not being supervised by a pharmacist, refilled a prescription for Kuznar with pills containing more than eight times the prescribed dosage. Randall worked for defendant Raksha Corporation, doing business as Crown Pharmacy. Kuznar and her husband

sued both Randall and Raksha Corporation, alleging ordinary negligence. The defendants moved for summary disposition, arguing that the claim sounded in medical malpractice rather than negligence and was therefore barred by the two-year statute of limitations. The circuit court denied the motion. The defendants appealed, and the Court of Appeals issued a published opinion affirming the circuit court's ruling. The Court of Appeals held that the plaintiffs' claim sounded in negligence, that "a pharmacy does not qualify as a 'licensed health facility or agency' subject to malpractice actions, as set forth in MCL 600.5838a(1)," and that a pharmacy technician is not a licensed health care professional subject to malpractice suits under MCL 600.5838a(1)(b). The defendants appeal.

KAISER v ALLEN (case no. 133031)

Attorney for plaintiff Roland Kaiser, Personal Representative of the Estate of Marion Rose Kaiser, Deceased: Kevin J. Rieman/(989) 895-5025

Attorney for defendant James Robert Allen, a/k/a James Krotzer: John A. Lydick/(248) 646-5255

Attorney for amicus curiae Michigan Association for Justice: Debra A. Garlinghouse/(248) 352-7777

Trial court: Bay County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/133031/133031-Index.htm>

At issue: The estate of a woman killed in a car accident sued the driver of the other car and its owner. The car owner settled the case for \$300,000, but the other driver remained in the case. Later, a jury found that the total damages suffered by the woman's estate were \$100,000. The trial court then entered an award of \$0 against the remaining defendant, reasoning that the \$300,000 settlement must be set off against the jury's verdict. Was this correct? What is the relationship between MCL 600.2957(1), which allocates liability "in direct proportion to the person's percentage of fault," and MCL 257.401(1), which imposes vicarious liability that is not based on fault?

Background: Marion Kaiser was killed in an automobile accident. James Allen was the driver of the other car involved in the accident, and Gary Keidel owned the car. Roland Kaiser, personal representative of Marion Kaiser's estate, sued Allen negligence and gross negligence, and also sued Keidel based on the vehicle owner liability statute, MCL 257.401. Keidel settled for \$300,000 and was dismissed from the lawsuit. Allen stipulated to liability and the case proceeded to trial on the issue of damages only. The jury returned a verdict in the plaintiff's favor. When asked, "[w]hat is the total amount of damages suffered by the Estate of Marion Rose Kaiser as a result of her death in this accident?" the jury awarded \$100,000. The circuit court set off the \$300,000 payment made by Keidel against the verdict, leaving \$0 adjudged against Allen. The Court of Appeals reversed in an unpublished opinion, ruling that a set-off was improper. Keidel and Allen were joint tortfeasors, and under tort reform legislation, liability for each defendant was not joint and several, but merely several, the Court of Appeals reasoned. Thus, Keidel's settlement represented damages attributable only to his own allocated fault, and no set-off was appropriate, the appellate court concluded. Allen appeals.

PEOPLE v PISCOPO (case no. 127129)

Prosecuting attorneys: Robert Berlin, Betsy B. Mellos/(586) 469-5350

Attorney for defendant Gennaro Joseph Piscopo: David A. Dodge/(616) 459-3850

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: Macomb County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/127129/127129-Index.htm>

At issue: A church pastor was accused of sexually groping a woman during an exorcism. In a questionnaire that she filled out before the ritual, the complainant stated that she was sexually abused by her pastor father throughout her youth and was raped by a demon living in her attic. But the trial court did not allow the jury to hear this evidence, in part because of the rape-shield law, and also excluded one of the defendant’s proposed experts. Did the trial court err, and should the defendant’s conviction be overturned as a result? Was the defendant denied his constitutional right to confrontation?

