

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Spring 2015



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From the Chair

By William Housefield



Our annual meeting on June 18 & 19 in Traverse City is rapidly approaching. If you have not already done so, please register, and make your hotel reservations as soon as possible. There are two forms to fill out: one for the hotel at the Park Place and the other for registration for the meeting and the Hall of Fame dinner. You will find both forms included in the Newsletter. While there is no cost to attend the actual meeting on Friday morning, there is a cost for the dinner and breakfast. **Room Registrations should be made by May 18** and you can call (231) 946-5000 and ask for the Workers' Compensation Law Section room block.

Meeting Registration: *online* or by *mail/fax form*.

There is no cost to attend the annual meeting portion of this event, but there is a cost for dinner

As many of you may know, the Council voted to induct Myron Charfoos and Thomas Cypher into the Workers' Compensation Hall of Fame. Myron practiced for over 47 years on the east side of the state and was a founding member of Charfoos & Reiter, PC. Tom practiced for 43 years on the west side of the state and was a founding member of Bleakley, Cypher, et.al. Please plan on attending and help us celebrate their induction. The Cocktail party begins at 5:30 pm followed by dinner at 7:00 pm. The induction ceremony will take place as the dinner is wrapping up. Your Council is also planning an after dinner get together on Thursday evening and will provide more details at the meeting.

For those of you who may not have heard, effective April 13, 2015, we have a new Director of the Workers' Compensation Agency. Mark Long took over those responsibilities from Kevin Elsenheimer. Director Long has agreed to appear and address the Section on June 19, 2015, prior to our general business meeting.

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From the Chair Continued from page 1

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George Wyatt, III, Michigan Compensation Appellate Commission

Danielle Michelle Brown, Commissioner Liaison

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Ella S. Parker, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

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Chief Magistrate Lisa Klaeren will also address the section on all issues pertaining to MAHS, including the evolution of the new scheduling order. This is the perfect time to ask pertinent questions relevant to you and your clients.

Our guest speaker will enlighten all of us on how statutes are enacted and rules come into being. Nell Kuhnmeunch earned a law degree and served as Chief of Staff to two different Speakers of the Michigan House of Representative. She recently retired from Governmental Consultant Services, Inc., where she was one of the most influential lobbyists in the state.

As always, our meeting will wrap up with a vote for next year's Council officers and members. I look forward to seeing all you as I hand over the reigns to the new Chairperson.



Join the section. It's all it's cracked up to be.
<http://www.michbar.org/sections>



A Word from the Editor

By Ella S. Parker

Many of you may recall an article I wrote for the Winter edition of the Newsletter in 2014 dealing with change and stepping outside of our comfort zone. The article referenced a quote by English Author Neil Gaiman. The quote began “I hope that in this year to come, you make mistakes.” Mr. Gaiman’s point was that if we try something new, we may make mistakes but, by doing so, we are truly living.

What I took from his quote was encouragement to try new things and step outside of my comfort zone so that I could live life fully and appreciate all that life has to offer. I had an opportunity to do that in April of this year when I accepted a new position with Accident Fund Holdings Inc. as a managing attorney. While I hope that I do not make too many mistakes, I am learning something new every day. I stepped outside of my comfort zone and took on the challenge of truly living.

I also stepped outside of my comfort zone and agreed to attend the Past Chairpersons’ Golf Outing. Too many times we get caught up in our world with work, family, clients and businesses to run that we do not stop and appreciate that we may be where we are today because of those that came before us. I am just as guilty of this as others. But, this year, even with all the changes going on with accepting a new position and leaving friends, partners and clients behind, I agreed to attend the Past Chairpersons’ Luncheon, Golf Outing and Dinner. I am not a great golfer and golfing is not one of my passions as any of you who may have golfed with me over the years probably knows. I was concerned about taking time away from my new job when there is so much to learn and so many meetings to attend. But, I committed to the outing (with an exclusionary clause if there was rain) and that is another decision I am happy I made.

The weather cooperated and provided us with a beautiful warm day with a nice breeze. I also had an opportunity to

golf with two of my former partners—men that I admire and respect: Don “The Deuce” Ducey and Bill Listman. We had a blast on the golf course but had an even better time at the dinner afterward.

