Michigan Appellate Practice Journal

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In this Issue

From the Chair

By Joanne Geha Swanson

In his *Twitter* account just after New Year's Day in 2012, Stephen Covey, author of *The 7 Habits of Highly Effective People*, wrote:

> "*The key is not spending time, but investing it. How will you invest your time this year*?"

I like to ask myself this question at the midpoint of the year when I can evaluate my personal ratio of spent versus invested time, and contemplate the import of another Covey quote:

> "*Your most important work is always ahead of you, never behind you.*"

These credos are apropos as I prepare to relinquish the Section leadership to Bridget Brown Powers, who will become Chair of the Section at the annual meeting in September. Who ever knew the time would pass so quickly! More importantly, in line with the Covey credos, what investments has the Section made in the past year to further the practice of appellate law in our state, and what important work lies ahead? These are questions that members of the Section might well wonder about. So here are a few highlights you might want to keep your eye on.

E-Briefing Proposal – The great work of the Ad Hoc E-Briefing Committee began under the leadership of former Chair Gaëtan Gerville-Reache and culminated in March of this year when the Section presented its proposed Administrative Order to the Court of Appeals for the implementation of a pilot e-briefing program. The goal of the proposal is to allow for the preparation of briefs in a manner that is conducive to readability on electronic devices. A key element is to permit a word count to govern the length of briefs, rather than a page limit. As explained by Committee Chair Scott Bassett, a word limit provides greater flexibility to incorporate techniques known to make briefs easier to read, such as increased use of white space, larger fonts, use of bullet points, and better line spacing. The proposal also incorporates guidelines for bookmarking and searchability. Stay tuned to the Appellate Practice Section Journal and the Section website for information regarding the progress of this proposal.

Section Council

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Enhanced Section Website and Evaluation of SBM Connect - Have you visited the Section webpage on SBM Connect lately? It is a great source of information regarding the Section, containing links to Section by-laws, minutes of monthly Council meetings, past issues of the Appellate Practice Journal, and other articles helpful to Section members. But efforts are underway to make the Section website even better. The newly formed Ad Hoc Website Committee is looking at ways to enhance our website offerings with the inclusion of announcements, podcasts, practice pointers, tutorials, and other items of interest to appellate practitioners. The Council is also considering whether to migrate the Section's listserv function to SBM Connect. More on this to come.

Membership Committee – The Section now has a membership committee to formalize efforts to increase membership and enhance benefits for Section members. Plans are underway to identify and invite non-member appellate practitioners from across the State to a meet-and-greet at the annual meeting in September. If you know someone who might like to attend, please extend an invitation on behalf of the Section.

Submission of Comment on Proposed Rules Changes – Thanks to our very active Court Rules Committee and other Council members, the Council has had a busy year considering, investigating, preparing, and communicating the Section's position on proposed court rules changes. The Council submitted comment on ADM 2016-25 (proposed amendment of the court rules to incorporate an appendix requirement for Court of Appeals briefs) and ADM 2002-37 (proposed e-filing rules), as well as ADM 2016-07 (MCR 6.310, 6.429, and 6.431); ADM 2017-08 (MCR 3.997 and 6.425); ADM 2014-36 (MCR 6.425); ADM 2016-13 (proposed addition of MCR 3.810); ADM 2016-42 (MCR 6.310, 6.429, 6.431); and ADM 2017-20 (MCR 7.202(6)(a)(iii)).

Efforts are currently underway to propose an amendment to MCR 7.205 to simplify the deadlines for applications for leave to appeal in criminal cases. Further, the Council is pleased to report that the Supreme Court adopted the Committee's proposed amendments to MCR 7.209 (submitted last year) to clarify the trial court's authority to stay enforcement of money judgments without a bond.

Accessibility of Briefs – The Council's Michigan Court Practice Committee has been assigned the task of working with the Michigan Court of Appeals and the Michigan Supreme Court to explore options for making appellate briefs accessible electronically. The early stages of the committee's effort will include surveying the accessibility and rules applicable to on-line dockets in other states; developing a process for verifying adherence to redaction policies; limitations on access; and determining appropriate fees.

Efforts to Educate – An important function of the Section is to provide educational opportunities to enhance our abilities as lawyers. To that end, peruse the pages of this Appellate Practice Journal and all of the editions that came before. Thanks to the efforts of our Publications Committee and contributing authors, you will find original content that is both enlightening, informative, and resourceful. And plan to attend this year's annual meeting program, addressing *The Do's and Don'ts of Oral Advocacy in Michigan's Appellate Courts*. Bridget Brown Powers will moderate a panel of five Court of Appeals Judges and five Supreme Court Justices. RSVP for this event when you register for the NEXT Conference at michbar.org/sbmnext. If you

have a question you would like the panel to address, feel free to email Bridget at bbrownpowers@brownpowers.com.

Good Deeds – Along the lines of "to whom much is given, much will be required" (Luke 12:48) and innumerable similar quotes, it is laudable that the Section searches out ways to serve the surrounding community. To this end, our Good Deeds Committee organized volunteers to prepare dinner for families temporarily residing at the Ronald McDonald House of Mid-Michigan. Additional service opportunities are upcoming and we would love you to join us. Watch the Section's website and listserv for more information.

I look forward to seeing everyone at the annual meeting on September 27 in Grand Rapids. Until then, have a wonderful summer.

Joanne Geha Swanson *is a member of Kerr, Russell and Weber, PLC in Detroit, where she specializes in federal and state court litigation and appeals.*

(Cleaned Up)

By Joseph E. Richotte, Butzel Long, P.C.

The words "innovation" and "appellate brief" rarely enjoy each other's company. Lawyers are an unadventurous bunch. We cling to our traditions like dust clings to the old Shepard's books, long ago abandoned to the basements of law libraries. But every now and again there is a rare opportunity to break new ground— to be, as the American Bar Association likes to say, "legal rebels."

Forty years ago, the plain-English rebels began to banish Latinisms and legalese and purge the passive voice from briefs. Thanks to their efforts, today's briefs and judicial opinions are much more readable, not just to the common man, but also to the common lawyer. Just compare, for example, *People v Frederick*, 500 Mich 228 (2017) (McCormick, J.), and *People v Rea*, 500 Mich 422 (2017) (Bernstein, J.), with *Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc*, 370 Mich 334 (1963), which was written before the plain-English revolution. Whether you agree or disagree with the holdings, I suspect your mind's ear will prefer @BridgetMaryMc's Fourth Amendment analysis of a predawn search, and @TheBlindJustice's statutory interpretation of the drunk-driving statute, to *Chatham*'s painful, prolix reversal of summary disposition. And I bet the same would be true for our non-lawyer friends.

