MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

FALSE-CONFESSION EXPERTS' TESTIMONY EXCLUDED AT DOUBLE MURDER TRIAL; MICHIGAN SUPREME COURT TO HEAR ORAL ARGUMENT ON WHETHER TESTIMONY SHOULD HAVE BEEN ALLOWED

Defendant charged with murders of brother and sister-in-law claims police interrogations, his psychology led him to make incriminating but false statements

LANSING, MI, November 7, 2011 – A man accused of murdering his brother and sister-in-law in their Livingston County home, and who confessed to the killings to police, seeks to reverse a trial judge's ruling barring him from presenting expert testimony regarding false confessions, in a case that the Michigan Supreme Court will hear in oral arguments this week.

In *People v Kowalski*, the accused sought to introduce testimony from two expert witnesses regarding the phenomenon of false confessions, and the interrogation techniques and psychological factors that tend to generate them. But the trial judge did not allow the testimony, partly out of concern that the experts could in effect be telling the jury that the defendant's confession was false; the jurors could make that determination on their own, the trial judge decided. The Court of Appeals upheld the trial court in a 2-1 decision; the dissenting judge would have allowed testimony from one expert, who would have addressed the defendant's personality and explained the defendant's mental state during the confession.

The Supreme Court will also hear two criminal sexual conduct cases, *People v Watkins* and *People v Pullen*, in which each defendant was charged with performing sexual acts with minors. In each case, the prosecution sought to introduce evidence that the defendant committed sexual acts with another minor; MCL 768.27a provides that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." But the defendants argue that the evidence should be excluded, partly because of an evidence rule that bars even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …."

Also before the Court is *People v Buie,* in which the defendant, who was convicted of sexually assaulting a woman and two children, argues that his constitutional right to confront the witnesses against him was violated when two expert witnesses for the prosecution were allowed to testify for the trial via two-way videoconference.

The remaining nine cases the Court will hear include constitutional, contract, criminal, environmental, medical malpractice, municipal, negligence, and tort law issues.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on **November 8, 9, and 10, starting at 9:30 a.m.** each day. The Court's oral arguments are open to the public.

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

Tuesday, November 8
Morning Session

JONES, et al. v DETROIT MEDICAL CENTER, et al. (case nos. 141624, 141629)
Attorney for plaintiffs Trenda Jones, Successor Personal Representative and Co-Personal Representative, Booker T. Jones, Co-Personal Representative, and Margaret A. Jones, Co-Personal Representative, of the Estate of Jamar Cortez Jones: Michael R. Dezsi/(313) 879-1206
Attorney for defendants Detroit Medical Center and Sinai-Grace Hospital: Anita Comorski/(313) 964-4500
Attorney for defendants Danny F. Watson, M.D., and William M. Leuchter, P.C.: Marc D. Saurbier/(586) 447-3700
Attorney for amicus curiae Michigan Association for Justice: Ronda M. Little/(248) 543-1920
Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: Phillip J. DeRosier/(313) 223-3500
Attorney for amicus curiae Michigan Health and Hospital Association: Graham K. Crabtree/(517) 482-5800
Trial Court: Wayne County Circuit Court
Court of Appeals case no. 288710
At issue: Jamar Jones died from a rare allergic reaction to an anticonvulsant drug his doctor prescribed. Jones' parents sued the doctor and other health care providers for medical malpractice. The trial court ruled that the anticonvulsant was the proximate cause of Jones' death; the Court of Appeals affirmed in a split published opinion. In determining whether the drug was the proximate cause of Jones' death, should the court consider whether it was probable that the drug would cause a fatal allergic reaction? Where the defendant's negligence has not been established, should the court grant partial summary disposition to the plaintiffs on the proximate causation issue?
Background: Jamar Jones was injured in a single-vehicle rollover accident and taken to the emergency room at Detroit Medical Center/Sinai-Grace Hospital. Dr. Danny F. Watson, a neurologist, saw Jones; according to Watson's notes, Jones could not recall how the accident happened, and reported that family members had told him that, on several occasions, they saw him staring blankly and could not easily get his attention. The doctor diagnosed "[p]robable partial complex seizure disorder" and prescribed tegretol, an anticonvulsant. Watson also ordered an electroencephalogram (EEG), which was normal.

Jones began taking the medication as prescribed. A second EEG was normal, but Watson believed that he could not exclude a seizure disorder; he told Jones to continue taking the anticonvulsant. Several days later, Jones returned to the emergency room, where he reported having a fever, a sore throat, an inability to eat due to pain, and swollen lips and mouth. Doctors diagnosed Jones with Stevens-Johnson syndrome, a potentially fatal dermatological condition caused by a severe allergic reaction; less than two weeks later, Jones died of Stevens-Johnson syndrome, complicated by pneumonia. The parties' medical experts agreed that the odds of a patient developing the syndrome, sometimes referred to as toxic epidermal necrolysis, are from one in a million to one in several hundred thousand, and that there is no way to determine in advance which patients are likely to suffer such a reaction.

Jones' parents, as personal representatives of their son's estate, sued Watson, his professional corporation, and the hospital; the plaintiffs claimed that Jones' reaction to the tegretol caused his allergic reaction and death. Watson breached the standard of care by prescribing tegretol when he could not conclusively diagnose Jones as suffering from a seizure disorder, the plaintiffs asserted. The plaintiffs also alleged that Watson breached the standard of care by failing to advise Jones that he might have an allergic reaction to the medication.

The plaintiffs argued that they were entitled to a ruling that the tegretol caused Jones' death. The defendants filed a counter motion, arguing the case should be dismissed because the doctor could not have foreseen that Jones would suffer the extremely rare allergic reaction. The trial court agreed with the plaintiffs that Jones was an "eggshell plaintiff" – a plaintiff who was unusually susceptible to injury – and that Watson and the other defendants could be held liable for his unusual allergic reaction. The trial court therefore granted partial summary disposition in favor of the plaintiffs and denied the defendants' motion. The court's order noted that the only issue remaining for trial was whether Watson breached the standard of care.

The defendants sought leave to appeal to the Court of Appeals. In a split published opinion, the Court of Appeals affirmed the lower court, concluding that Stevens-Johnson syndrome was a foreseeable risk that was included in the literature accompanying the drug. Reasonable jurors could not dispute that the plaintiffs had shown the drug to be the proximate cause of Jones' death, the Court of Appeals majority said. The dissenting judge noted that, where there is no intervening cause, the test for proximate cause is not whether the plaintiff's injury was foreseeable. Rather, contended the dissenting judge, the proper test is whether the injury was the "natural and probable result of the negligent conduct." Because reasonable jurors could disagree on this question, the dissenting judge would have reversed the trial court's grant of partial summary disposition. The defendants appeal.