Background: A pastor at a Pentecostal church in Roseville was accused of sexually groping women during a church ritual known as the “deliverance,” a form of exorcism. Before this ritual, the complainant had filled out a questionnaire in which she indicated that she had been sexually abused by her pastor father throughout her youth and that she had been raped by a demon living in her attic. At trial, the court denied the defendant’s request to present this questionnaire to the jury and to cross-examine the complainant about it. Citing Michigan Rules of Evidence 401 and 402, the trial court reasoned that since the complainant filled out the questionnaire before the alleged assault, the statements were not relevant as to whether the assault occurred or whether the complainant was credible. The trial court also concluded that the questionnaire’s contents were more prejudicial than probative and that the complainant had never intended for the intimate details in the document to become public. MRE 803(6), the business-records exception, did not authorize admission of the questionnaire, especially where the questionnaire was not inherently trustworthy, the court added. Finally, the trial court ruled that the statements referred to the complainant’s past sexual conduct or past sexual activity and were inadmissible under the rape-shield law. The listed exceptions contained in the law were not applicable, said the judge, and the evidence was therefore barred by the statute. The trial court also refused to permit an expert on the effects of extreme stress on perceptions to testify for the defendant pastor, because the expert was unfamiliar with the “deliverance” ritual. The defendant was convicted of fourth-degree criminal sexual conduct and appealed, but the Court of Appeals saw no abuse of discretion and affirmed his conviction in an unpublished opinion. The defendant “failed to demonstrate that the evidence [contained in the questionnaire] was necessary to protect his right to confront the witness,” the Court of Appeals stated. The appellate court concluded that the trial court “properly excluded the questionnaire evidence as irrelevant and contrary to the rape-shield laws.” As for the trial court’s decision to exclude the testimony of the defendant’s proposed expert, the Court of Appeals agreed that the expert’s lack of familiarity with the “deliverance” ritual prevented her from testifying. The defendant appeals.

Afternoon Session

ROSS v BLUE CARE NETWORK OF MICHIGAN (case no. 131711)

Attorney for petitioner Desiree E. Ross, Personal Representative of the Estate of Douglas

G. Ross: Andrew B. Wachler/(248) 544-0888

Attorney for respondent Blue Care Network of Michigan: Phillip J. DeRosier/(313) 223-3500

Attorney for amicus curiae Commissioner of the Office of Financial and Insurance

Services: William A. Chenoweth/(517) 373-1160

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131711/131711-Index.htm>

At issue: Is the Commissioner of the state's Office of Financial and Insurance Services bound by the recommendations of an independent review organization on issues of medical necessity and clinical review under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.*?

Background: Douglas Ross, a Blue Care Network insured, suffered from an extremely virulent form of multiple myeloma. When he had exhausted his known available in-network treatment options, he sought treatment at a facility in Arkansas that specialized in treating multiple myeloma, but he did not obtain Blue Care Network's pre-authorization for that treatment. Blue Care Network refused to cover this out-of-network medical care. The petitioner, the personal representative of Ross' estate, appealed Blue Care Network's decision to the Commissioner of the Office of Financial and Information Services. The Commissioner assigned the case to Permision, an independent review organization, pursuant to the Patient's Right to Independent Review Act (PRIRA). The independent review organization recommended that Blue Care Network's denial of coverage be overturned. Despite this, the Commissioner upheld Blue Care Network's denial, with the exception of a two-week hospitalization which she ruled constituted "emergency care." The circuit court reversed this ruling on appeal, ordering Blue Care Network to pay for all of Ross' medical care at the Arkansas facility. The Court of Appeals affirmed the circuit court's ruling in a published opinion, with the exception of certain services the Commissioner had not considered or ruled on. The Court of Appeals reasoned that the Commissioner had erred by discounting the independent review organization's medical recommendations and replacing them with her own, independent conclusions, which was beyond her authority under PRIRA. Blue Care Network appeals.

PEOPLE v DENDEL (case no. 132042)

Prosecuting attorney: Jerrold E. Schrottenboer/(517) 788-4283

Attorney for defendant Katherine Sue Dendel: Valerie R. Newman/(313) 256-9833

Trial court: Jackson County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132042/132042-Index.htm>

At issue: After a bench trial, the defendant was found guilty of second-degree murder for killing her partner by injecting him with a lethal dose of insulin. Following a hearing, the trial court denied the defendant's motion for a new trial. The Court of Appeals reversed in a split unpublished decision. Did the Court of Appeals err in concluding that, where the defendant's guilt hinged on the victim's cause of death, trial counsel's failure to consult with, or present the testimony of, a forensic pathologist was overwhelming evidence of prejudice?