Today, a new rebellion is aiming to tear down two more barriers to readability: clunky quotes and legal citations. For those active on social media, you may have heard of #AppellateTwitter, a forum for appellate attorneys and judges nationwide. Jack Metzler, one of the deans of #AppellateTwitter, has suggested an innovative way to remove much of the clutter we've been adding to our quotes and cites, and it comes with a nifty new post-citation parenthetical: (cleaned up).

Right now, our briefs are littered with strings of letters and numbers that can wrap around three lines of text or more, and our penchant for quoting quotes only compounds the problem. It's fairly common to see a mess of brackets, ellipses, and single (or triple) quotation marks, followed by a case name, a series of parallel cites, and then a "quoting" signal (followed by yet more parallel citations) or an "omitted" parenthetical. In other words, something like this:

> "[To] condition the availability of benefits [*including access to the ballot*] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *McDaniel v Paty*, 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978) (quoting *Sherbert v Verner*, 374 US 398, 406; 83 S Ct 1790; 10 L Ed 2d 965 (1963) (alterations in original) (emphasis added) (internal quotation marks omitted)).

All of this baggage distracts the reader from the point being made. Do we really need all of this visual blight? Metzler says no. He persuasively posits that the bracketed material is part of the *McDaniel* decision, even if it wasn't part of the *Sherbert* decision. Why not just quote *McDaniel*? And if we do that, do we really need a flurry of brackets to accurately quote *McDaniel*? Metzler recommends that we

Continued on next page

slice this down to what really matters:

> "To condition the availability of benefits *including access to the ballot* upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties." *McDaniel v Paty*, 435 US 618, 626; 98 S Ct 1322; 55 L Ed 2d 593 (1978) (cleaned up) (emphasis added).

Isn't that much easier to read? Have we lost anything essential by omitting the *Sherbert* cite? Is our quote any less accurate without the brackets? Metzler doesn't think so, and I agree. *McDaniel* is binding all on its own; we don't need to cite *Sherbert* for *stare decisis* purposes. By using (cleaned up), we signal that at least part of the quoted passage was itself a quotation, and the reader retains the option to verify that for himself without being visibly taxed. At the same time, we still let the reader know that we added emphasis to part of the text, something *McDaniel* didn't do.

Here's another example:

> "Plaintiffs claiming an equal protection violation must first 'identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled . . . out for unlawful oppression.'" *Rubinovitz v Rogato*, 60 F3d 906, 910 (CA1, 1995) (alteration and omission in original) (emphasis added) (quoting *Dartmouth Review v Darmouth College*, 889 F2d 13, 19 (CA1, 1989), *overruled on other grounds by Educadores Puertorriquos en Accion v Hernandez*, 367 F3d 61 (CA1, 2004).

Using (cleaned up), Metzler notes that we can eliminate the triple quotes, brackets, and ellipsis that came with the quoted quote *and* eliminate 35 words from the citation (including the negative-sounding "overruled on other grounds," which isn't relevant because it doesn't impact the binding nature of *Rubinovitz* within the First Circuit or its persuasive value outside of the First Circuit):

> "Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently, instances which have the capacity to demonstrate that plaintiffs were singled out for unlawful oppression." *Rubinovitz v Rogato*, 60 F3d 906, 910 (CA1, 1995) (cleaned up).

In addition to being easier on the eyes, (cleaned up) saves precious space. Go back to your longer briefs. What could you have done with the extra page or two that you would have saved if you had used (cleaned up)?

If you're thinking, "I don't want to go out on a limb and be the first to do this," fear not. A few of us are already on file with (cleaned up), and Metzler has even identified a few courts that have started using (cleaned up) in their opinions. If you're worried whether a judge will understand what it means until this catches on, Metzler offers a short, model explanation in his forthcoming article that you can put in your brief for the uninitiated. You can find Metzler's article at http://goo.gl/X8ty8t.

Join the rebellion. Keep innovating!

Joseph E. Richotte *is a shareholder at Butzel Long, P.C. He concentrates his practice in the areas of appeals, white-collar criminal defense, and media defense.*

Meet Justice Kurtis T. Wilder

By Conor B. Dugan

We meet in Justice Wilder's chambers in Lansing in early March. Justice Wilder is welcoming and engaging. Here are some of the highlights of the subjects we discussed.

Trailblazing Parents

Justice Wilder grew up in Cleveland. His parents met at Tuskegee University and came north for opportunity. Justice Wilder describes them as "trail blazers." Justice Wilder's mother, Dr. Sarah Wilder, is a retired dietician and nutritionist who has a doctorate degree in community health systems, emphasizing gerontology, from Penn State University. Dr. Wilder's first leadership position was as the head dietician at Jewish Convalescent Hospital in Cleveland. She later became a professor at Cuyahoga Community College where she founded the Dietary Technology Program. Her work was used by the World Health Organization in Caribbean countries. Not to be outdone, Justice Wilder's father, Nathaniel Wilder, earned a master's degree in soil sciences, and was the first black soil conservationist hired in the state of Ohio. He held the job for over three decades.

The Cleveland neighborhood Justice Wilder grew up in was multiracial and he attended a church that was predominantly African American. Beginning in seventh grade, Justice Wilder's family moved from Cleveland to University Heights. At the time, University Heights was predominantly a Jewish community, and as a result, many of Justice Wilder's "closest friends growing up were Jewish." Justice Wilder credits his parents with teaching him no matter what environment he found himself in, to be himself. He said, "Whether you're in a setting where everybody is African-American or you're in a multi-racial setting, or where you're the only one . . . just be yourself, and you'll do fine."

Formative High School Experiences

Justice Wilder said that his high school experience was fairly diverse but that the mid-1970s "were some explosive times." His high school principal was a great man who "reached out and said that we've got to find a way to get along." According to Justice Wilder the principal "didn't brush" the racial tension "under the rug, he exposed it, and he called it out, and we had school-wide assemblies, and he was determined to make sure that we were talking to each other, so it was a pretty decent environment to go to school in."