ENGENIUS, INC., et al. v FORD MOTOR COMPANY (case no. 141977)

Attorney for plaintiffs EnGenius, Inc. and EnGenius-Eu, Limited: Mayer Morganroth/(248) 864-4000

Attorneys for defendant Ford Motor Company: Edward H. Pappas, Phillip J. DeRosier/(313) 223-3500

Trial Court: Wayne County Circuit Court

Court of Appeals case no. 290682

At issue: EnGenius, Inc. and EnGenius-EU, Ltd. sued Ford Motor Company for breach of contract. Ford's motion to compel binding arbitration was granted, and the arbitration panel, by a vote of 2-1, rendered an award in the plaintiffs' favor, finding that Ford had breached two contracts with the plaintiffs. But the arbitrators first determined that one of the contracts did not

include an arbitration clause. Was it proper for the arbitration panel to retain jurisdiction over that contract and render an award for its breach?

Background: EnGenius, Inc. (EnGenius) and EnGenius-EU, Ltd. (EEU) sued Ford Motor Company, claiming that Ford had violated two contracts with the EnGenius companies. The first contract was a technical support agreement referred to by the parties as the "FACTS Contract." That agreement called for EnGenius to provide technical support for the "FACTS system," an end-of-the-line vehicle testing system, for the life of Ford's use of the system. In return, Ford agreed to exclusively use EnGenius for support, and EnGenius agreed to maintain the resources and personnel necessary to support the system as it was phased out. The second contract was a five-year agreement known as the "eCATS Contract," under which EnGenius was to develop and implement the replacement system for the outdated FACTS system. To pursue the eCATS Contract, EnGenius agreed to create a European affiliate known as EEU, which would support the eCATS system in Ford's European plants.

After EnGenius sued, Ford filed a motion, arguing that the parties had agreed to resolve such claims through binding arbitration. The court granted Ford's motion, and the matter was submitted to a three-member arbitration panel. By a vote of 2-1, the panel awarded EnGenius $22,689,898.43: $1,239,885 in lost profits for Ford's breach of the FACTS Contract, $14,425,954 for Ford's breach of the eCATS Contract, and $1,946,131 for tortious interference. The circuit court confirmed the arbitration award.

Ford appealed, and the Court of Appeals affirmed the circuit court in an unpublished per curiam opinion. With respect to the FACTS Contract, Ford objected to the arbitration panel's conclusion that the document containing the arbitration clause was not part of the parties' agreement. But, argued Ford, if the arbitration agreement was not part of the parties' FACTS Contract, then the arbitration panel did not have jurisdiction to rule that the contract was breached. The Court of Appeals rejected this argument, ruling that Ford's successful effort to send all claims in the parties' dispute to binding arbitration amounted to an implicit agreement to allow the arbitrators to decide the makeup of the FACTS Contract and adjudicate related claims. The panel also concluded that, "once the trial court determined that there was a valid agreement to arbitrate, granted Ford's motion for summary disposition, and sent the entire dispute to arbitration, the arbitrators lacked the power to divest themselves of jurisdiction over the matter." Turning to Ford's next argument, the Court of Appeals was not persuaded that the arbitration panel made an improper damages award with respect to the eCATS Contract; the Court of Appeals concluded that the arbitration panel's award was proper compensation for work that had already been completed. Finally, the Court of Appeals ruled that arbitration panel did not err by finding that Ford tortiously interfered with EEU's relationship with its own employees. Ford appeals.

PEOPLE v WILLIAMS (case no. 141161)

Prosecuting attorney: Charles F. Justian/(231) 724-6435

Attorney for defendant Glenn Terrance Williams, a/k/a Glen Terrance Williams: Peter Ellenson/(248) 691-9020

Trial Court: Muskegon County Circuit Court

Court of Appeals case no. 284585

At issue: The defendant entered a retail store intending to rob it, suggested to a clerk that he had a weapon, but fled without taking anything. The defendant pleaded guilty to armed robbery, but after sentencing, he sought to withdraw his guilty plea. The defendant argued that he could not

be guilty of armed robbery because he did not take anything from the store. The trial court denied the motion, concluding that the defendant's *attempt* to commit a larceny was sufficient to support the armed robbery conviction. The Court of Appeals affirmed the defendant's conviction in a split published opinion. Is a completed larceny necessary to sustain an armed robbery conviction?

Background: Glenn Williams entered the Admiral Tobacco store in Muskegon County and approached the store clerk, who was behind the cash register. Standing to the side of the register and holding his hand inside his coat, Williams told the clerk, "[Y]ou know what this is, just give me what I want." Williams fled, however, without obtaining anything.

Williams was arrested and charged as a fourth felony offender, with armed robbery and assault with intent to rob while armed. Williams agreed to plead guilty to armed robbery. At the plea hearing, Williams admitted that he entered the Admiral Tobacco store with his hand under his coat, intending to steal money. The prosecutor and defense counsel agreed that the facts were sufficient to support a conviction for armed robbery. Williams was sentenced to 24 to 40 years in prison.

Williams later moved to withdraw his guilty plea; he claimed that, because he did not take anything from the store, he was not guilty of armed robbery, MCL 750.529. The armed robbery statute states that a person is guilty of armed robbery if he "engages in conduct proscribed under section 530 [MCL 750.530]" and "in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he . . . is in possession of a dangerous weapon . . . ." MCL 750.530(1) explains that a person is guilty of robbery who, "in the course of committing a larceny . . . uses force or violence against any person who is present, or who assaults or puts the person in fear . . . ." Section 530 adds that the phrase "in the course of committing a larceny" includes "acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). Relying on this subsection, the prosecutor responded that Williams could be convicted of armed robbery based on his *attempt* to commit a larceny. The trial court agreed and denied Williams' motion to withdraw his plea.

Williams appealed to the Court of Appeals, which affirmed in a split published opinion. The majority concluded that the statutory language defining robbery and armed robbery, which the Legislature amended in 2004, now encompassed robbery attempts; a completed larceny is no longer required for an armed robbery conviction, the majority said. The dissenting judge did not agree, saying that the Legislature, in response to a ruling from the Michigan Supreme Court, *People v Randolph*, 466 Mich 532 (2002), merely sought to clarify that robbery "encompasses acts that occur before, during, and after the larceny." Williams appeals.