Background: At trial, the prosecutor alleged that Katherine Dendel killed her live-in partner of nearly thirty years, Paul Michael Burley, by injecting him with insulin. Dendel denied this, and theorized that Burley either took his own life or died from the side effects of the many medications he was taking for his various ailments. Dendel was charged with first-degree murder and, after a bench trial, was found guilty of second-degree murder. She was sentenced to a prison

term of seven and one-half to fifteen years. Dendel filed a motion for a new trial, claiming that she received ineffective assistance of trial counsel. Following an evidentiary hearing, the trial court denied her motion. Dendel appealed, and the Court of Appeals reversed in a split unpublished decision. The majority held that Dendel was denied the effective assistance of counsel when counsel failed to present expert testimony on the cause of Burley's death. The dissenting Court of Appeals judge would have affirmed the trial court's denial of the motion for a new trial. The prosecutor appeals.

DRAKE v CITIZENS INSURANCE COMPANY (case no. 130855)

Attorney for plaintiff Michael Eugene Drake: Mark R. Daane/(734) 662-4426

Attorney for defendant Citizens Insurance Company: Joseph S. Mierzejewski/(248) 338-2290

Trial court: Hillsdale County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/130855/130855-Index.htm>

At issue: This no-fault case involves a parked delivery truck that pumps grain into a silo using a three-auger device permanently connected to the truck. Plaintiff lost two fingers while clearing an obstruction from one of the augers while the truck was parked but running. Did the plaintiff's injury arise out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1), so that the plaintiff is entitled to recover no-fault benefits? Does the parked-vehicle exception in MCL 500.3106(1)(b) apply? If so, does that establish that the plaintiff's injury arose out of the use of the parked vehicle as a motor vehicle under MCL 500.3105(1)?

Background: Michael Drake lost two fingers while clearing an obstruction from a device that pumps grain from a truck into a silo; this device is permanently connected to the truck. At the time, the truck was parked but running. Drake sued his no-fault carrier, Citizens Insurance Company, to recover insurance benefits. MCL 500.3105(1) provides that an insurer is "liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" MCL 500.3106(1)(b) provides that "[a]ccidental bodily injury" does not arise out of the use of a *parked* vehicle as a motor vehicle, unless "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process" Citizens Insurance denied that it owed benefits, arguing that Drake's injuries did not arise out of the use of a motor vehicle as a motor vehicle. The trial court disagreed, holding that Drake's injury did arise out of the use of a motor vehicle as a motor vehicle. Citizens appealed, but the Court of Appeals affirmed in a divided published opinion. The panel observed that the Supreme Court had held in *McKenzie v ACIA*, 458 Mich 214 (1998), that "whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles." The Court of Appeals concluded that, here, the vehicle was a delivery truck that was being used as a delivery truck when the injury occurred. Thus, the injury was closely related to the motor vehicle's transportational function. But the Court of Appeals majority also expressed concern that there was an inconsistency between the statutory language and the *McKenzie* transportational function test as applied in a case like this, involving a parked vehicle. Citizens appeals.

LIBERTY HILL HOUSING CORPORATION v CITY OF LIVONIA (case no. 131531)

Attorney for petitioner Liberty Hill Housing Corporation: June Summers Haas/(517) 377-0734

Attorney for respondent City of Livonia: Barbara J. Scherr/(734) 466-2520

Attorney for amicus curiae Pheasant Ring a/k/a Homes for Autism: William J. Schramm/(248) 644-1030

Tribunal: Michigan Tax Tribunal

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131531/131531-Index.htm>

At issue: The petitioner is a non-profit corporation whose purpose is to “create integrated housing alternatives for low income individuals . . .” The Michigan Tax Tribunal, affirmed by the Court of Appeals, found that petitioner did not “occupy” its housing, and therefore was not entitled to a property tax exemption under MCL 211.7o(1), because the property was occupied by tenants who signed leases. Is petitioner “occupying” the premises by leasing the homes to low income or disabled persons? Is it entitled to the exemption from property tax?