Many of our past leaders attended, including George Wood, Ed Welch, Steve Pollok, Chuck Palmer, Mike Brenton, Marty Glista, Tom Bobay, and Tony Marchese Jr. Our current chairperson Bill Housefield was present, along with Tim Esper and myself from your current Council. Mr. Esper did an excellent job with the weather, the facilities and the food. Yes, Tim is also taking credit for the beautiful weather.

It’s funny because I still feel like a “newbie” in the Comp world, even though I have been practicing for over 25 years now. We sat around and discussed issues that workers’ comp is facing today and reflected on prior members who have passed on but are not forgotten. Those stories and those shared memories are what made the night so special. “I’ve been beaten by the best and I’ve been beaten by the worst, so take a number,” or words to that effect was a classic story about Karl Mistiff. Another great story was about a new attorney many years ago who brought a copy of the statute with him to trial and the defense attorney exclaiming to the ALJ (back then), “look he doesn’t even know comp, he’s brought the statute with him!”

I would like to encourage some of our other “newbies” to attend the Past Chairpersons’ Outing in the Future. One day, 25 years from now, you may be the one sitting around a table sharing memories and keeping traditions alive. Step outside of your comfort zone and take time to reflect.

We look forward to seeing everyone in Traverse City and are in the process of working on after dinner events on Thursday and after golf/wine tour events for Friday evening.

Please take the time to look at some of the pictures from the Golf Outing in our Photo Section. ✖



Scenes from the Past Chairpersons' Golf Outing



Is Don Waldron trying to hold the cart up or is the cart holding him up?



Don Ducey explaining to Bill Listman how to send a text message on a smart phone



Bill Listman talking trash to Mark Farrell about his game.



Bill Housefield, Mark Farrell, Don Waldron and Steve Pollok competing for the best legs contest.



Starting on the left and going around the table clockwise: Chuck Palmer, Ella Parker, Tom Bobay, Mike Brenton, Tony Marchese, Jr, George Wood, Tim Esper, Bill Housefield, Ed Welch, Steve Pollok, Marty Glista, Bill Listman and Don Ducey.

From the Director: Mark Long

First, I would like to thank you for allowing me a moment to introduce myself as the new Director of the Workers' Compensation Agency (WCA). To some of you, this is just Mark Long in a different capacity. To others, this may be our first introduction. No matter what category you find yourself, please know that I am humbled at this opportunity and look forward to serving with dedication and commitment to all those that come into contact with the workers' compensation system and working with the Workers' Compensation Section of the State Bar of Michigan.

I have been involved in workers' compensation for nearly 25 years. I have served in multiple capacities starting as a file clerk at the Accident Fund, working as a claims examiner, mediator, division manager, Funds Administrator, and now WCA Director. Each position has brought its own set of unique challenges; but, more importantly, each afforded me an opportunity to learn not only about workers' compensation, but also about how different processes impact all of those that are touched by our program.

As we move through this next year, we expect to complete work on the Agency's new IT system. This will mean that many of our interactions will look different in the future than they do today, as most of them will be in electronic format. Both claims reporting and applications or petitions will be in electronic forms. Moreover, as the responsibility for docket and litigation management com-

pletes its transition to the Michigan Administrative Hearing System's Board of Magistrates and the Michigan Compensation Appellate Commission, we are partnering with them to ensure a seamless transition as they also move to a new IT system. We will continue to keep our stakeholders apprised as to the status of the new IT systems.

The transition to a new system and more electronic interactions may require some updated rules. In addition, we will also be performing the annual update to the Health Care Services Rules (HCSR). The HCSR update will address source documents and the conversion factor, as well as some treatment modalities and prescriptions.

As I indicated above, workers' compensation touches each individual uniquely depending on how you come into contact with the workers' compensation system. It may be through the receipt of weekly benefits or involvement with litigation; it may be through the filing of insurance coverage or the payment of a Funds assessment; no matter the situation, the WCA impacts each process. My goal is to ensure that our processes operate at the highest level of efficiency. This means we will approach each decision with an attitude of public service and establish a goal of having limited, but consistent, interactions. Efficient operations should not create additional burdens. Thus, my goal is that our interactions always be burden free.

