

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

Michigan Supreme Court considers convicted shooter's constitutional challenge in oral arguments this week; Court to hear nine other cases

LANSING, MI, January 8, 2013 – A prosecutor's cross-examination about a defendant's failure to assert an alibi in an earlier trial is at issue in a case the Michigan Supreme Court will hear in oral arguments this week.

In *People v Clary*, the defendant was tried twice, with his first trial – in which he did not testify – ending in a hung jury. He was convicted in the second trial of assault with intent to murder, despite his asserting that he was elsewhere when the victim was shot. The prosecution cross-examined the defendant about his failure to raise the alibi with the police, and about his silence during his first trial and his failure to assert the alibi then, including the fact that he did not call witnesses to testify that he was elsewhere during the shooting. In closing arguments, the prosecutor also emphasized the defendant's failure to raise this alibi before the second trial, observing "He doesn't even tell his other jury." The prosecutor also referred to the defendant's failure to proclaim his innocence before he was arrested. The Court of Appeals reversed the defendant's convictions and sent the case back to the circuit court for a new trial, stating in part that the prosecutor had violated the defendant's due process rights by referring to his failure to take the stand in the first trial.

The Court will also hear arguments in nine other cases, including constitutional, contract, Drain Code proceedings, medical malpractice, no-fault auto insurance, and worker's compensation issues.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on **January 9 and 10**, starting at **9:30 a.m.** each day. The Court's oral arguments are open to the public.

As a public service, the Court provides summaries of the cases it will hear at <http://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Oral-Arguments/Pages/default.aspx>.

Please note: These brief accounts may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, issues, procedural history, and significance of these cases. For further details about the cases, please contact the attorneys.

Wednesday, January 9
Morning Session

FISHER SAND AND GRAVEL COMPANY v NEAL A. SWEEBE, INC. (case no. 143374)

Attorney for plaintiff Fisher Sand and Gravel Company: Allan Falk/(517) 381-8449

Attorney for defendant Neal A. Sweebe, Inc.: W. Jay Brown/(989) 486-3676

Attorney for amicus curiae Michigan Creditors Bar Association: Roger L. Premo/(248) 566-3237

Trial Court: Midland County Circuit Court

Issue: The plaintiff sued the defendant, contending that the defendant owed over \$92,000 for concrete supplies the plaintiff provided. The defendant argues that, under the Uniform Commercial Code, the plaintiff's suit is barred by a four-year statute of limitations for lawsuits over sales of goods; the plaintiff maintains that a general six-year limitations period for contract actions applies. ... [Read more](#)

SMITTER v THORNAPPLE TOWNSHIP OF BARRY COUNTY, et al. (case no. 144354)

Attorney for defendants Thornapple Township of Barry County and Michigan Municipal League Workers' Compensation Fund: James J. Ranta/(248) 626-7300

Attorney for defendant Second Injury Fund: Dennis J. Raterink/(517) 373-1176

Tribunal: Workers' Compensation Appellate Commission

Issue: When an employee with two jobs is injured on one of those jobs and becomes disabled, the employer at the place where the worker was injured is responsible for paying worker's compensation wage loss benefits based on the employee's combined wages from both jobs. If the employee's wages from the "injury employer" are 80 percent or less of the worker's combined wages, the Second Injury Fund is required to reimburse that "injury employer" for compensation payments based on the percentage of wages earned with the other employer. In this case, the "injury employer" chose to pay more than the amount required under the state's Worker's Disability Compensation Act by not taking advantage of the provision allowing the coordination of benefits. Is the Second Injury Fund liable based on the worker's compensation actually paid by the injury employer, or only for the amount the statute states must be paid to the employee following coordination? ... [Read more](#)

Afternoon Session

FARMERS INSURANCE EXCHANGE, et al. v MICHIGAN INSURANCE COMPANY (case nos. 144144-5, 144159)

Attorney for plaintiff Farmers Insurance Exchange: David M. Pierangeli/(616) 977-9200

Attorney for plaintiff State Farm Mutual Automobile Insurance Company: Devin R.