Background: Liberty Hill Housing Corporation is a Michigan non-profit corporation whose purpose is to “create integrated housing alternatives for low income individuals and families and persons with disabilities to interact with the general public, and to promote the establishment of safe, affordable and accessible as necessary housing for low income individuals and families and persons with disabilities.” This case concerns five homes owned by Liberty Hill and leased to people who have qualified as tenants under Liberty Hill’s guidelines. Liberty Hill requested an exemption from property taxes under MCL 211.7o(1), which provides: “Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act.” Liberty Hill argued that it was pursuing its charitable goal by leasing these homes to qualified individuals and that it should be considered to be “occupying” the premises. The Michigan Tax Tribunal denied Liberty Hill’s request for the property tax exemption, finding that Liberty Hill did not “occupy” the premises. Liberty Hill appealed the decision to the Court of Appeals, which affirmed in an unpublished opinion. Liberty Hill appeals.

LAKE FOREST PARTNERS 2, INC. v DEPARTMENT OF TREASURY (case no. 132013)

Attorney for petitioner Lake Forest Partners 2, Inc.: Louis R. Johnson/(734) 996-9456

Attorney for respondent Department of Treasury: Michael R. Bell/(517) 373-3203

Attorney for amicus curiae Michigan Association of Home Builders: Gregory L. McClelland/(517) 482-4890

Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890

Attorney for amicus curiae Washtenaw County: Cynthia L. Reach/(734) 994-1400

Tribunal: Michigan Tax Tribunal

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132013/132013-Index.htm>

At issue: A developer sold vacant lots and contracted to build homes on some of the lots. After the homes were completed and after closing, the developer paid a real estate transfer tax, pursuant to MCL 207.521 of the state real estate transfer tax act, based on the value of the vacant

lot, and a warranty deed was recorded. The Department of Treasury issued an assessment requiring the developer to pay additional taxes based on the value of the constructed home and the value of the lot. The Michigan Tax Tribunal sustained the assessment, but the Court of Appeals reversed in a divided published opinion. Should the transfer tax be paid on the value of the improved property at the time the deed was recorded?

Background: This case involves construction and application of the state real estate transfer tax act, MCL 207.521 *et seq.* Lake Forest Partners 2, Inc., a developer, sold vacant lots. The purchasers of the vacant lots would then hire a builder to construct a home on the lot. Sometimes the purchasers contracted with Johnson Building Group, a division of Lake Forest, to build the house. In those cases, both the sale of the lot and construction of the house were agreed to in a single document, the “purchase agreement.” Lake Forest would not pay the state transfer tax until closing, after the house was completed. The transfer tax was based on the value of the vacant land as of the date of the purchase agreement. In 2001, the Department of Treasury reviewed Lake Forest’s past tax payments of state real estate transfer taxes and determined that, from November 1997 through September 2000, Lake Forest had underpaid taxes in the amount of \$65,968 and owed a penalty of \$16,492 plus interest. Lake Forest challenged the ruling and eventually filed a petition with the Michigan Tax Tribunal. The Tribunal sustained the assessment, but the Court of Appeals reversed in a divided published opinion. The Court of Appeals majority concluded that the state real estate transfer tax act requires the transfer tax to be based on the value of property at the time the parties executed the purchase agreement. The dissenting judge thought that the act imposed a tax on the executed deed, and not the earlier and unrecorded purchase agreement. The Department appeals.

Thursday, October 4, 2007

Morning Session

HASTINGS MUTUAL INSURANCE COMPANY v MOSHER, DOLAN, CATALDO & KELLY, INC. (case no. 131546)

Attorneys for plaintiff Hastings Mutual Insurance Company: Constantine N. Kallas, Michele L. Riker-Semon/(248) 335-5450

Attorney for defendant Mosher, Dolan, Cataldo & Kelly, Inc.: Paul C. Smith/(313) 965-8300

Attorney for amicus curiae Complex Insurance Claims Litigation Association: Stephen M. Kelley/(586) 563-3500

Attorney for amicus curiae Amerisure Mutual Insurance Company: Paul E. Richards/(248) 615-9000