If you wish to contact me, please feel free to do so either by email at longm1@michigan.gov or phone at (517) 636-6601. ✖

Board of Magistrates Update

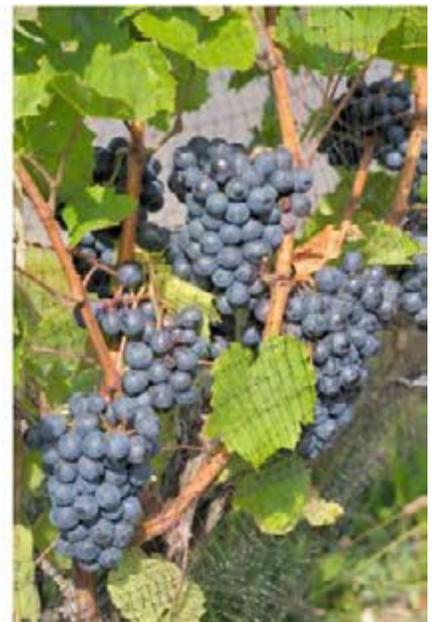
By Chief Magistrate Lisa Klaeren

Chief Magistrate Klaeren will be providing her update at the upcoming hearing and welcomes any questions you may wish to address at that time.

Workers' Compensation Section State Bar of Michigan Annual Summer Meeting

June 18-19, 2015

Park Place Hotel • Traverse City, Michigan



Thursday, June 18

4:00 pm Council Meeting

**5:30 pm Welcome Reception followed by
Dinner & Hall of Fame Induction**

Friday, June 19

8:00 – 10:00 am Breakfast

9:00 – 12:00 pm Business Meeting

12:00 – 6:30 pm Golf or Free Time

6:30 – 8:00 pm To be Determined

Optional Scheduled Friday Afternoon Events

Golf: Contact David DeGraw at 616-446-7200 or ddegraw@shrr.com. **Additional activities:** Visit the beach at Grand Traverse Bay, browse the shops in downtown Traverse City, or relax on your own.



Park Place Hotel

GROUP NAME: State Bar of MI/Workers' Compensation Law Section

GROUP CODE: WCLS DATES: June 18-20, 2015

Reservations may be made by utilizing this form or by calling **231-946-5000** and asking for the **Workers' Compensation Law Section** room block. Reservations must be made by **May 18, 2015**. Reservation requests received after this date will be subject to availability, and the group rate is not guaranteed. Subject to availability, the Group Rate will be honored for those who wish to extend their stay.

Check-In Time: 4:00PM

Check-Out Time: 11:00AM

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| <p><i>Rooms feature either one king or two queen beds, a small refrigerator, microwave and coffee maker and complimentary high-speed wireless internet.</i></p> | <p>Group rate \$149.95 plus 6% state sales tax and a 5% local assessment per room per night. (\$166.44) Rate includes lodging only.</p> | <p><i>Pet-friendly rooms may be available; please inquire when making reservations if you plan to bring a furry friend. Additional charges may apply.</i></p> |
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If you would like a confirmation sent to you via email, please be sure to provide your email address below.

Group Code: WCLS

Arrival Day/Date: _____ Departure Day/Date: _____

Name: _____

Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

Email Address: _____

Room Type Request (king bed, two queen beds): _____

Conference Attendees sharing same room: _____

Special Requests (accessibility, dietary, etc.): _____

**All reservation requests must be guaranteed by a credit card (see below)
or accompanied by a deposit equal to one night's stay per room.
Reservations may be cancelled without penalty up to 24 hours prior to your arrival date.**

AUTHORIZATION NOTE: I authorize and acknowledge that my reservation is guaranteed by my payment card as detailed below. A credit card must be presented at check-in.

Credit card #: _____ Expiration Date: ____/____/____ Billing Zip Code: _____

Signature: _____

Name and/or Company Name as it appears on card: _____

Mailing/Fax/Email Information:
Park Place Hotel
Attn: Reservations Department
300 East State Street, Traverse City, MI 49684
Phone: 231-946-5000 Fax: 231-946-2772
reservations@park-place-hotel.com

Caselaw Update

By Martin L. Critchell

Since the last issue of the newsletter, the Michigan supreme court issued no opinion concerning workers' compensation, the Michigan court of appeals issued four, and the Michigan compensation appellate commission, five.