Afternoon Session

PEOPLE v WATKINS (case no. 142031)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Lincoln Anderson Watkins: Gail O. Rodwan/(313) 256-9833
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Randy E. Davidson/(313) 256-9833
Attorney for amicus curiae Attorney General Bill Schuette: Mark G. Sands/(517) 373-4875

Trial Court: Wayne County Circuit Court
Court of Appeals case no. 291841
At issue: The defendant was charged with having a sexual relationship with a 12-year-old girl; at trial, the prosecution presented evidence that the defendant had an earlier sexual relationship with another minor. MCL 768.27a states that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The defendant challenges his convictions for criminal sexual conduct, arguing, among other matters, that the evidence admitted under MCL 769.27a deprived him of his constitutional rights. Does MCL 768.27a conflict with MRE 404(b) and, if so, does the statute prevail over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, § 1 and § 5? Does MCL 768.27a violate a defendant's due process right to a fair trial? Does MCL 768.27a interfere with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in Michigan courts under Article 6, section 1 of the Michigan state constitution?
Background: Lincoln Watkins was charged with first-degree and second-degree criminal sexual conduct, based on allegations that he committed sexual acts with his then-12-year-old babysitter. The prosecution sought to admit evidence that Watkins had also committed similar sexual acts with a different girl who had occasionally babysat for Watkins' children. Watkins was tried three times, with his first trial ending in a hung jury and the second in a mistrial. At a third trial, following a ruling from the Court of Appeals, the trial court allowed the evidence of the other babysitter to be admitted. The Court of Appeals cited MCL 768.27a, which states that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." A jury convicted Watkins of four counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The trial court sentenced Watkins to concurrent prison terms of 25 to 40 years for each first-degree criminal sexual conduct conviction, and to 10 to 15 years for second-degree criminal sexual conduct.

Watkins appealed to the Court of Appeals. He argued that his right against double jeopardy was violated when the trial court tried him a third time, contending that the prosecutor's misconduct caused the mistrial. Watkins also argued that his constitutional rights were violated when the court admitted the evidence of the other babysitter; MCL 768.27a violated his fundamental right to the presumption of innocence, Watkins maintained. Watkins also argued that the statute conflicted with Michigan Rule of Evidence 404(b), which excludes evidence of "other crimes, wrongs, or acts … to prove the character of a person in order to show action in conformity therewith." Moreover, the statute infringed upon the Michigan Supreme Court's authority to regulate the conduct of trial, Watkins said. He further argued that the trial court should not have admitted evidence under MCL 768.27a without first considering whether it was unfairly prejudicial and prohibited under MRE 403, which provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …."

But the Court of Appeals affirmed Watkins' convictions in an unpublished opinion. The appellate court rejected his double-jeopardy argument, concluding that the record did not show that the prosecutor intended to provoke a mistrial. While agreeing that MCL 768.27a and MRE 404(b) conflict, the appellate panel noted that an earlier Court of Appeals panel had held that the

statute prevails, allowing admission of the evidence in cases of sexual offenses against a minor. The Court of Appeals also held that, even if the trial court had conducted a balancing test under MRE 403, the evidence was admissible. Finally, the Court of Appeals was not persuaded that Watkins' due process rights were violated by the admission of the evidence. Watkins appeals.

PEOPLE v PULLEN (case no. 142751)
Prosecuting attorney: Sylvia L. Linton/(989) 895-4185
Attorney for defendant Richard Kenneth Pullen: Edward M. Czuprynski/(989) 894-1155
Attorney for amicus curiae Attorney General Bill Schuette: Mark G. Sands/(517) 373-4875
Trial Court: Bay County Circuit Court
Court of Appeals case no. 298138
At issue: The defendant has been charged with criminal sexual conduct and aggravated indecent exposure for acts allegedly committed against his 12-year-old granddaughter. The prosecution sought to introduce a 1989 police report that the defendant had also committed criminal sexual conduct against his then-16-year-old daughter. Under MCL 768.27a, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." But the trial court, acting on the defendant's motion, excluded the evidence under Michigan Rule of Evidence 403; the Court of Appeals affirmed the trial court. Does MCL 768.27a violate a defendant's due process right to a fair trial? Is the evidence described in MCL 768.27a admissible only if it is not otherwise excluded under MRE 403? Does MCL 768.27a interfere with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in Michigan courts under Article 6, section 1 of the Michigan Constitution?
Background: Richard Pullen was charged with two counts of second-degree criminal sexual conduct and one count of aggravated indecent exposure, based on sexual contact with his then-12-year-old granddaughter. The granddaughter alleged that Pullen touched her breasts with his hands, touched her genitals under her clothes, and masturbated when he knew she was watching.

Before the case went to trial, the prosecutor filed a notice of intent to use other acts evidence under MCL 768.27a. That statute states that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The prosecutor provided the trial court with a 1989 police report concerning sex abuse allegations made by Pullen's then 16-year-old daughter, who alleged that Pullen digitally penetrated her vagina and repeatedly touched her breasts, buttocks, and genital areas. She also stated that Pullen walked in on her when she was unclothed, and that he arranged to expose himself to her when he was bathing. Pullen allegedly admitted some of his daughter's accusations, but no criminal charges were ever filed.

Pullen moved to exclude the evidence of the earlier sexual abuse, arguing that the evidence's probative value was substantially outweighed by the danger of unfair prejudice to him. The trial judge agreed, finding that the evidence should be excluded under Michigan Rule of Evidence 403. MRE 403 provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …." The trial judge reasoned that he was required to perform the MRE 403 balancing test before admitting evidence under MCL 768.27a. As to the evidence that Pullen sexually abused his daughter, the prejudicial impact outweighed the probative value

because the evidence involved more serious facts than those in the present case, the trial judge concluded: "Should this evidence be presented to the jury, it is highly probable that the jury would not be able to separate the two cases and would likely decide the case based on emotional impact rather than logical reasons. Thus, this evidence does not survive the balancing test of MRE 403 and is not admissible." The trial court also ruled that it would be "fundamentally unfair and a violation of due process" to force Pullen to defend accusations from over 20 years ago for which criminal charges were never filed.