Attorney for amicus curiae Insurance Institute of Michigan, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America:

Deborah A. Herbert/(248) 355-4141

Attorney for amicus curiae National Association of Home Builders and Michigan

Association of Home Builders: Gregory L. McClelland/(517) 482-4890

Trial court: Oakland County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131546/131546-Index.htm>

At issue: At issue is the plaintiff insurance company’s liability for certain damages arising from the presence of mold and other toxins in building materials used to construct a house. Was there

an “occurrence” giving rise to the insurer’s duty to indemnify the defendant insured, a residential general contractor, under any of three Comprehensive General Liability policies for years 2001 through 2003? Does a “Fungi Exclusion” or “Damage to Your Own Work Exclusion” apply?

Background: Hastings Mutual Insurance Company issued Comprehensive General Liability (CGL) policies to Mosher, Dolan, Cataldo & Kelly, Inc. for 2001, 2002 and 2003. Mosher Dolan, acting as the general contractor, built a \$5 million custom home for Lisa and David Feinbloom. The Feinblooms later sought damages in arbitration for various defects in building materials and workmanship, including claims concerning the presence of mold and other toxins in building materials. Mosher Dolan sought coverage from Hastings under the CGL policies. Hastings provided a defense under a reservation of rights letter, but also brought a declaratory action against Mosher Dolan and the Feinblooms, asking the court to rule that Hastings had no duty to defend or indemnify any defendant in the arbitration. The arbitrator found for the Feinblooms and against Mosher Dolan on some claims, especially those involving visible mold on installed sub-flooring materials. But the arbitrator denied the bulk of the Feinblooms’ claims, including ones that the house was unlivable and that spores affected the Feinblooms’ asthmatic children, finding that Mosher Dolan was not responsible. Hastings and Mosher Dolan both sought summary disposition in the declaratory action; the key issues were whether the property damage was an “occurrence” under the policies and whether exclusions to coverage applied, most prominently the “Damage to Your Own Work” and “Fungi” exclusions in the CGL policies. The circuit court ruled in favor of Mosher Dolan, finding that Hastings had a duty to indemnify Mosher Dolan. Hastings appealed. The Court of Appeals held that the circuit court erred in finding that Hastings had a duty to indemnify, but found that Hastings’ duty to defend was “broader” and might obligate it to defend Mosher Dolan. The Court of Appeals remanded the case to the circuit court for it to determine: (1) at what point in the arbitration proceedings, if any, could Hastings confine the Feinblooms’ claims to theories not covered by the policy, and (2) the extent of Hastings’ liability for Mosher Dolan’s defense costs until that point. Both Hastings and Mosher Dolan appeal.

TOLL NORTHVILLE, LTD, et al. v TOWNSHIP OF NORTHVILLE (case no. 132466)

Attorneys for plaintiffs Toll Northville, Ltd., and Biltmore Wineman, LLC: Myles B.

Hoffert, David B. Marmon/(248) 865-4700

Attorney for defendant Township of Northville: Robert E. Thall/(269) 382-4500

Attorney for amicus curiae Michigan Association of Home Builders: Gregory L.

McClelland/(517) 482-4890

Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890

Attorney for amicus curiae Michigan State Tax Commission: Ross H. Bishop/(517) 373-3203

Attorney for amicus curiae Michigan Townships Association, Michigan Municipal League, Michigan Assessors Association, and the Michigan Association of School Boards: James W. Porter/(269) 375-7195

Trial court: Wayne County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132466/132466-Index.htm>

At issue: The plaintiffs develop raw land into residential lots and subdivisions, installing infrastructure such as roads, sewers, telephone, and electricity. MCL 211.34d(1)(b)(viii) allows

increases in property taxes for “additions” to property, including “public service” improvements. Does this statute violate 1994 Proposal A, Const 1963, art 9, §3, which generally limits increases in taxable value of property to the inflation rate “adjusted for additions and losses”?