It was a high school counselor who began Justice Wilder's life in the law. During his junior year, she called him to her office and told him he had been nominated for a scholarship to attend Boys State that summer at Ohio University in Athens, Ohio. As Justice Wilder described it, Boys State "teaches you about everything involving government from campaigns to actually running governmental positions." At Boys State, Justice Wilder "ran for and was elected county prosecutor." He actually tried cases. The Boys State county sheriff "would chase guys who were running down the stairs because the stairs has been designated a walk fast zone by the County Commission. The sheriff would give them a ticket, and some of the guys would pay the fine, and others would go to court." If someone who received a ticket fought the ticket, Justice Wilder "had to try the case." Justice Wilder had five convictions.

One of the convicted defendants appealed to the Buckeye Supreme Court. The Supreme Court "set aside the conviction." Justice Wilder asked why he had lost the case; he believed he had proved his case. The answer he received sheds light on a motivation for becoming a judge and the philosophy he brings to judging. The Court told him that he had proven his case, but that the Court "just wanted to give the guy a break." Justice Wilder "didn't think that was fair." He believed "judges were supposed to apply the law and not decide based on their own who should prevail and who shouldn't, and so the more [he] thought about it the more [he] realized" that law school and perhaps someday being a judge were things that "appealed" to him.

The same high school counselor who had directed him to Boys State learned of his interest in the law and said that if he wanted to go that direction he should go to the University of Michigan. (Her husband was a lawyer who had graduated from Michigan Law School.) That's how someone from the Buckeye State became a Wolverine. Justice Wilder chuckled and said, "I guess she knew me pretty well, because I loved it." He ended up staying seven years and receiving both his undergraduate and law degrees from Michigan. While at Michigan, he was a member of the Sigma Chi Fraternity. Justice Wilder has recently been named by the International Fraternity as a Significant Sig, one of the Fraternity's highest awards, for significant career and personal achievements.

Justice Wilder also often had bragging rights back home in Cleveland in the week before Thanksgiving. Each

Wednesday before Thanksgiving his high school had an alumni party and he'd proudly wear his maize and blue in a sea of scarlet and grey.

Law School and Practice

Justice Wilder worked during the summer following his first year of law school as a garbage man. This was a very good thing. During this job, Justice Wilder was able to work with people very different from himself "and learned not only the value of hard work, but also the importance that everybody play in making a community work." This experience helped him when he became a judge. He stated:

> I think that when I became a judge later, having that understanding [of] people who come from totally different circumstances and listening to their stories helps you be a better judge. [W]hen you can do that, when you can understand where people are coming from even though you haven't lived their life, [it helps your judging.]

Justice Wilder's second summer was also formative. During that summer, he worked in the City of Cleveland Prosecutor's Office. He was able to second chair a trial and he and the assistant prosecutor obtained a conviction after Justice Wilder's cross-examination in which he was able to get the defendant "to admit the elements of the crime." After that, Justice Wilder was "given a courtroom by [himself], no supervision for the entire summer." Justice Wilder batted a 1.000 getting five convictions in five trials.

After law school, Justice Wilder worked at Foster Swift in Lansing. There he did mostly auto-negligence work. He received a lot of deposition experience, motion experience, and trial work. In 1987, Justice Wilder worked with the future-Judge David McKeague on a lawsuit against the State Republican Party contesting the rules for seating delegates from the Republican caucus. That litigation gave him a taste of non-no fault litigation and so he decided to branch out. He lateraled to Butzel Long in 1989 and moved to Washtenaw County.

Two and a half years after moving to Washtenaw County, Justice Wilder learned of a judicial vacancy in the circuit court. Despite being young—just 32 years old—he applied for the vacancy and was appointed by Governor Engler. That was March 1992. Justice Wilder had to run for reelection in November. Thus, he was thrown into the fire with a full docket and an election campaign to manage in his first months on the job. He won reelection and served on the Court until 1998 when he was nominated to the Michigan Court of Appeals.

The Court of Appeals and the Supreme Court

Justice Wilder describes what he liked about his work on the Court of Appeals:

> I think the best thing about the court of appeals is the opportunity to really dig into the law. When you're at the trial court, you're trying to keep things moving; you of course make decisions according to the law and you try to prepare as quickly as you can, but in the heat of trial, you have to make decisions—you don't have time to research everything. And so you have to be well advised ahead of time about what the issues are likely to be and try to prepare yourself so that you can make a quick decision, and sometimes with the motions you do take them under advisement and you have a little more time to write your opinion. But of course that's all the job is at the court of appeals, so you're getting the opportunity particularly when it's a case of first impression, to give more guidance to the attorneys and to the state in that particular area of the law.

Last May, Governor Snyder nominated Justice Wilder to the Michigan Supreme Court. After being sworn in at 4 pm on May 9, Justice Wilder's staff handed him his briefcase. He took his parents and best friend from high school to dinner and then retreated to the hotel where he worked past midnight reviewing briefs for his first conference on May 10. At the Supreme Court, Justice Wilder notes that one of the biggest differences he sees is volume. He states:

> We're meeting in conference every week, and we're looking at the applications for leave, and even though we may not grant a particular application or we may not do an oral argument on the application, we're still reading the application and analyzing its merits before we make a decision not to do that. So it's roughly 30 cases a month at the Court of Appeals to 30 cases a week or so here. That's a slight exaggeration, but it's definitely an increased case load.

Good Advocacy

Justice Wilder and I spend some time discussing good advocacy and a judge's pet peeves. When he was a trial judge, he disliked the personal attacks made on the other side. He says, "Present your arguments to the judge, let the judge make the ruling. We're professionals, it shouldn't be personal to the other side."

When he arrived at the Court of Appeals, one of Justice Wilder's "biggest frustrations was having somebody present the case not having reviewed the record." Appellate advocates should know their records cold so that they can help the Court "understand fully the nuances that are presented in the case."

Now, as Justice Wilder prepares to celebrate his first anniversary on the Supreme Court, he gives this advice to appellate advocates:

I would say at the Supreme Court, the biggest thing I would ask of lawyers is to recognize that we're not just deciding their case, we're looking for something jurisprudentially significant so that we can provide guidance to the next 50-100 cases. And the arguments of the lawyers who can improve tend to focus simply on the facts of their case, which is not why they're here. They're here because their facts could mean something for the broader class of cases, and so they should be prepared to tell us, using the facts as a guide, why this is jurisprudentially significant, and how the general rule that is called out by the facts of their case should be enacted. Or whether that rule already exists and shouldn't be changed.