Omian v Chrysler Group, LLC: Crime does not pay

Monasser Omian had two jobs. One job was working at Chrysler that he left because of any injury to his back.¹ The other job was at an unnamed criminal enterprise that he left when he was arrested, convicted and jailed.²

When Omian was released from jail, Chrysler filed a claim to reduce or end wage loss compensation because the activities in the criminal enterprise showed that he had an ability to work and earn money.³

Two of the three judges on the panel of the Michigan court of appeals hearing the case agreed that an "ability to engage in illegal activity does not equate with the ability to earn wages within the meaning of the statute [in the workers compensation act.]"⁴ because

"wage earning capacity is defined as wages that can be earned at a job reasonably available. See MCL 418.301(4)(b), MCL 418.302, and MCL 418.40192) (c). Neither the Legislature nor our Supreme Court has precisely defined what exactly constitutes a reasonably available job, and indeed, the word "job" is not defined at all. However, I think as a matter of public policy, it would be dangerous to consider illegal activities to be reasonably available jobs." *Omian*.⁵

The court of appeals returned the case for the Michigan appellate commission to allow Chrysler to prove the facts of the indictment – bank records that an account of \$24,000 was opened after leaving Chrysler and testimony of accomplices about Omian's capacities – to contradict the credibility of Omian. *Omian*.⁶

The decision is authoritative until the Michigan supreme court reverses.

Moore v Nolff's Constr A return to *Reed v Yackell*

The Michigan supreme court ruled in the case of *Reed v Yackell*.⁸ that someone who was injured while working for

another could not recover workers' compensation when having a separate business involving the same kind of service. *Reed*.⁹ ("subsection 161(1)(n) sets forth three criteria for determining whether a person performing services for an employer qualifies as what is commonly called an 'independent contractor' rather than an employee. * * * Reed was performing a service in the course of Mr. Food's business. We thus turn to the three criteria required for the exception in subsection 161(1)(n): whether Reed, in relation to the service he provided for Mr. Food, (1) maintained a separate business offering *the same service* ...") (original emphasis) The Court concluded that the business that Ricky Reed had – painting houses – was not the same as the service provided to Mr. Food – delivering foodstuffs – and so, was an employee, not an independent contractor. *Reed*.¹⁰ ("where the most Reed can point to is that he was a house painter at times, the tests to take him out of the workers' compensation system are not met.") To illuminate the point, the Court postulated that someone injured doing roofing work for an employer would be excluded if having a separate roofing business. *Reed*.¹¹ ("for example, if the service that the person performs for the employer is roofing, to be an independent contractor and, thus, ineligible for workers' compensation, the person must maintain a separate roofing business ...")

The particular circumstance that was postulated by the Court when deciding the case of *Reed* was presented to the court of appeals by the case of *Moore v Nolff's Constr*.¹² Eric D. Moore was injured while shingling a roof for Nolff's Construction, *Moore*,¹³ while having his own roofing business. *Moore*.¹⁴ Perhaps not too surprisingly, the court of appeals barred the claim by Moore for workers' compensation from Nolff's with the conclusion that he was an independent contractor on the authority of *Reed*. *Moore*.¹⁵ ("the record showed that [Moore] maintained a roofing business. * * * the statutory phrase "in relation to this service" refers to roofing in general. [citation of *Reed* omitted] In other words, the phrase 'in relation to this service' refers to the *type* of services performed, not the identity of the party receiving the services.")

Although not authoritative because it was not released for publication, *Moore* should be considered for having revisited and applied what had been only postulated by the Court and perhaps just obiter dicta in *Reed*.

The case was not presented to the Court for review.

Arbuckle v Gen Motors LLC
Union representation of retirees

Robert Arbuckle qualified for wage loss compensation and a total and permanent disability pension because of an injury that he sustained working for General Motors in 1991. *Arbuckle v Gen Motors, LLC*.^{16,17} Arbuckle also qualified for social security disability insurance. *Arbuckle*.¹⁸

The wage loss compensation was not reduced by the amount of the disability pension because of an agreement between Arbuckle's employer, GM, and his collective bargaining agent, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, that was in effect when he was injured and left work. Years later, the agreement between GM and the UAW was changed to allow the reduction of the wage loss compensation if the wage loss compensation, pension, and SSDI together exceeded the average weekly wage when an employee was injured and retired before January 1, 2010. *Arbuckle*.¹⁹

GM reduced the wage loss compensation by the terms of the last agreement and Arbuckle objected because SSDI was part of the calculation. *Arbuckle*.²⁰ ("The thrust of [Arbuckle's] objection to coordination of benefits was that [GM's] formula violated MCL 418.354(11) because it used SSDI benefits ...") The director of the workers' compensation agency proposed that the last agreement was not effective having been reached long after Arbuckle had retired but did not decide that. *Arbuckle*.²¹ The workers' compensation board of magistrates did decide this. The board said that the last agreement could not apply because "there was insufficient evidence to establish that the UAW had authority to bargain on [Arbuckle's] behalf and bind him to the 2009 Agreement." *Arbuckle*.²² The Michigan compensation appellate commission reversed the board and the case was then accepted for review by the court of appeals.