Background: Toll Northville, Ltd. and Biltmore Wineman, LLC, develop raw land into residential lots within the township of Northville. Relying on MCL 211.34d(1)(b)(viii), part of the enabling legislation for 1994 Proposal A (which capped increases in taxable value of real property), the township increased the two developers’ property tax assessments for 2001 and 2002. The township reasoned that “public service” improvements (such as water service, sewer service, utility service) were “additions” to the property within the meaning of Proposal A that allowed for increased taxation of the property. But Toll Northville and Biltmore Wineman claim that the meaning of “additions” in 1994, when Proposal A was passed, did not include public service improvements, and that therefore the Legislature’s effort to define “additions” to include improvements for “public services” (i.e., MCL 211.34d(1)(b)(viii)) should be struck down as unconstitutional. The township argues that “additions” is a term of art that had been consistently construed to include “public services” long before 1994. The developers challenged their tax assessments before the Michigan Tax Tribunal, but the Tribunal stayed its proceedings so that this declaratory action regarding the statute’s constitutionality could proceed in circuit court. The circuit court ruled that the statute is unconstitutional because it taxes improvements to real property beyond the meaning of “additions” when Proposal A passed. The Court of Appeals affirmed the circuit court’s ruling in a published opinion. The township appeals.

WESCHE v MECOSTA COUNTY ROAD COMMISSION (case no. 129282)

Attorney for plaintiffs Daniel John Wesche and Beverly Wesche: Mark J. Warba/(231) 796-5887

Attorney for defendant Mecosta County Road Commission: William L. Henn/(616) 774-8000

Attorney for amicus curiae Attorney General Michael A. Cox: Ann M. Sherman/(517) 373-6434

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

Trial court: Mecosta County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/129282/129282-Index.htm>

KIK v SBRACCIA, et al. (case no. 132849)

Attorney for plaintiffs Rebecca Kik and Robert Kik, Individually, and as Co-Personal Representatives of the Estate of Sharon Ann Leelani Kik: Jonny L. Waara/(906) 265-6173

Attorney for defendants John-Christopher Sbraccia, Kinross Charter Township EMS, and Kinross Charter Township: William L. Henn/(616) 774-8000

Attorney for amicus curiae Attorney General Michael A. Cox: Ann M. Sherman/(517) 373-6434

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

Trial court: Chippewa County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132849/132849-Index.htm>

At issue: Is a loss of consortium claim one for “bodily injury” within the meaning of MCL

691.1405, the motor vehicle exception to governmental immunity? In *Wesche v Mecosta County Road Comm*, the trial court and the Court of Appeals answered in the negative. But the Court of Appeals convened a conflict panel in *Kik v Sbraccia*, and held that consortium claims may be asserted in actions under the motor vehicle exception.

Background: These two cases involve plaintiffs seeking to recover for “loss of consortium,” a legal term that refers to all the tangible and intangible benefits that one spouse derives from the other, such as material support and companionship. The husband of Beverly Wesche, a plaintiff in the first lawsuit, was injured in a collision involving a government-owned vehicle. Wesche was not injured in the accident; her sole claim is for loss of consortium. In the second lawsuit, Robert Kik sought loss of consortium damages as a result of injuries his wife sustained while being transported by an ambulance. In both lawsuits, at least some of the defendants who were being sued are governmental entities, raising the question of whether the defendants are protected from suit by governmental immunity. Wesche and Kik argue that their claims for loss of consortium fall within the Governmental Tort Liability Act’s waiver of immunity for “bodily injury” resulting from the negligent operation of a government-owned motor vehicle, MCL 691.1405. In *Wesche*, the trial court dismissed the loss of consortium claim, ruling that it was not one for “bodily injury” within the meaning of the motor vehicle exception to governmental immunity. The Court of Appeals affirmed in a published opinion. The plaintiffs appeal. In *Kik*, the trial court allowed the plaintiff’s claim to proceed, denying the defendants’ motion for partial summary disposition on the grounds of governmental immunity. On appeal, the Court of Appeals stated that, were it not obliged to adhere to the earlier Court of Appeals panel’s holding in *Wesche*, it would have held that Kik was entitled to recover damages for loss of consortium. The Court of Appeals then convened a special conflict panel in *Kik*, to consider anew the question of whether loss of consortium damages are recoverable under § 1405 as damages for “bodily injury.” The special panel held, in a four-to-three published opinion, that the trial court had properly denied the defendants’ motion for partial summary disposition of Kik’s claim for loss of consortium. Adopting the reasoning of the original *Kik* decision, the special panel held that MCL 691.1405 does not foreclose a loss of consortium claim. The defendants appeal.