Day/(616) 451-8111

Attorney for defendant Michigan Insurance Company: Daniel S. Saylor/(313) 446-5520

Attorney for amicus curiae Insurance Institute of Michigan: John A. Yeager/(517) 351-6200

Trial Court: Mason County Circuit Court

Issue: On the way to a music festival, four people were injured while riding in a utility van owned by the festival company. At issue is whether the four passengers' insurers – or the insurer of the festival company's vans – are ultimately responsible for covering no-fault benefits paid to the passengers. ... [Read more](#)

TOWNSHIP OF ELBA, et al. v GRATIOT COUNTY DRAIN COMMISSIONER (case no. 144166)

Attorney for plaintiff Township of Elba and intervening plaintiffs David L. Osborn, individually and as Trustee of the Osborn Trust, Mark Crumbaugh, Cloyd Cordray and Rita Cordray: Elian E.H. Fichtner/(989) 792-9641

Attorney for defendant Gratiot County Drain Commissioner: Stacy L. Hissong/(517) 381-0100

Attorney for amicus curiae Michigan Townships Association: John K. Lohrstorfer/(269) 382-4500

Attorney for amicus curiae Michigan Association of County Drain Commissioners: Michael G. Woodworth/(517) 886-7176

Trial Court: Gratiot County Circuit Court

Issue: The plaintiffs sued to stop a drain consolidation project in Gratiot County, arguing in part that a notice of public hearing on the project did not sufficiently identify all the areas the project would affect. ... [Read more](#)

PEOPLE v CLARY (case no. 144696)

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

Attorney for defendant Rayfield Clary: Michael L. Mittlestat/(313) 256-9833

Attorney for amicus curiae Attorney General Bill Schuette: Bruce H. Edwards/(517) 373-4875

Trial Court: Wayne County Circuit Court

Issue: The defendant did not take the stand at his first trial, which ended in a hung jury, but did testify at his second trial that he was elsewhere when the victim was shot. Among the issues in this appeal is whether the trial court erred by allowing the prosecutor to raise, in cross-examination and in closing arguments, the defendant's failure to assert his alibi before the second trial. ... [Read more](#)

Thursday, January 10

Morning Session Only

KENNEY v BOOKER (case no. 145116)

Attorney for plaintiff Patrick J. Kenney: Kevin S. Ernst/(313) 965-5555

Attorney for defendant Warden Raymond Booker: Scott R. Rothermel/(517) 335-7021

Trial Court: Wayne County Circuit Court

Issue: Several months before he was to be discharged from parole on drug possession charges, the plaintiff in this case was pulled over while driving with a drug dealer friend; police discovered a gun in the engine compartment. After the parole board concluded that he had violated his parole, the plaintiff brought an action for *habeas corpus*, arguing in part that there was insufficient evidence that he had violated his parole conditions. ... [Read more](#)

MCPHERSON v MCPHERSON, et al. (case no. 144666)

Attorney for plaintiff Ian McPherson: Merrill H. Gordon/(248) 626-3000

Attorney for defendant Progressive Michigan Insurance Company: Robert D. Goldstein/(810) 695-3700

Trial Court: Oakland County Circuit Court

Issue: A man who suffered a grand mal seizure after being in a car accident was in a second accident while riding his uninsured motorcycle several months later. He claims that the second

accident is related to his injuries in the first – and that therefore, the no-fault insurer for the car he was riding in during the first accident is obligated to pay him no-fault benefits. ... [Read more](#)

MICHIGAN INSURANCE COMPANY v NATIONAL LIABILITY & FIRE INSURANCE COMPANY (case nos. 144771, 144792)

Attorney for plaintiff Michigan Insurance Company: Kenneth S. Dombrowski/(248) 335-5450

Attorney for defendant National Liability & Fire Insurance Company: James G. Gross/(313) 963-8200

Trial Court: Oakland County Circuit Court

Issue: At issue is whether a homeless man who lived at an adult foster care facility could be deemed a “family member” who would be covered under the facility’s no-fault insurance policy. ... [Read more](#)

LEFEVERS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al. (case no. 144781)

Attorney for plaintiff Charles Anthony LeFevers: Robert S. Drazin/(248) 948-9696

Attorney for defendant State Farm Mutual Automobile Insurance Company: Devin R. Day/(616) 451-8111

Trial Court: Wayne County Circuit Court

Issue: Is a tailgate on a dump trailer “equipment permanently mounted on the vehicle” for the purposes of the auto no-fault act? ... [Read more](#)

HOFFMAN v BARRETT (case no. 144875)

Attorney for plaintiff Beth Hoffman, Personal Representative of the Estate of Edgar Brown, Deceased: David R. Parker/(313) 875-8080

Attorney for defendant Dr. Peter Barrett: Timothy P. Buchalski/(616) 575-2060

Trial Court: Calhoun County Circuit Court

Issue: At issue is whether the plaintiff’s medical malpractice claim was brought within the statute of limitations – and whether the notice of intent served to stop the limitations period from running out. ... [Read more](#)

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