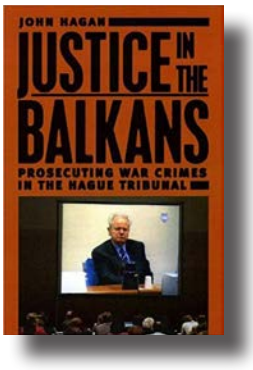
Justice Wilder also emphasizes that "brevity is good. Being succinct, being direct and to the point, giving enough background so as to be complete and not deceptive by omission. The 50 page limit does not have to be reached all the time."

They are good words to remember for those of us who advocate for clients. They are the fruit of nearly a quarter century on the bench that has its roots in a Boys State experience back in the 1970s.

Recommended Reading for the Appellate Lawyer

By Mary Massaron

Last year, on a trip to Amsterdam to visit the Rijksmuseum, the Van Gogh museum, and the Rembrandt House, I had the chance to also visit the Hague and meet with some of the lawyers and an appellate judge who were involved in setting up the Kosovo tribunal. In March of this year, the Hague Tribunal convicted five senior Serbian officials for their roles in the 1999 Kosovo war. Since the Nuremburg trials, which I discussed in some long-ago reviews published in this newsletter, I have been interested in the efforts of the international community to establish principles of law and to figure out how to enforce them. This month's reviews discuss several books dealing with war crimes and the efforts to bring those who commit them to justice.



Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal

John Hagan

(University of Chicago Press 2003)

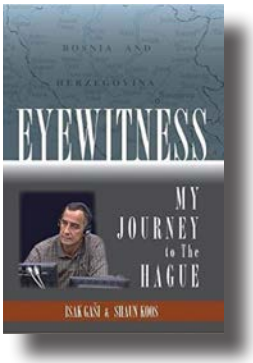
John Hagan has written an in-depth examination of the history and inner workings of the International Criminal Tribunal for the former Yugoslavia as revealed through the prosecution of Slobodan Milosevic. It is a fascinating and instructive account of what it takes for such an institution to work, why it is important, and what some of the pitfalls and problems are likely to be.

Hagan describes the infancy of the tribunal with an uncertain budget, little or no international prestige, no real staff, and no infrastructure for its operations. He explains the difficulties in recruiting a chief prosecutor – it ended up being Justice Goldstein, a justice of the South African Constitutional Court, who was granted a leave to help with this job. When Justice Goldstein first met with Cherif Bassiouni, the United Nations' first chief investigator of the war crimes, he had a bare office with no supplies and not even a map of the Balkans. Goldstein and the chief deputy prosecutor, Graham Blewitt, had to raise funds, develop a computer system capable of holding and managing the hundreds of thousands of documents that had been gathered as part of the investigations, and build a state-of-the-art courtroom for the trials.

Hagan also recounts prosecutorial choices about who to prosecute in the initial trials. Hagan also recounts the cloak and dagger efforts of the tribunal to protect potential witnesses. One witness, Drazon Erdemovic, sought to turn himself over to the tribunal to confess his involvement in the Srebrenica massacre, an incident during which hundreds of unarmed Muslims were shot and killed. But before he could do so, he was arrested by the Yugoslav police. Deputy chief prosecutor, Blewitt, knew that Erdemovic's life was in danger

so he immediately faxed orders to Belgrade putting the government on notice that the Tribunal knew this witness was in custody and wanted to speak with him. Efforts by Tribunal personnel and the U.S. State Department were successful in getting the government to cooperate in turning this witness over to testify.

Hagan's focus on the key players in the drama, coupled with his detailed and accurate account on court proceedings is fascinating reading for any lawyer. His description of the legal theories, the problems and efforts to staff the complex investigations and later to present the evidence at trial, the issues around forensic evidence, and many other aspects of the lengthy and complicated litigation, are enlightening. He also describes the efforts to create a permanent International Criminal Court, and how the objections by the United States to participating in it might subject U.S. personnel to extradition. Hagan reports that the inability to resolve this concern ultimately has kept the U.S. and its citizens from participating in the work of the Court, even though their experience in the Tribunal, which preceded it, meant they had a great deal to offer.

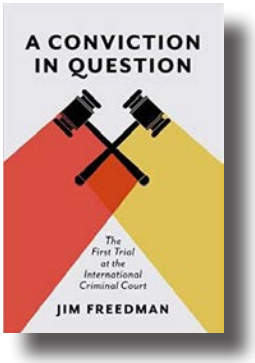


EyeWitness: My Journey to the Hague
Isak Gasi & Shaun Koos
(Brandylane Publishers, Inc., 2018)

If Hagan's account of the creation of the Tribunal and the series of trials that took place there offers an historical overview – starting at the Nuremburg trials and ending with the treaty creating an International Criminal Court – Gasi and Koos's book provides a heart-rending account of one man's story – and his suffering at the hands of Milosevic and others, his bravery, and his eventual role as a key witness for the prosecution. They focus on Gasi's youth as a member of the Yugoslav Olympic rowing team, a time when the ethnic differences seemed to Gasi to be a source of strength in the country and not a basis for deathly division.

But all too soon, Gasi finds himself in prison and on an execution list. He describes the signs of political division, emerging ethnic hostilities, and his eventual arrest. His stories of friends and neighbors turning against each other, and his vivid and heart-wrenching descriptions of brutality and mass killing bring the conflict and horrors alive for the reader. Gasi uses his intelligence, strength, and some luck, to survive. He is eventually able to get his family out of the country. But he agrees to come back to testify at numerous trials of perpetrators of war crimes, including Milosevic.

Gasi wrote his book, he explains, because "[n]ationalism, not unlike the destructive nationalism we experienced in the former Yugoslavia, is on the rise around the world. It was a prominent feature in the 2016 U.S. presidential campaign." He sees "Yugoslavia's experience as a cautionary tale; it is my reason for telling this story." Gasi reflects on the history noting that "[o]nce the dividing started in Yugoslavia, it was amazing how quickly it spread." He also cautions that "[w]e humans are so easily manipulated by propaganda, by claims that we need to fear our neighbors." And these forces in Yugoslavia led to those who took power and then used the state apparatus to bring both the "army and independent media to heel." Gasi and those involved in the criminal trials believe that this process is a way for victims to seek justice and also a way to be sure that those responsible are identified and the history is accurately told. This book is worth reading for anyone interested in understanding the human side of this history and for anyone who cares about what can prompt such inhumanity and how international law can be used to bring justice.