Afternoon Session

MARTIN v THE RAPID INTER-URBAN TRANSIT PARTNERSHIP, et al. (case no. 132164)

Attorney for plaintiff Gaila Marie Martin: Mark R. Bendure/(313) 961-1525

Attorney for defendants The Rapid Inter-Urban Transit Partnership and City of Grand Rapids: Marcelyn A. Stepanski/(248) 489-4100

Trial court: Kent County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132164/132164-Index.htm>

At issue: The plaintiff was injured when she slipped on the icy top step of the defendants’ shuttle bus. She claimed that the defendants negligently failed to install heaters that would eliminate ice on the steps and that the driver failed to keep the step free of ice and snow. The defendants asserted that governmental immunity barred the lawsuit, but the plaintiff argued that she could sue under the motor vehicle exception of the governmental tort liability act. Was the plaintiff injured by the “operation” of the bus, as required by the exception?

Background: Gaila Martin slipped on the icy top step of a shuttle bus as she was exiting the bus.

She fell to the ground, injuring her back. Martin sued the Rapid Inter-Urban Transit Partnership (ITP) and the city of Grand Rapids. The city of Grand Rapids owned the bus, and ITP operated the bus and provided maintenance for it under a contract with the city. In her lawsuit, Martin claimed that the defendants were negligent by failing to install heaters on the bus that would eliminate ice and snow on the steps. She also alleged that the driver negligently failed to scrape the top step of the bus to keep it free of ice and snow. The defendants moved for summary disposition, arguing that they were entitled to governmental immunity. They argued that Martin was not injured as a result of the “operation” of the bus, and that therefore the motor vehicle exception to governmental immunity did not apply. Martin responded that operation of the bus includes discharging passengers. The trial court denied the defendants’ motion. On appeal, the Court of Appeals reversed in a unanimous published opinion, ruling that Martin’s injuries did not result from the “operation” of the bus within the meaning of *Chandler v Muskegon Co*, 467 Mich 315 (2002). As a result, the motor vehicle exception did not apply, the court reasoned, and the defendants were entitled to dismissal on the basis of governmental immunity. Martin appeals.

STOKES v DAIMLERCHRYSLER CORPORATION (case no. 132648)

Attorney for plaintiff Freddie Stokes: Daryl C. Royal/(313) 730-0055

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

Attorney for amicus curiae Alticor: Thomas H. Cypher/(616) 774-2131

Attorney for amicus curiae Michigan Self-Insurers’ Association, Michigan Manufacturers Association, and Michigan Chamber of Commerce: Martin L. Critchell/(248) 593-2450

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

Tribunal: Workers’ Compensation Appellate Commission

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/132648/132648-Index.htm>

At issue: This case concerns the relative burdens of proof in the determination of whether a worker’s compensation claimant is disabled. Did the burden-shifting analysis described by the Court of Appeals relieve the plaintiff employee of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144 (2002)?

Background: Freddie Stokes worked for DaimlerChrysler Corporation. His work involved driving forklifts and “mules,” which were small trucks used to transport parts around the plant. Near the end of the 1990s, Stokes began feeling pain in his neck and arms while working. The pain increased until the fall of 1999, when it forced him to stop working. Stokes sought worker’s compensation benefits based on an alleged cervical spine disability. The magistrate initially granted Stokes an open award of wage loss benefits. DaimlerChrysler appealed to the Workers’ Compensation Appellate Commission (WCAC). The WCAC remanded the case to the magistrate for reconsideration of his determination of disability in light of a then recently released opinion, *Sington v Chrysler Corp*, 467 Mich 144 (2002). The magistrate was directed to apply the *Sington* test and determine whether Stokes had “suffered a limitation of his maximum wage earning capacity in work within his qualifications and training.” The magistrate held another hearing, and again granted Stokes an open award of benefits. DaimlerChrysler appealed the magistrate’s decision to the WCAC, which affirmed in a split en banc decision. DaimlerChrysler then sought leave to appeal at the Court of Appeals and the Supreme Court. After the Supreme Court