The prosecutor sought to overturn the trial court's ruling, but the Court of Appeals affirmed the trial court in an unpublished per curiam opinion. The panel noted that a prior Court of Appeals panel had upheld the constitutionality of MCL 768.27a in *People v Pattison*, 276 Mich App 613 (2007). In *Pattison,* the Court of Appeals also held that, even when evidence is admissible under MCL 768.27a, a trial court must weigh the probative value of the evidence against its prejudicial effect under MRE 403. In Pullen's case, the Court of Appeals ruled, the trial court properly considered whether the evidence should be excluded under MRE 403 as unfairly prejudicial. The appellate court further held that Pullen's case presented a "close" question, but that the trial court gave a reasoned explanation for its decision. Accordingly, the trial court did not abuse its discretion in deciding to exclude the evidence, the Court of Appeals concluded. The prosecutor appeals.

Wednesday, November 9
Morning Session

DEPARTMENT OF ENVIRONMENTAL QUALITY, et al. v TOWNSHIP OF WORTH (case no. 141810)
Attorney for plaintiffs Department of Environmental Quality and Director of the Department of Environmental Quality: Alan F. Hoffman/(517) 373-7540
Attorney for defendant Township of Worth: Michael G. Woodworth/(517) 886-7176
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
Attorney for amicus curiae Great Lakes Environmental Law Center: Nicholas J, Schroeck/(313) 820-7797
Trial Court: Ingham County Circuit Court
Court of Appeals case no. 289724
At issue: Privately owned septic tanks are discharging effluent into Lake Huron along a five-mile strip of shoreline located in Worth Township. The Michigan Department of Environmental Quality and its director sued the township after the township declined to install a public sanitary sewer system. The trial court ruled in the department's favor, ordering the township to take corrective action; the court also ordered the township to pay a fine and the department's attorney fees. The Court of Appeals reversed in a split published opinion. Does the Natural Resources and Environmental Protection Act, MCL 324.101, *et seq*., empower a circuit court to order a township to install a municipal sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters?
Background: Worth Township, located in Sanilac County along the shores of Lake Huron, does not operate a public sanitary-sewerage system; local residences and businesses rely on private

septic systems for waste disposal. Some of these septic systems located along a five-mile strip of shoreline are failing, and effluent is being discharged into Lake Huron. The Michigan Department of Environmental Quality encouraged the township to install a public sanitary-sewerage system, but the township concluded that such a project was not financially feasible. The department and its director sued the township, arguing that, under the Natural Resources and Environmental Protection Act, the township was responsible for the discharge and should be compelled to correct the situation. The act states in part that "[t]he discharge of any raw sewage of human origin, directly or indirectly, into the waters of this state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department." MCL 324.3109(2). The township argued that it could not be held liable for the discharge of sewage from privately owned septic tanks. The trial court disagreed and ruled in the department's favor, setting a time frame for the township to design, begin construction on, and begin operating a sewerage system. The order also imposed a $60,000 fine and awarded attorney fees to the department.

The township appealed to the Court of Appeals, which reversed in a split published opinion and remanded the case to the trial court for a ruling in the township's favor. A majority of the Court of Appeals held that MCL 324.3109(2) did not impose liability on the township; rather, the statute merely created a presumption that the township was the source of the discharge, the majority said. The majority added that Worth Township could advance a "particularly compelling argument that it was not the source of the violation: it does not operate a sanitary-sewerage system that could be the source of the discharge." Because the township was not responsible for the discharge, it was not subject to the statutory remedies for a discharge, the majority reasoned.

The dissenting Court of Appeals judge would have affirmed the trial court's ruling. He concluded that MCL 324.3109(2) imposes liability on a municipality, including a township, for any discharge of raw sewage of human origin into the waters of the state, if the discharge occurred within the municipality's borders. The department appeals.

JOHNSON, et al. v PASTORIZA, et al. (case no. 142127)
Attorney for plaintiffs Candice Johnson and Baby Johnson: Don Ferris/(734) 677-2020
Attorney for defendants Rajan Pastoriza, M.D. and Rajan Pastoriza, M.D., P.L.C., d/b/a Women's First Health Services: Beth A. Wittmann/(313) 965-7405
Trial Court: Jackson County Circuit Court
Court of Appeals case no. 288338
At issue: The plaintiff gave premature birth to a non-viable fetus. On behalf of her child and herself, she sued her doctor for wrongful death of a fetus under MCL 600.2922a, and also sought damages for her own emotional distress. The defendants argued that they could not be held liable for their failure to act and that they were protected by the statutory exclusion for the performance of medical procedures at MCL 600.2922a(2)(b). They also argued that the plaintiff could not recover for her own emotional distress in this wrongful-death lawsuit. The trial court denied the defendants' motions to dismiss the case, and the Court of Appeals affirmed the trial court in a published opinion. Did the courts err in ruling that the plaintiff could proceed under the wrongful death act against a medical professional for the death of her non-viable fetus?
Background: Candice Johnson has a medical condition that causes her cervix to open prematurely during pregnancy, causing her to have a number of miscarriages. Despite this condition, she was able to carry three pregnancies to term when her doctor performed a cerclage,

a procedure in which the cervix was stitched closed to prevent it from opening prematurely. Doctor Rajan Pastoriza treated Johnson during her pregnancy in 2005; he was aware of Johnson's medical history. During an appointment on October 19, 2005, Johnson complained of cramping and a feeling she described as "like pre-term labor," she asked Pastoriza to perform a cerclage, but he declined. On November 1, Johnson's cervix opened; despite an emergency cerclage, she prematurely delivered a non-viable fetus at 20 weeks gestation.

Johnson, on behalf of herself and Baby Johnson, sued Pastoriza and his professional corporation, seeking damages for medical malpractice, including a claim for her own emotional distress, and for wrongful death of a fetus under MCL 600.2922a. MCL 600.2922a(1) allows for recovery against "[a] person who commits a wrongful or negligent act against a pregnant individual . . . if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus." MCL 600.2922a(2) provides several exceptions to that general liability; subsection (b) excludes liability for a "medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent. . . ."

Pastoriza moved to dismiss the case, arguing that his alleged negligence did not make him liable under MCL 600.2922a; he contended that he did not commit a "wrongful or negligent act," as required by the statute. Pastoriza also argued that the exception for medical procedures, at MCL 600.2922a(2)(b), exempted him from liability. Johnson responded that Pastoriza's refusal to perform the cerclage was an affirmative act. Moreover, she contended, MCL 600.2922a ties into the wrongful-death act, MCL 600.2922, which allows actions for a fetus' death when it is caused by a wrongful act or negligence. MCL 600.2922(1), as amended in 2005, states that whenever ". . . death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another . . . the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the . . . death as described in section 2922a . . . ."