A Conviction in Question: The First Trial at the International Criminal Court
Jim Freedman
(University of Toronto Press 2017)

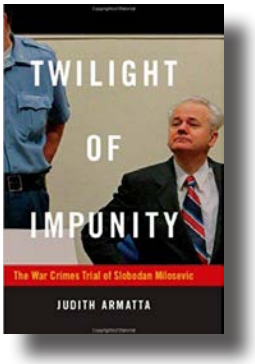
Jim Freedman, a news reporter who repeatedly risked his life to cover ethnic warfare in the Congo, wrote this book to recount the first trial that took place in the relatively newly-created International Criminal Court. Because he had witnessed some of the atrocities committed by Thomas Lubanga Dyilo, a ruthless politician who had committed multiple war crimes and crimes against humanity during his time reporting from the Congo, Freedman was "curious about what the new Court would make of the case, whether it could in fact reckon with these crimes, some of which [he] had by chance observed." He "wondered whether the loft vision of the Court inscribed in the Rome statute could deal with the harsh reality of what Lubanga had done in Ituri. It was not just what kind of justice would be rendered for Lubanga. The Court itself was on trial." Freedman makes clear that he is "not a legal scholar, either by profession or by inclination."

Both Freedman's essential question, about whether the Court could render justice in these horrific cases, and his vantage point as both eye witness to the horrors that took place and to the trial, makes this book worth reading. Freedman raises questions about the fundamental notions of justice as they are embodied in a criminal justice system

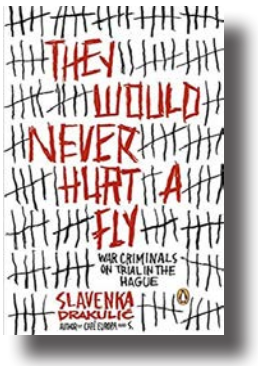
that are significant both for efforts at achieving the enforcement of international law and for our own evaluation of our state and federal systems of criminal justice.

Freedman is quick to recognize and to point out some of the inadequacies of the process and the players – particularly in finding a way to deal with Milosevic, whose sole goal was to use the trial as a forum for making speeches about history that were fundamentally inaccurate.

For those of you who want to pursue this subject further, I will mention two other books that look good but that I have neither time nor space to discuss in this issue's reviews.



Twilight of Impunity: The War Crimes Trial of Slobodan Milosevic, by Judith Armatta (Duke University Press 2010)



They Would Never Hurt a Fly: War Criminals on Trial in the Hague by Slavenka Drukulic (Viking 2004)

Together these books paint a picture of both the worst kinds of conduct that humans can engage in and the bravery and kindnesses of the best in horrific times. They also offer a nuanced and deep depiction of how international law can help and ways in which it is problematic in achieving justice. And throughout, the books all remind us of how fragile the civil society in which we live is – whether in Nazi Germany or Yugoslavia or anywhere.

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application*

By Linda M. Garbarino and Anita Comorski

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

People v Cameron; **SC 155849, COA 330876**

Criminal Law: In a published opinion, the Court of Appeals held that the imposition of court costs pursuant to MCL 769.1k(1)(b)(*iii*) was a tax rather than a fee, but that "the legislative delegation to the trial court to impose and collect the tax contains sufficient guidance and parameters so that it does not run afoul of the separation-of-powers provision" of Michigan's Constitution. The Supreme Court has requested briefing on how the court costs under this statute should be classified and if the court costs are a tax, whether the statute violates the separation-of-powers provision.

People v Ames; **SC 156077, COA 337848**

Criminal Law: The Supreme Court requested briefing "addressing whether MCL 769.34(10) has been rendered invalid by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), to the extent that the statute requires the Court of Appeals to affirm sentences that fall within the applicable guidelines range 'absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.'"

Thiel v Goyings; **SC 156708, COA 333000**

Contract Law: This litigation arose out of a dispute as to whether the defendants' home, built as a combination of prefabricated modules and on-site construction, violated a restrictive covenant which precluded "modular homes." The trial court found the covenant wording ambiguous and held

that the defendants' home did not violate the "intent" of the covenant. The Court of Appeals reversed. The Supreme Court requested briefing on "(1) whether the defendants' home is a 'modular home' as defined by Timber Ridge Bay's 'Declaration of Restrictions, Covenants and Conditions'; and (2) if so, whether the violation was a technical violation that did not cause substantial injury."

***People v Roberts;* SC 156223, COA 327296**

Criminal Law: The Supreme Court will examine whether the Court of Appeals correctly held that the defendant was denied effective assistance of trial counsel.

***Bauserman v Unemployment Insurance Agency;* SC 156389, COA 333181**

Governmental Immunity: The Court of Claims Act requires a claimant to file "a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." The at-issue claims here involved alleged improper termination of unemployment benefits, assessment of penalties, and subsequent seizure of income tax refunds. The Supreme Court will consider whether the "happening of the event" for limitations purposes was the "allegedly wrongful notice of redetermination, or when [UIA] actually seized the appellants' property."

***Henderson v Civil Service Commission;* SC 156270, COA 332314**

Constitutional Law: The plaintiffs challenged the reclassification of their positions with the Department of Corrections to newly created positions with the same duties, but at a lower rate of pay. The Supreme Court has requested briefing to address "(1) whether the 'authorized by law' scope of review under Const 1963, art 6, § 28 applied to the appellants' judicial review of the Civil Service Commission's final decision made without a hearing; (2) if so, whether the Court of Appeals gave proper meaning to the 'authorized by law' constitutional standard; and (3) whether the Court of Appeals correctly applied that scope of review to the appellants' challenge."

***People v Lee;* SC 157176, COA 334308**
***People v Worth-McBride;* SC 156430, COA 331602**

Criminal Law: These cases will be argued together and generally involve the extent to which a parent/guardian can be convicted of child abuse and/or murder, when the crime was committed by the other parent.

***Walker v Underwood;* SC 156651, COA 333160**

Contract Law: The Supreme Court requested that the parties address "the applicability of the legal canon *expressio unius est exclusio alterius* [when one or more things of a class are expressly mentioned others of the same class are excluded]" to their disputed contract provision.

***People v Dixon-Bey;* SC 156746, COA 331499**
***People v Beck;* SC 152934, COA 321806**

Criminal Law: The Supreme Court will consider the appropriateness of upward departures from the sentencing guidelines based on acquitted conduct.