remanded the case to the Court of Appeals, that court issued a published opinion vacating various portions of the WCAC's opinion as inconsistent with established law, but affirming the award of benefits because the WCAC's errors did not affect the result. In the course of analyzing this case, the Court of Appeals described a burden-shifting analysis. First, the employee must produce sufficient evidence to create a prima facie case of disability, such as proof that he or she cannot perform the job that was being performed at the time of the injury, the Court of Appeals explained. If the employee produces such evidence, he or she is entitled to worker's compensation benefits unless the employer presents evidence "showing that there is in fact real work within the employee's training and experience, paying the maximum wage, that the employee is able to perform." In this case, the Court of Appeals concluded, DaimlerChrysler did not produce such evidence, so Stokes was entitled to benefits. One judge dissented. DaimlerChrysler appeals.

KOULTA v CITY OF CENTERLINE, et al. (case no. 131891)

Attorney for plaintiff Hany F. Koulta, Personal Representative for the Estate of Sami F.

Koulta, Deceased: Neil B. Pioch/(248) 358-9400

Attorney for defendants Daniel Merciez, Robert Wroblewski, and Steven Hilla: Julie

McCann O'Connor/(248) 433-2000

Attorney for amicus curiae Michigan Municipal League and Michigan Townships

Association: Rosalind H. Rochkind/(313) 446-5522

Trial court: Macomb County Circuit Court

Link to briefs:

<http://www.courts.michigan.gov/supremecourt/Clerk/10-07/131891/131891-Index.htm>

At issue: Police officers who responded to an unwanted person call found the homeowner's ex-girlfriend, who was intoxicated and refused to leave. They ordered her to get in her car and drive home, and she complied. On her way, she ran a red light and struck another vehicle, killing its driver. Are the police officers entitled to governmental immunity, or does their conduct amount to "gross negligence" as defined by MCL 691.1407(7)(a)? Was the officers' conduct the proximate cause of the accident? Does the public duty doctrine bar the plaintiff's claims?

Background: Police officers Daniel Merciez, Robert Wroblewski and Steven Hilla arrived at the home of Frances Offrink in Centerline, in response to an "unwanted person" call. Offrink complained that Chrissy Lucero, her son's ex-girlfriend, would not leave the premises. The officers allegedly found Lucero outside of the home, clinging to a rose trellis, and asking Offrink to let her into her home because she was too drunk to drive. The officers did not conduct sobriety tests or administer a breathalyzer test. According to the officers, Lucero told them that she had been drinking, but that she did not tell them the extent of her drinking because she was afraid she would be arrested. The officers say Lucero agreed to leave when they told her to do so. Lucero sat in her car in the driveway, and did not move because, as she later reported, she did not feel that she was fit to drive. Merciez, who had left the house a moment before, saw that Lucero was still in the driveway and returned to tell her that she had 10 seconds to leave. Lucero obeyed. Less than seven minutes later, Lucero ran a red light at a high rate of speed, and struck another car, killing its driver, Sami Koulta. Lucero's blood alcohol content was .11, above the legal limit. The plaintiff sued, claiming, among other things, that the officers were negligent or grossly negligent in the way they handed the unwanted person call. The officers argued that they were entitled to governmental immunity as a matter of law under the Governmental Tort Liability Act, MCL 691.1401, because the plaintiff could not show that they were grossly negligent. Even if

they were grossly negligent, the officers argued, their gross negligence was not the proximate cause of Koultas death. The officers also argued that they did not owe a specific duty to protect Koultas from harm, and that the public duty doctrine barred the plaintiffs claims against them. The trial court denied the officers motion for summary disposition, but the Court of Appeals reversed in an unpublished opinion. The appellate court reasoned that, under the public duty doctrine, the officers did not owe a duty to Koultas to protect him from harm. Even if the officers did owe such a duty, the Court of Appeals held, they were nonetheless entitled to summary disposition because their actions were not the proximate cause of Koultas death. The plaintiffs appeals.

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