The trial court was persuaded by Johnson's arguments and denied Pastoriza's motion for summary disposition. In a published opinion, the Court of Appeals affirmed the trial court's ruling. The panel reasoned that MCL 600.2922(1), the general wrongful death statute, allows a wrongful death claim to be made "[w]henever . . . death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another. . . ." The Court of Appeals concluded that this provision did not allow a defendant to rely on the exception found in MCL 2922a(2)(b) because, "[w]hile MCL 600.6922 references 'a death described in MCL 600.6922a,' it does not indicate that the death in question must occur in the *manner* described in MCL 600.2922a." Accordingly, Johnson's claim of negligence "sufficiently establishes a cause of action pursuant to MCL 600.6922." In the alternative, the court held, Pastoriza's refusal to perform a cerclage was an affirmative act giving rise to liability under MCL 600.2922a; the exception for physicians performing medical procedures did not apply because no medical procedure was performed, the court reasoned. The court also determined that Johnson could bring her emotional distress claim both under the wrongful death act, MCL 600.2922(6)(d), and under a medical malpractice theory. The defendants appeal.

PEOPLE v FRANKLIN (case no. 142323)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Joseph Alexander Franklin: Joseph L. Stewart/(248) 545-7011

Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Sheila R. Deming/(517) 627-2174
Trial Court: Wayne County Circuit Court
Court of Appeals case no. 292469
At issue: The defendant pleaded guilty to second-degree home invasion in exchange for the prosecution's agreement to dismiss other charges. At the plea hearing, the trial judge was agreeable to sentencing the defendant under the Holmes Youthful Trainee Act, MCL 762.11, if the defendant qualified for such status. But at the sentencing hearing, the judge declined to impose a HYTA sentence; the judge vacated the plea agreement, reinstated the original charges, and set the case for trial. The defendant was convicted as charged. The Court of Appeals vacated the convictions, holding that the judge acted improperly by unilaterally vacating the plea agreement. Was the trial judge required to give the defendant the opportunity to affirm his guilty plea when she declined to impose the sentence proposed at the plea hearing? Should the question of the defendant's right to affirm his guilty plea be evaluated under MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)? Even if the defendant had the right to affirm his guilty plea, did he waive that right by failing to object when the trial court vacated his plea and scheduled a trial?
Background: Joseph Franklin was charged with first-degree home invasion, larceny in a building, larceny of a firearm, and felony-firearm. He pleaded guilty to second-degree home invasion in exchange for the prosecutor's agreement to dismiss the remaining charges. Franklin's attorney asked for an evaluation pursuant to *People v Cobbs*, 443 Mich 276, 283 (1993), from the trial court, asking that Franklin be sentenced to probation under the Holmes Youthful Trainee Act , MCL 762.11, if he qualified for it. A *Cobbs* evaluation is the judge's initial determination of the appropriate sentence for the charged offense, based on information available at the plea proceeding. The judge's evaluation must be made at a party's request and not on the judge's own initiative. The trial judge in Franklin's case initially agreed to probation, and the prosecutor did not object. But when Franklin appeared for sentencing, the trial judge stated that she would not sentence him to probation under HYTA. She set aside the plea and scheduled a trial on all the charges. Franklin waived his right to a jury, and was convicted following a bench trial of first-degree home invasion, larceny in a building, and larceny of a firearm. He was sentenced to four to 20 years in prison for the first-degree home invasion conviction, and to time served for the other convictions.

Franklin appealed, and the Court of Appeals vacated his convictions in an unpublished per curiam opinion. The appellate court said that the "pivotal question is whether the trial court could, after concluding that it would not impose the sentence agreed upon by the parties, unilaterally set aside the plea and sentence agreement, or if it could only refuse to impose the agreed upon sentence and allow defendant the option to withdraw his guilty plea . . . ." The Court of Appeals turned to MCR 6.302(C)(3), which states that if a court does not choose to follow an agreed-upon sentence, the defendant "will be allowed to withdraw from the plea agreement." Under this rule, the trial court could not unilaterally set aside the plea itself; that decision should be made by the defendant, the Court of Appeals held, in accordance with the requirements of MCR 6.310(B)(2)(a). The trial judge's failure to inform Franklin what sentence she intended to impose, and her failure to allow Franklin the option of withdrawing his plea, amounted to plain error, the Court of Appeals said. The Court of Appeals remanded the case to the trial court so that Franklin could be given the opportunity to withdraw his guilty plea to second-degree home invasion. If Franklin chose not to withdraw his plea, the Court of Appeals held, the trial court should then sentence him. The prosecutor appeals.

Afternoon Session

PEOPLE v KOWALSKI (case no. 141932)
Prosecuting attorney: William J. Vailliencourt, Jr./(517) 546-1850
Attorneys for defendant Jerome Walter Kowalski: Walter J. Piszczatowski, Michael J. Rex/(248) 335-5000
Attorney for amicus curiae Innocence Network: Jill M. Wheaton/(734) 214-7629
Attorney for amicus curiae Attorney General Bill Schuette: Mark G. Sands/(517) 373-4875
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: John R. Minock/(734) 668-2200
Attorney for amicus curiae American Psychological Association: David W. Ogden/(202) 663-6000
Trial Court: Livingston County Circuit Court
Court of Appeals case no. 294054
At issue: The defendant seeks to present expert testimony regarding interrogation techniques that tend to generate false confessions, and regarding aspects of his psychological makeup that, he argues, make him vulnerable to falsely confessing. The trial court excluded the testimony of his two proffered expert witnesses, and the Court of Appeals affirmed. Is the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions, admissible under MRE 702? Is the probative value of the proffered expert testimony substantially outweighed by the danger of unfair prejudice? Did the trial court's order excluding the defendant's proffered expert testimony deny the defendant his constitutional right to present a defense?
Background: On May 1, 2008, Richard and Brenda Kowalski were found shot to death in their Oceola Township home. On the day that the bodies were discovered, police questioned Jerome Kowalski, the brother of Richard Kowalski. Five days later, Kowalski came to the police station, at the request of police, for follow-up questioning. Officers interrogated Kowalski for two hours, and asked him to take a polygraph examination. Approximately one hour into the pre-test interview, Kowalski told the polygrapher that he dreamed that he shot his brother. At this point, police began to videotape the interrogation. The results of the polygraph were inconclusive, but after the test, two officers interrogated Kowalski for another hour and a half hours. Kowalski was arrested and transported to the jail, where he was detained. The next day, officers interrogated Kowalski for another five and a half hours. During that interrogation, Kowalski made numerous incriminating statements and ultimately confessed to the murders.