The court of appeals ruled that the last agreement that

allowed coordination was not effective because "the record contains no evidence that [Arbuckle] authorized the UAW to act as his representative to modify the 1990 agreement under which he retired." *Arbuckle*.²³

The sufficiency of the record was crucial to the court of appeals as that was what distinguished the case from *Murphy v City of Pontiac*²⁴ in which a subsequent change did apply. The court of appeals said that "the crucial distinction between *Murphy* and the present case is that in *Murphy* the parties had stipulated that 'the pension plan may ... be changed by collective bargaining or by ordinance amendment.' There was no such stipulation in the present case." *Arbuckle*.²⁵ But the court of appeals did not appreciate that the "gap" in the record occurred only because the subject was not before the director or the board. The subject was not before the director as the director interjected the question after the hearing and not before the board as the director did not decide the case on the basis of the question he had interjected.

The supreme court is considering a request for review of the decision by the court of appeals.

ACE American Ins Co v Workers Compensation Agency:

A Form 400 is not workers compensation insurance

ACE American Insurance and Pacific Employers Insurance issued policies of workers compensation insurance for some of the subsidiaries of Delphi Corporation and filed Form 400s with the workers' compensation agency that inaccurately listed Delphi as the insured (Delphi had been approved to self-insure). *ACE American Ins Co v Workers Compensation Agency/Director*.²⁶ When Delphi filed for bankruptcy, the director of the workers' compensation agency and the trustees of the self-insurers security fund claimed that ACE American and Pacific Employers were responsible for claims to workers' compensation by employees of Delphi because of the Form 400s. *ACE American Ins Co*.²⁷

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The court of appeals rejected the claims with the ruling that the Form 400s could neither create nor modify the policy of insurance that was issued. *ACE American Ins Co.*²⁸ (“the function of a Form 400 is to indicate, inform, or announce the existence of an underlying insurance obligation, but not to create that obligation. * * * the Legislature understood that an insurance policy becomes effective and enforceable prior to and independent of an insurer filing a Form 400.”)

The supreme court is considering a request for review of the decision by the court of appeals that was filed by the director.

Pudvan v Midland Cogeneration Venture:

Knee replacement does not equal a specific loss

Rick Pudvan had a knee joint replaced on April 11, 2011 because of an injury at work for Midland Cogeneration Venture on August 27, 2010 (that is, when the so-called “uncorrected” standard from *Trammel v Consumers Energy Co*, 2009 Mich ACO 126 applied). *Pudvan v Midland Cogeneration Venture.*^{29,30}

He then claimed a specific loss to qualify for specific loss compensation that could not be reduced by the group disability benefits and wages that he earned after the injury. *Pudvan.*³¹ This claim was rejected by the Michigan compensation appellate commission. The commission ruled that a specific loss must be established before surgery by the loss of the usefulness of the leg, not because of some implant. *Pudvan.*³² (“a knee replacement alone is not sufficient evidence of a [specific] loss. In our view, the uncorrected standard of *Trammel [v Consumers Energy Co]*, 2009 Mich ACO 126 applies after surgery, but the loss of usefulness must occur before that surgery.”) And Pudvan had the use of the injured leg having “worked [his] regular job right up until the surgery. *Pudvan.*³³ (in the matter before us, [the worker] essentially worked [at his] regular job right up to the surgery. In other words, [he] [did not] prove the loss of usefulness of the leg. * * * he retained the usefulness of his leg at the time of the knee replacement surgery.”)

The ruling in *Pudvan* is faithful to the pronouncement by the Court in the case of *Cain v Waste Mgt, Inc (After Remand)*.³⁴ There, the Court ruled a specific loss could be established by either physical loss (*amputation) or an equivalent loss of the use of a leg (or other part of the body) before any surgical implant or use of a brace or crutch. *Cain.*³⁵ (“loss’ includes not only amputation but also loss of usefulness. * * * we referred to this as anatomical loss or its equivalent.”) Pudvan did not experience the physical loss of his leg and the injury to his knee at work did not result in an equivalent loss of use as he could drive a car, walk in and around at home and work without a cane or brace, and get in and out of a chair.