***People v Price;* SC 156180, COA 330710**
***People v Davis;* SC 156406, COA 332081**

Criminal Law: These cases involve the issue of whether the defendants' convictions violate double jeopardy, whether the defendants were convicted under statutes that "contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct", whether the Court of Appeals "erred in recognizing a rule against mutually exclusive verdicts in Michigan", and whether that rule is applicable to these cases.

***Van Buren Charter Township v Visteon Corp;* SC 156018, COA 331789**

Contract Law: Issues include "whether the Court of Appeals: (1) properly determined that a declaratory judgment was not ripe under MCR 2.605; and (2) properly interpreted the contract to determine that 'defendant is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village.'"

***People v Harbison;* SC 157404, COA 326105**

Criminal Law: The Supreme Court directed the parties to address whether admission of expert testimony that "the victim suffered 'probable pediatric sexual abuse'" violated the Court's prior decision "and, if so, whether this was plain error requiring reversal of the defendant's convictions."

***People v McBurrows;* SC 157200, COA 338552**

Criminal Law: The Supreme Court will address the "proper venue for the charge of delivery of a controlled substance causing death."

People v Moss; SC 156616, COA 338877

Criminal Law: The defendant sought to withdraw his no contest plea under MCL 750.520d(1)(d), which provides that a person is guilty of criminal sexual conduct in the 3rd degree if he or she engages in sexual penetration with another person and "[t]hat person is related to the actor by blood or affinity to the third degree . . ." The alleged victim is the defendant's adopted sister. Supreme Court has asked the parties to address "whether adoptive siblings are related by blood or affinity."

Paquin v City of St. Ignace; SC 156823, COA 334350

Constitutional Law: The text of Const 1963, art 11, § 8, renders a person ineligible for "election or appointment to any state or local elective office of this state" and ineligible to hold certain positions of public employment in this state if the person was convicted of certain felonies "and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government." The Supreme Court has asked the parties to address "whether the plaintiff's holding elective office with and being employed by an Indian tribe constitutes 'any elective office or position of employment in local, state, or federal government'" under this provision.

W A Foote Memorial Hosp v Michigan Assigned Claims Plan; SC 156622, COA 33360

No-Fault Law: The Supreme Court will address the retroactive application of its prior decision in *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017).

Home-Owners Insurance Co v Jankowski; SC 156240, COA 331934

No-Fault Law: Issues to be addressed include "whether, to be eligible to receive personal protection insurance (PIP) benefits, [defendants] were required to register, in Michigan, the vehicle involved in the accident, and were thus obligated to maintain security for the payment of PIP benefits pursuant to MCL 500.3101 or be precluded from receiving such benefits by MCL 500.3113(b)."

People v Snyder; SC 153696, COA 325449

Criminal Law: Among the issues to be addressed are "(1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., amount to 'punishment,'" and "(2) whether the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required him to register."

People v Hammerlund; SC 156901, COA 333827

Criminal Law: The Supreme Court directed the parties to brief the issue of "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest."

Genesee County Drain Commissioner v Genesee County; SC 156579, COA 331023

Governmental Immunity: The Court of Appeals held in a published opinion that a claim based on a theory of unjust enrichment is not barred by the doctrine of governmental immunity. The Supreme Court requested that the parties address "whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 *et seq*., see *In re Bradley Estate*, 494 Mich 367 (2013), because it was based on the equitable doctrine of implied contract at law."

Stacker v Lautrec, LTD; SC 155120, COA 328191

Statutory Construction: The plaintiff slipped and fell on ice in a driveway of the apartment complex where she resided. The Supreme Court requested briefing on the issue of whether there were genuine issues of material fact that would preclude summary disposition on the plaintiff's claim that the driveway was not "fit for the use intended by the parties."

West v City of Detroit; SC 157097, COA 335190
Wigfall v City of Detroit; SC 156793, COA 333448

Governmental Immunity: Regarding the notice provision in MCL 691.1404, the Supreme Court requested briefing on "whether strict or substantial compliance is required with the notice provision;" "whether the plaintiff's notice failed to comply with MCL 691.1404(2) under either a strict or substantial compliance standard;" "whether the Legislature's use of the word 'shall' in MCL 691.1404(1) and the word 'may' in MCL 691.1404(2) indicates that service on an individual is not the only method of serving proper notice;" "whether an individual described in MCR 2.105(G)(2) can delegate the legal authority to accept lawful process under MCL 691.1404(2);" and "whether the defendant should be estopped from asserting that the statutory notice requirement was not met."

***People v Carter;* SC 156606, COA 331142**

Criminal Law: Issues include "whether the defendant was properly assigned 10 points under Offense Variable 12 (OV 12), MCL 777.42." An assessment of 10 points is proper when "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." The Court of Appeals noted that the evidence indicated that the defendant shot at the victims three times and concluded that each time the defendant pulled the trigger was a "contemporaneous felonious criminal act" for purposes of OV 12.

***People v McKeever;* SC 156161, COA 331594**

Criminal Law: The Supreme Court directed briefing on the issues of "(1) whether the defendant is entitled to a new trial based on either trial court error or ineffective assistance of counsel, where the defense witness that was not produced at trial also did not appear at the post-conviction evidentiary hearing; and (2) whether the witness's failure to appear at the hearing is attributable to the defense under the circumstances of this case."

***People v Walker;* SC 155198, COA 327063**

Criminal Law: Among the issues to be considered are "(1) whether the defendant is entitled to a new trial based on the trial judge's comments to the jury in lieu of the standard 'deadlocked jury' instruction, M Crim JI 3.12; (2) whether Offense Variable 19 (OV 19), MCL 777.49, was improperly assigned 10 points for interference with the administration of justice . . . and (3) if OV 19 was misscored, whether the defendant is entitled to resentencing before a different judge based on the judge's verbal exchange with the defendant at sentencing."

** As of 6/15/2018*

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Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Appellate jurisdiction - mootness

TM v MZ
__ Mich ___ (Docket no. 155398, rel'd 5/18/18)
Panel: Supreme Court
Trial court: St. Clair Circuit Court

The petitioner obtained a personal protection order under MCL 750.411s against a neighbor, prohibiting the respondent from posting messages about the petitioner on social media. The respondent appealed, but the order had expired by the time the case was considered in the Court of Appeals and the panel held the issue was moot. The Supreme Court reversed, "conclud[ding] that identifying an improperly issued PPO as rescinded is a live controversy . . ." It "expressed no opinion" regarding how much relief could be afforded.