After he was charged with the murders, Kowalski sought to suppress the incriminating statements he had made to the police. He filed a notice of intent to introduce the expert testimony of Dr. Richard Leo and Dr. Jeffrey Wendt. According to the notice, Leo would "give expert testimony concerning false confessions; that is, that they occur and some of the reasons that they are known to occur, that false confessions are associated with certain police interrogation techniques, and that some of those interrogation techniques were used in this case." Wendt, a forensic psychologist, was to testify that he administered several psychological evaluations to Kowalski and that he concluded that the circumstances surrounding Kowalski's communication with law enforcement "resulted in conditions that increased his likelihood of false confession." However, Wendt did not intend to offer testimony on the question of whether Kowalski made a

false confession. Instead, his testimony was to address the "psychological and situational factors" bearing on the reliability of Kowalski's statements to the police.

The prosecutor moved to suppress the proffered expert testimony, arguing that it was inadmissible under Michigan Rule of Evidence 702, which governs the admission of expert testimony, and *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). Following a hearing at which both experts testified, the trial court ruled that the experts' proposed testimony was not admissible under MRE 702. The court held that Leo's methodology was unreliable and highly questionable; his testimony would not assist the jury and was not relevant, the court said, because Leo admitted that the same interrogation techniques that produce false confessions also produce true confessions. The court held that jurors could determine on their own whether Kowalski's confession lacked credibility. Moreover, the police witnesses could be cross-examined on the interrogation techniques and methods that they used, and the jury could consider this information in weighing the reliability of Kowalski's confession, the court stated. The court also held that Wendt's proposed testimony was not relevant because it could not be linked to proof of a false confession.

Kowalski appealed the trial court's ruling. But in a split unpublished opinion, the Court of Appeals affirmed the trial court. The Court of Appeals majority noted that, although both experts testified that they would not opine regarding whether Kowalski made a false confession, that conclusion was implicit in their proposed testimonies. By implicitly giving an opinion as to whether Kowalski's confession was genuine, the experts would interfere with the jury's role in determining the confession's credibility and weight, the majority said. Thus, the proposed testimony could unfairly prejudice the trial; neither expert's proposed testimony had high probative value, the majority concluded.

The dissenting Court of Appeals judge agreed that Leo's testimony concerning police interrogation techniques should be excluded. But the dissent would have reversed the trial court's ruling excluding that part of Leo's testimony that would educate the jury about false confessions. That false confessions do occur, even in the absence of mental illness or torture, is not within the jury's general understanding, the dissenting judge said. Likewise, Wendt's proposed testimony about Kowalski's state of mind during the confession should also have been admitted; Wendt's opinion that Kowalski's personality made him more susceptible to influence than normal was based on reliable methodologies and was highly relevant to explain Kowalski's mental state during the confession, the dissenting judge concluded. Kowalski appeals.

TOWNSHIPS OF HARING & SELMA v CITY OF CADILLAC (case nos. 142117-8)
Attorney for plaintiffs Charter Township of Haring and Township of Selma: Ronald M. Redick/(616) 632-8000
Attorney for defendant City of Cadillac: Michael D. Homier/(616) 726-2200
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
Attorney for amicus curiae City of Detroit: Robert C. Walter/(313) 237-3074
Attorney for amicus curiae Michigan Municipal League: Jeffrey V. H. Sluggett/(616) 459-1171
Trial Court: Wexford County Circuit Court
Court of Appeals case nos. 292122, 292164
At issue: In the mid-1970s, the city of Cadillac and Wexford County executed two contracts to allow nearby townships to use the city's wastewater treatment system. Both contracts were set to

expire in 2017 unless renewed by the parties' agreement. In 2006, the city notified the townships that it did not intend to renew the contracts, absent the townships' annexation into the city. Three of the townships sued, claiming that the city had a legal obligation to allow them to continue using the wastewater treatment system at least through 2052 and possibly beyond. The trial court granted summary disposition to the city, and the Court of Appeals affirmed. Are the townships entitled to relief based on the holding of *Washtenaw Co Health Dep't v T&M Chevrolet, Inc*, 406 Mich 518 (1979), which states that "[w]hen ... an available sewer line crosses municipal boundaries, the municipality operating the sewer system may not condition connection on annexation of the properties involved when connection means abatement of a public health hazard"? Are plaintiffs' claims ripe for adjudication now, when the contracts have not yet expired?

Background: The city of Cadillac and Wexford County entered into two contracts, one in 1977 and one in 1980, under which the city agreed to provide wastewater collection and treatment for local townships that bordered two polluted lakes. The contracts required a "buy-in" payment from the townships at a price equivalent to the proportion of each township's projected use of the city's wastewater treatment system. The contracts provided that the contracts would be in effect until 2017, but could be renewed for successive ten-year terms by the parties' agreement.

In November 2006, the city notified the townships that it did not intend to renew the contracts upon their expiration in May 2017. Haring Township filed a complaint alleging that the city had a legal obligation to continue providing wastewater treatment and disposal service to it after the "ostensible" expiration of the 1980 contract on May 12, 2017. Shortly thereafter, Selma and Clam Lake Townships filed a complaint asserting a similar claim under the 1977 contract, initiating a second lawsuit. The plaintiff townships claimed that, by virtue of the contracts, they had purchased capacity in the city's wastewater treatment system. Because of this ownership interest, the plaintiff townships argued, the contracts' expiration dates were ambiguous. The townships also contended that, because the city had provided wastewater treatment services to the townships for 30 years, the city was a "public utility" that was required to continue providing such services, absent a qualifying basis for stopping services.

The trial court consolidated the cases and granted summary disposition to the city. The trial court reasoned that the contracts contained clear and explicit termination language that was controlling, and that none of the townships' arguments entitled them to receive wastewater treatment services beyond the contracts' expiration.

Haring and Selma appealed, and the Court of Appeals consolidated the appeals. In a split, published opinion, the Court of Appeals rejected the townships' arguments and affirmed the trial court's ruling. The Court of Appeals majority held that the contracts' termination date was controlling; that nothing in the contracts indicated that the townships had purchased an ownership interest in the capacity of the city's system; and that the city did not have an obligation, as a public utility, to continue providing sewer service to the townships after the contracts' termination date. In a dissenting opinion, one judge opined that the matter was not ripe for judicial review because the contracts did not expire until 2017; a future city council could decide to renew the contracts, the judge said. The townships appeal.