Salenbien v Arrow Uniform Rental Ltd Partnership
(After Remand):

Injury between work locations

Jason Salenbien was injured driving his car from a sales call to his office at Arrow Uniform Rental to do some work, *Salenbien v Arrow Uniform Rental Ltd Partnership (After Remand)*,³⁶ and he and his auto no-fault insurer, Allstate Insurance, claimed that Arrow was responsible for workers’ compensation because the injury was **arising out of and in the course of employment** by Arrow. *Salenbien (After Remand)*.³⁷

The Michigan compensation appellate commission ruled that the place of the departure and the intended destination resolved whether Salenbien had been **in the course of employment** but not whether his injuries had been **arising out of employment**. *Salenbien After Remand.*³⁸ (“an injury is not compensable just because it occurs while traveling on company business. This may establish that it occurred in the course of employment but is not dispositive of the issue of ‘arising out of.’)

The commission then found the record about **arising out of employment** was wanting. *Salenbien After Remand.*³⁹ (“We continue to affirm that portion of [the initial decision by the board of magistrates] that [Salenbien] did not preponderate in proving that the injuries he sustained on July 26, 2006 ‘arose out of’ his employment...” In the original decision, the board of magistrates said, “[Salenbien] is really the only person who knows everything that happened on the day in question, but because of his memory loss, all we are to speculate where he was headed... [he] has failed to sustain his burden [of proof].” *Salenbien After Remand.*⁴⁰ The commission said that the absence of evidence to contradict the claim was not germane. *Salenbien After Remand.*⁴¹ (“The lack of evidence suggesting [Salenbien] had non-work content does not serve as affirmative evidence of work intent or purpose.”)

Salenbien and the auto no-fault carrier, Allstate, have asked the court of appeals for review. ✖

Endnotes

- 1 *Omian v Chrysler Group, LLC*, ___ Mich App ___, ___ ; ___ NW2d ___ (2015) (WILDER, J., concurring).
- 2 *Id.* at ___.
- 3 *Id.*
- 4 *Id.* at ___ (STEPHENS, J., concurring).
- 5 *Id.* at ___ (RONANYE KRAUS, J., dissenting).
- 6 *Id.* at ___ (WILDER, J., concurring).
- 7 473 Mich 520; 703 NW2d 1 (2005).
- 8 Martin L. Critchell was counsel for an amicus curiae.
- 9 473 Mich 535, 536.

- 10 *Id.* at 537.
- 11 *Id.*
- 12 Unpublished opinion of the Court of Appeals, issued on February 5, 2015 (Docket no. 313440).
- 13 *Id.* at 2.
- 14 *Id.*
- 15 *Id.* at 7.
- 16 Unpublished opinion of the Court of Appeals, issued on February 10, 2015 (Docket no. 310611), 1.
- 17 Martin L. Critchell was counsel of record for General Motors.
- 18 Unpublished opinion of the Court of Appeals, issued on February 10, 2015 (Docket no. 310611), 1.
- 19 *Id.* at 2.
- 20 *Id.* at 3.
- 21 *Id.*
- 22 *Id.* at 4.
- 23 *Id.* at 4-5.
- 24 *Id.* at 6.
- 25 2015 Mich ACO 1 at 1-2.
- 26 *Id.* at 2.
- 27 472 Mich 236; 697 NW2d 130 (2005).
- 28 *Id.* at 257, n 20, 257.
- 29 2015 Mich ACO 4 at 1.
- 30 Martin L. Critchell was counsel of record for Midland Cogeneration.
- 31 2015 Mich ACO 4 at 5-6.
- 32 *Id.* at 6.
- 33 *Id.*
- 34 472 Mich 236; 697 NW2d 130 (2005).
- 35 *Id.* at 257, n20, 257.
- 36 2015 Mich ACO 5 at 2.
- 37 *Id.*
- 38 *Id.* at 5.
- 39 *Id.*
- 40 *Id.* at 9 (WYATT, Chair, concurring)(quoting magistrate opinion).
- 41 *Id.* at 5.