In re R Smith
___ Mich App ___ (Docket no. 339478, rel'd 4/24/18)
Panel: Murphy, Jansen, Swartzle
Trial court: Livingston Circuit Court, Family Division

The trial court terminated the respondent's parental rights to her severely handicapped child, who died while her appeal was pending. The Court of Appeals held the appeal was not moot, even though "reunification" with the child would no longer be possible, because the termination of the respondent's parental rights "may have collateral legal consequences . . ."

In re Johnson
__ F3d ___ (Docket no. 16-8045, rel'd 4/16/18)
Panel: Harrison, Opperman, Wise
Trial court: Southern District of Ohio Bankruptcy Court

A creditor appealed from the approval of a bankruptcy plan. The Sixth Circuit rejected the debtor's argument that the appeal was moot because "relief," that is, reversing approval of the plan, would have a "detrimental impact" on him and the settlements with his other creditors, but agreed that the appeal was "equitably" moot. It noted that the appellant has not sought a stay of the plan; that the plan had been "substantially consummated;" and that rights of third parties would be affected.

Appellate jurisdiction – final order

Bd of Trustees of the Plumbers, Pipe Fitters & Mechanical Equipment Serv v Reece
___ F3d ___ (Docket nos. 16-3285, 17-3394, rel'd 3/12/18)
Panel: Sutton, Kethledge, Larsen
Trial court: Southern District of Ohio

The plaintiff union sued three employers, alleging breach of a collective bargaining agreement. The district court initially found in favor of the union, but on reconsideration held that one employer was not bound by the agreement. Both sides appealed. Two of the employers and the union stipulated to an order that set the amount of damages but provided that "none of the parties are waiving any rights or arguments" in either the district or appellate courts. The Sixth Circuit ultimately held that the stipulated order was not "final" because it "leaves open the possibility of 'piecemeal appeals'" in the event the court did "anything [other than] affirm" the district court.

Mischler v Bevin
___ F3d ___ (Docket no. 18-5249, rel'd 4/4/18)
Panel: Guy, Daughtrey, Sutton
Trial court: Eastern District of Kentucky

In a civil rights case, the plaintiff moved to have the district court judge recused because of an alleged relationship between the judge and an employee of one of the defendants. The motion was denied and the plaintiff appealed. The Sixth Circuit held the order was not appealable. Although there is an exception to the "final order" rule in mandamus proceedings, it "applies only when a petitioner alleges that delay will cause irreparable harm." Because the plaintiff did not establish "greater harm" than that of any other litigant, the appeal was dismissed.

Royce v LaPorte
Docket nos. 337549; 340354, rel'd 5/8/18
Panel: Cameron, O'Brien, Gadola
Trial court: Oakland Circuit Court

In another in the multitude of cases concerning whether an order "affects custody" of a minor for purposes of MCR 7.202(6)(a)(iii), the Court of Appeals considered two appeals on remand from the Supreme Court. It held that the denial of the defendants' two motions to expand parenting time, from two days a week to "a 50/50 schedule," were appealable orders.

Dubin v Fincher
Docket no. 339175, rel'd 1/30/18*
Panel: Murphy, Sawyer, Beckering
Trial court: Washtenaw Circuit Court

In a domestic relations case, the defendant filed both an application for leave to appeal and a claim of appeal from an order denying her motion for expanded parenting time and a reunification plan. The application for leave to appeal was denied "for lack of merit." The Court of Appeals ordered supplemental briefing on the issue of jurisdiction in the (alleged) appeal of right, but held the order did not "affect custody" under MCR 7.202(6)(a)(iii). The order appealed from "did not change the status quo nor is there any evidence indicating that the [requested] modification . . . had the potential to change the [child's established custodial environment]."

*On 6/20/18, the Supreme Court issued an order vacating the Court of Appeals' opinion and remanding the case "for reconsideration in light of *Marik v Marik*, 501 Mich 918 (2017), and *Royce v LaPorte*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket Nos. 337549 and 340354)." ___ Mich ___ (Docket No. 157369), rel'd 6/20/18.

Appellate Practice Section Mission Statement

The Appellate Practice Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Lowe v Lowe
Docket no. 340128, rel'd 2/20/18
Panel: Sawyer, Murray, Stephens
Trial court: Oakland Circuit Court, Family Division

The husband's parents motion for grandparenting time with their son's child was denied and they appealed. The mother argued that the order was not "final." The Court of Appeals followed *Varran v Granneman*, 312 Mich App 591, 602; 880 NW2d 242 (2015), which held that an order denying grandparenting time "is a final judgment or order pursuant to MCR 7.202(6)(a)(iii) because it affects the custody of a minor."

O'Connell v Berrien Co Treasurer
Docket no. 338827, rel'd 2/15/18
Panel: Markey, M. J. Kelly, Cameron
Trial court: Berrien Circuit Court

The plaintiff, apparently in pro per, filed an action challenging a tax foreclosure. The trial court dismissed it, without prejudice, because it should have been filed as a motion for relief from judgment in the foreclosure case. The plaintiff appealed. The Court of Appeals held the order was not a "final order" because it did not decide any of the plaintiff's claims and the dismissal was "without prejudice." The panel went on, however, to treat the appeal as an application for leave to appeal but affirmed the trial court's decision.

Appellate jurisdiction - standing

22022 Michigan Avenue LLC v Brome Burgers & Shakes, LLC
Docket no. 335839, rel'd 4/12/18
Panel: Gleicher, Boonstra, Tukel
Trial court: Wayne Circuit Court

One of several defendants moved for entry of a "judgment" rather than a stipulated "order of dismissal." The trial court denied the motion and that defendant appealed. The Court of Appeals majority held it did not have standing because it did not establish that it "suffered any particularized or concrete injury." Rather, its argument concerned only "the liability of other potential alleged tortfeasors . . ." Judge Gleicher concurred in the result, but would hold that "Brome was aggrieved by an order entered against its will that it believed inadequate to protect its rights."

Thesier v TBSK Limited Partnership
Docket no. 336398, rel'd 5/22/18
Panel: Murphy, Jansen, Swartzle
Trial court: Ingham Circuit Court

The plaintiffs were limited partners in a partnership formed to develop a shopping center. The general partner was another partnership, with three individual members. Some time later, the general partner effectively abandoned the project. The plaintiffs filed suit and one of them was appointed as receiver. Eventually, the property was sold and the plaintiffs sought distribution of the profits and other relief. Klein (succeeded by her estate) was the only member of the defendant partnership to appear in the case. The trial court granted the sales profits to the plaintiffs. Both parties appealed. The Court of Appeals rejected the plaintiffs' argument that Klein's estate was not a "aggrieved party." The trial court's order of distribution "constituted a 'concrete and particularized' injury . . ."