Thursday, November 10
Morning Session Only

PEOPLE v BUIE (case no. 142698)

Prosecuting attorney: Timothy K. McMorrow/(616) 632-6710
Attorney for defendant James Henry Buie: Jonathan Sacks/(313) 256-9833
Trial Court: Kent County Circuit Court
Court of Appeals case no. 278732
At issue: Following a jury trial, the defendant was convicted of five counts of first-degree criminal sexual conduct, as well as felony-firearm. Two of the prosecution's medical experts testified from remote locations by video-conferencing; before trial, the defendant's attorney agreed that they could do so. Did the trial court violate the defendant's rights under the Confrontation Clause or MCR 6.006(C)(2) by allowing the witnesses to testify via two-way interactive video technology? Did defense counsel waive the issue?
Background: James Buie was accused of breaking into a Grand Rapids home and sexually assaulting two children and their adult babysitter. Two expert witnesses who testified at trial did so via two-way interactive video conferencing. Before the witnesses testified, Buie's attorney told the court that she had no objection to the use of video technology, but that Buie, "wanted to question the veracity of the proceedings . . . ."

One of the two witnesses, an expert in child sexual abuse who had collected DNA evidence and examined the two children, was employed by Wayne State University and Children's Hospital of Michigan in Detroit at the time of trial. The other witness, who testified about DNA testing he had performed in the case, was located in Virginia at the time of trial, but had been previously employed by the Michigan State Police laboratory in Grand Rapids. A third witness, who testified in person at trial, stated that the DNA collected and examined by the previous two experts was eventually matched to Buie's DNA through CODIS (Combined DNA Indexing System), a DNA data bank.

A jury convicted Buie of five counts of first-degree criminal sexual conduct and one count of felony-firearm. The trial court sentenced him as a fourth-habitual offender to life in prison for the five first-degree criminal sexual conduct convictions, consecutive to a two-year prison sentence for the felony-firearm conviction.

Buie appealed, arguing that the use of two-way video technology violated his constitutional right to confront the witnesses against him. In a published opinion, the Court of Appeals remanded the case to the trial court for an evidentiary hearing to determine whether allowing the two witnesses to testify via two-way interactive video technology was necessary to further an important public policy or state interest; the Court of Appeals retained jurisdiction. The Michigan Supreme Court declined the parties' request to intervene at that time, but did direct the trial court to make findings on remand regarding Michigan Court Rule 6.006(C)'s requirements of "good cause" and "consent." Under that court rule, upon a showing of "good cause," a circuit court may use two-way interactive video technology to take testimony from a person at another location in specified proceedings, including trials, "with the consent of the parties …."

The trial court held an evidentiary hearing at which the prosecutor, Buie's attorney, and Buie testified. Buie's defense counsel testified that she consented to the use of two-way video technology, but that Buie objected to that and "everything" about the trial. The lawyer explained that, when she told the trial court that Buie "wanted to question the veracity of the proceedings," she was communicating his objection to the court. The trial judge ruled that the two witnesses were properly allowed to testify by video, and that Buie consented to the use of that technology. The judge further held that important state interests or public policies justified using video technology; allowing the two experts to testify via video-conference saved costs, insured an

efficient trial, and prevented further delay, preserving Buie's right to a speedy trial.

The Court of Appeals reversed the trial court in a published opinion and vacated Buie's convictions. The Court of Appeals held that no public policy or state interest at issue outweighed Buie's rights under the Confrontation Clause. Defense counsel's agreement to use two-way interactive video technology did not waive Buie's constitutional right to confrontation; the trial court plainly erred in permitting the two experts to testify by video, the appellate court said. The Court of Appeals also held that MCR 6.006(C) does not permit defense counsel to consent to the use of two-way interactive video technology where a defendant objects to the procedure. The prosecutor appeals.

MCCUE v O-N MINERALS (MICHIGAN) COMPANY (case no. 142287)

Attorney for plaintiff Donald T. McCue, individually and as the conservator of the Estate of Debra K. McCue: John L. Noud/(517) 676-6010

Attorneys for defendant O-N Minerals (Michigan) Company: Noreen L. Slank/(248) 355-4141, MaryEllen McLeod/(248) 386-8800

Attorney for amicus curiae Michigan Manufacturers Association: Kristin B. Bellar/(517) 318-3100

Trial Court: Mackinac County Circuit Court

Court of Appeals case no. 294661

At issue: The plaintiff's wife fell as they were cycling along a section of highway that passes through property owned by the defendant mining company. Steel rails had been embedded in the concrete; the concrete was degraded around the rails, producing the ruts which caused her fall. The plaintiff sued the mining company, alleging negligence and public nuisance. Did the defendant mining company owe a duty to the plaintiff because the defendant used the state highway in a way that caused the defect at issue or increased the hazard posed by the defect? Did the plaintiff state a claim for public nuisance?

Background: Donald T. McCue and his wife Debra were participating in the 2008 Annual Dick Allen Lansing to Mackinac bike tour. Debra McCue rode onto a stretch of State Highway M-134 where a private gravel road connected with the highway; O-N Minerals Company owned the land on both sides of M-134, including the gravel road, which the company used to move equipment and materials to and from its properties on both sides of the highway. O-N Minerals used the highway crossing under an easement with the state. The highway was paved with concrete and reinforced with six railroad rails at the point where the gravel road connected to the highway; the concrete around the rails had deteriorated, leaving ruts in the road. Debra McCue fell in this area and suffered serious injuries, including a fractured skull and head trauma resulting in permanent brain damage.

McCue sued O-N Minerals on his own behalf and as conservator of his wife's estate; he alleged that O-N Minerals had a duty to maintain the highway where his wife fell and that the company breached that duty by allowing the intersection to fall into disrepair. He also contended that O-N Mineral's failure to maintain that section caused his wife to be thrown from her bike and injured. Although McCue also sued the state of Michigan and the Michigan Department of Transportation, those defendants were dismissed from the lawsuit because the McCues had signed releases in order to participate in the DALMAC tour.

The trial court dismissed McCue's claims against O-N Minerals, ruling as a matter of law that O-N Minerals owed Debra McCue no duty with regard to M-134, which is under the exclusive jurisdiction of the state. By virtue of the easement, the company had no obligation to

maintain or repair the highway, nor any responsibility for the creation of a nuisance, if any existed, the trial court said. The trial court also denied McCue's motion for partial summary disposition, in which McCue sought a ruling that O-N Minerals had a duty to repair the highway, but failed to do so, and that that failure caused Debra McCue's fall.

McCue appealed, and the Court of Appeals reversed in part in an unpublished decision. There are circumstances in which a landowner's conduct can give rise to a duty with regard to an adjacent right-of-way – namely, when the landowner has physically intruded upon the area or has done some act that either increased an existing hazard or created a new hazard, the appellate court said. Because McCue had presented evidence from which a reasonable trier of fact could conclude that O-N Minerals used the highway in a way that either caused the defect or increased the related hazard, the trial court erred by granting summary disposition in favor of O-N Minerals, the Court of Appeals determined. The appeals court agreed with the trial court's denial of McCue's motion for partial summary disposition, concluding that a jury could decide that O-N Minerals' use of the highway was reasonable under the circumstances or that its use did not cause the defect. O-N Minerals appeals.

RESIDENTIAL FUNDING CO., L.L.C., et al. v SAURMAN, et al. (case nos. 143178-9)
Attorney for plaintiffs Residential Funding Co., L.L.C., f/k/a Residential Funding Corporation and Bank of New York Trust Company: Thomas M. Schehr/(313) 568-6659
Attorney for defendant Gerald Saurman: David H. Tripp/(269) 945-9585
Attorney for defendant Corey Messner: Lysle G. Hall/(517) 782-2253
Pro per for amicus curiae Gregory V. Alkema: Gregory V. Alkema/(616) 942-0200
Attorney for amicus curiae American Land Title Association: Michael J. Hagerty/(248) 901-4000
Attorney for amicus curiae Legal Services Association of Michigan, Michigan Poverty Law Program, State Bar of Michigan Consumer Law Section Council, and the National Consumer Law Center: Lorray S.C. Brown/(734) 998-6100
Attorney for amicus curiae Michigan Association of Realtors: Gregory L. McClelland/(517) 482-4890
Attorney for amicus curiae Real Property Law Section of the State Bar of Michigan: David E. Pierson/(517) 482-4890
Attorney for amicus curiae Michigan Bankers Association and the Michigan Mortgage Lenders Association: Aaron D. Lindstrom/(616) 752-2000
Attorney for amicus curiae Mortgage Electronic Registration System, Inc. and Mortgage Bankers Association: Charles Milne/(248) 723-5977
Attorney for amicus curiae Law Professors: John A. E. Pottow/(734) 647-3736
Attorney for amicus curiae Chemical Bank: William C. Collins/(989) 839-5314
Attorney for amicus curiae Michigan Chamber of Commerce: Brian C. Summerfield/(248) 743-6000
Trial Courts: Kent and Jackson County Circuit Courts
Court of Appeals case nos. 290248, 291443
At issue: These consolidated cases each involve a foreclosure initiated by the Mortgage Electronic Registration Systems, Inc. MERS foreclosed on the property by advertisement, but the defendants claimed that the foreclosures were invalid. They argued that MERS was not qualified under the foreclosure by advertisement statute (MCL 600.3204(1)(d)) to foreclose without judicial proceedings. The district courts rejected the defendants' claims, as did the circuit courts. The Court of Appeals reversed, ruling that MERS owned no interest in the indebtedness as

required by MCL 600.3204(1)(d), and that, as a result, its foreclosures by advertisement were void from the beginning. Is MERS, as the mortgagee and nominee of the note holder, an "owner … of an interest in the indebtedness secured by the mortgage" within the meaning of MCL 600.3204(1)(d), such that MERS was permitted to foreclose by advertisement?

Background: The Mortgage Electronic Registration Systems, Inc. is owned by the mortgage industry and operated as a nationwide membership organization. MERS tracks transfers of beneficial ownership interests in mortgage loans on behalf of MERS members and also tracks changes in mortgage servicing rights among the members. According to briefs submitted in this case, MERS was developed to allow faster and lower-cost buying and selling of mortgage debt. As part of the national electronic registry, MERS serves as the "nominee" or limited agent for the beneficial owners – the lender – of the mortgage loan. As nominee, MERS serves as the mortgagee; when mortgage loans are bought and sold, MERS remains the mortgagee of record, with the authority to enforce mortgage rights on the lender's behalf. According to the defendants, this system makes it more difficult for the borrower to know who actually holds the loan and to approach the lender when the borrower has financial difficulty.

In these consolidated cases, each defendant purchased property and obtained financing; the original lender in both cases was Homecoming Financial, L.L.C. Each financing transaction involved loan documentation – the promissory note – and a mortgage security document, known as the mortgage instrument. Each note provided for the amount of the loan, the interest rate, methods and requirements of repayment, the lender's identity and that of the borrower, and other matters. The mortgage instrument provided for rights of foreclosure by the mortgagee if the borrower defaulted. Although Homecoming was named as the lender in the mortgage instrument, MERS, not Homecoming, was designated as the mortgagee. The mortgage instrument also stated that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." The mortgage instrument further provided that "Borrower does hereby mortgage, warrant, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with the power of sale, the following described property …. Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender …) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

The defendants defaulted on their respective notes, and MERS began non-judicial foreclosures by advertisement as permitted by MCL 600.3201, *et seq.* MERS purchased the properties at sheriff's sales and then quit-claimed the properties to the plaintiffs as successor lenders.

The plaintiffs began eviction proceedings, but the defendants argued that the foreclosures were invalid; they asserted, among other matters, that MERS did not fall within any of the three categories of mortgagees who are permitted to foreclose by advertisement under MCL 600.3204(1)(d). The statute provides that "[A] party may foreclose a mortgage by advertisement if all of the following circumstances exist … (d) the party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage."

In both cases, the district courts, affirmed by their respective circuit courts on appeal, rejected the defendants' argument that MERS lacked authority to foreclose under the statute. But

in a 2-1 published opinion, the Court of Appeals reversed both lower courts, holding that MERS owned no interest in the indebtedness and that, as a result, MERS is not authorized under MCL 600.3204(1)(d) to foreclose by advertisement. Because the promissory note and the mortgage are "different legal transactions providing two different sets of rights, even though they are typically employed together," MERS' role as nominee and mortgagee did not give it any ownership interest in the note, the majority said. As a result, the majority held, the plaintiffs owned no interest in the indebtedness, i.e., the promissory note. To the extent that the lender sought to empower MERS to act on its behalf, this action was ineffective because the lender could not grant a right that the statute prohibits, the majority stated. The dissenting judge would have affirmed the lower courts because the mortgage and indebtedness were interrelated, and because MERS as the mortgagee owned a contractual interest in the indebtedness to act for the lender's benefit. The plaintiffs appeal.

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