Appellate jurisdiction - admiralty

Buccina v Grimsby
___ F3D ___ (Docket nos. 17-3679, 17-3721, rel'd 4/27/18)
Panel: Batchelder, Sutton, White
Trial court: Northern District of Ohio

The plaintiff alleged both diversity and admiralty jurisdiction. Because she wanted a jury trial, however, she pleaded that the case was not an "admiralty and maritime claim." After a verdict for the defendant, the district court granted the plaintiff's motion for a new trial. She appealed and the defendants cross-appealed. The Sixth Circuit held it did not have jurisdiction. "By opting not to proceed with the case as an admiralty claim, [the plaintiff] told the defendant and the district court that ordinary civil procedures would apply" and the interlocutory-appeal opportunity [allowed umder 28 USC 1292(a)(3)] does not." While the plaintiff could have "redesignated" the case earlier to take advantage of the admiralty rules, she did not.

Appellate jurisdiction – time to appeal

Ader Estate v Delta College Bd of Trustees
Docket no. 337157, rel'd 6/5/18
Panel: Meter, Gadola, Tukel
Trial court: Midland Circuit Court

The trial court granted summary disposition of the plaintiff's claim. He filed a motion for reconsideration, which was denied, and he appealed. On appeal, the defendant argued the motion for reconsideration was defective, thus rendering the appeal untimely. The Court of Appeals held that "despite

the alleged defects," because the motion was accepted by the trial court and the claim of appeal was filed within 21 days of denial of the motion, the appeal was timely.

Appellate jurisdiction – tax foreclosure

In re Petition of Berrien County Treasurer/ Berrien Co Treasurer v New Products Corporation
Docket no. 330795, rel'd 4/10/18
Panel: Hoekstra, Stephens, Shapiro
Trial court: Berrien Circuit Court

The respondent owned seven parcels in Benton Harbor. It challenged the tax foreclosure of six of them but lost. In an earlier appeal (Docket No. 327688), the Court of Appeals held the respondent was required to pay "the full amount owed on the judgment of foreclosure" in order to appeal. He paid the tax on five of the parcels and appealed again, but the court held he was required to pay the entire amount due. After remand from the Supreme Court, the Court of Appeals held that he was only required to pay "the amount owed for parcels that are the subject of the appeal," but it declined to consider the respondent's arguments regarding the one parcel on which the tax due had not been paid.

Preservation – issue not briefed

Gohl v Tubiak
Docket nos. 335389 and 335604, rel'd 5/3/18
Panel: Boonstra, Beckering, Ronayne Krause
Trial court: Wayne Circuit Court

The plaintiff was a special education student who alleged he had been abused by a teacher. The suit named a multitude of parties and asserted a variety of claims. The Court of Appeals found that "neither party has undertaken to brief the issue" of whether one of the plaintiff's claims was viable and "decline[d] to undertake the task" itself.

Groulx v Bay Co Prosecutor
Docket no. 335811, rel'd 2/27/18
Panel: Cavanagh, Hoekstra, Beckering
Trial court: Bay Circuit Court

The plaintiff filed a pro per claim for malicious prosecution. The trial court dismissed it based on governmental immunity. The plaintiff appeal, but "entirely fail[ed] to address governmental immunity" in his briefs. The court considered the question anyway, but affirmed the trial court.

Preservation – issue abandoned

Meredith Estate v BRT Properties LLC
Docket no. 339045, rel'd 5/29/18
Panel: Meter, Gadola, Tukel
Trial court: Washtenaw Circuit Court

The plaintiff made two arguments in the trial court. On appeal, she "provided cursory analysis" regarding one of them. The Court of Appeals deemed it abandoned but went on to state the plaintiff would lose anyway.

Preservation – questions presented

Andrich v Delta College Bd of Trustees
Docket no. 337711, rel'd 6/5/18
Panel: Meter, Gadola, Tukel
Trial court: Saginaw Circuit Court

The plaintiff's claim was dismissed and he appealed. The Court of Appeals reversed in part but declined to consider an additional argument, noting that it was not included in the statement of questions presented. Although it was addressed "somewhat" in the reply brief, "a party may not raise new or additional arguments in its reply brief." The plaintiff also "did not adequately address" the trial court's reasoning in his brief and another argument was "deemed abandoned" because it was not presented to the trial court.

Szymanski v Szymanski
Docket no. 336915, rel'd 3/13/18
Panel: Talbot, Beckering, Cameron
Trial court: Lapeer Circuit Court, Family Division

In a divorce action, the trial court did not award the defendant (husband) spousal support. Rather than making it a "question presented" on appeal, however, he asked for a remand "in the conclusion section of his brief." Despite noting that it was not required to, the panel considered the issue and affirmed the trial court order.

Preservation – post-trial motions

Saiyed v Nair
Docket no. 338549, rel'd 5/22/18
Panel: Roynane Krause, Markey, Riordan
Trial court: Washtenaw Circuit Court

In a third-party auto case, the plaintiffs appealed from a jury verdict that they had not met the no-fault threshold or suffered excess economic damages. They alleged there was insufficient evidence to support the verdict. The Court of Appeals held the issue was not preserved because the plaintiffs did not raise it in any post-trial motion. The panel also

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Selected Decisions of Interest

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held that the plaintiffs had failed to identify a "miscarriage of justice" that would result from a lack of review.

Attorney fees – appointed counsel

In re Sharon Attorney Fees
Docket no. 336408, rel'd 2/27/18
Panel: Murphy, O'Connell, K. F. Kelly
Trial court: Kent Circuit Court

The petitioner was appointed appellate counsel in a guilty plea case and requested "extraordinary" fees (approximately $500 more than the county's maximum), because the issue was unfamiliar and the case involved several conferences with the defendant and his trial attorney. The trial court denied her motion without comment. Following the Supreme Court's order in *In re Ujlaky*, 498 Mich 890 (2015), the Court of Appeals remanded with directions to the trial court to "either award the requested attorney fees which appear reasonable to this panel, or, if the extra fees are not awarded, articulate on the record or in writing the basis for determining that such fees are not reasonable."

About the Author

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