Michigan Appellate Practice Journal

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From the Chair

By Joanne Geha Swanson

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In this Issue

Words are the tools of the trade for appellate lawyers. But the truth is, many of us have had a fascination for words long before we became lawyers. At a much earlier age, I began developing self-imposed vocabulary lists from unfamiliar words I encountered while reading the articles of great writers in the Atlantic Monthly, the Smithsonian, or other favorite periodicals. I hung chalkboards on the walls of my kitchen so I could share unusual and interesting words with my children [the children are now grown but the chalkboards are still there]. And to this day, my favorite estate sale finds are vintage dictionaries.

A single word, in and of itself, can be a treasure. It is gratifying to find the one perfect word that expresses exactly what I mean. Or the one word that can substitute for three or four. For me, this process of refinement occurs when I edit - scrutinizing every word [yes, even whether to use "a" or "the"], rearranging words, cutting extraneous words, clarifying transitions, rewriting headings, and a myriad of other adjustments.

Not long ago, I read an article that emphasized the role of editing in writing. It was written by Jason Fried, Co-Founder and CEO of Basecamp, and described the college writing course he would like to teach.

"Every assignment would be delivered in five versions: A three-page version, a one page version, a three paragraph version, a one paragraph version, and a one sentence version," he wrote.

"I don't care about the topic. I care about the editing. I care about the constant refinement and compression. I care about taking three pages and turning it [into] one page. Then from one page into three paragraphs. Then from three paragraphs into one paragraph. And finally, from one paragraph into one perfectly distilled sentence."

Through this process, Mr. Fried believed, the writer would be asking, and understanding, "[w]hat's really important…Whittling it all down until all that's left is the point."

Mr. Fried wasn't talking about legal writing and appellate lawyers cannot realistically submit one-sentence, one-paragraph, or even three-page briefs. But distilling

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the point of an argument so it can be easily understood is the essence of persuasion. In fact, many of us engage in a very similar exercise when, in the course of preparing for oral argument, we must focus our presentation on the two or three points most essential to the desired outcome.

Speaking of oral argument, mark your calendars now for the Appellate Practice Section's annual meeting and seminar, which will be held in conjunction with the State Bar of Michigan NEXT Conference on September 27-28, 2018 in Grand Rapids. The seminar, moderated by Chair-Elect Bridget Brown Powers, will address the "do's and don'ts" of appellate advocacy in Michigan's appellate courts. Planning is also underway for a section-sponsored seminar on appellate briefing. Stay tuned for further information on these educational opportunities.

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.*

Endnote

1. https://m.signalvnoise.com/the-writing-class-id-like-to-teach-11b259f44a5d

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Proposed e-briefing Pilot Program

By Gerald F. Posner

More judges, staff, and attorneys are reading briefs on electronic devices, such as iPads or other tablets. The Appellate Practice Section Council was asked to provide recommendations for a pilot program that would allow lawyers to file briefs that would be easier to read on those kinds of electronic devices.

Reading a conventionally formatted brief on a tablet can be more difficult than reading the same brief on paper. The Council formed a Readability Subcommittee that explored how briefs could be formatted in ways that could make them easier for readers to efficiently engage in extended deep reading on electronic devices, while at the same time preserving or enhancing readability on paper.

After many months of work, a proposal was developed by the subcommittee, and approved by the Council, which presented recommendations for allowing and encouraging lawyers to file briefs in a more reader-friendly format for extended deep reading on tablets and on paper as well. These recommendations were based on the subcommittee's review of materials from the American Bar Association, researchers who study readability, and leading typographers, as well as from practical experience and feedback received from numerous attorneys to whom various ideas were presented.

The subcommittee's proposal provides that filing a brief in the format allowed by the pilot program would be optional, not mandatory. The subcommittee

addressed matters such as line spacing, margins, and font selection, while allowing attorneys some flexibility, within certain parameters and limitations, to encourage experimentation in developing a more readable brief on electronic devices. The subcommittee did not address or include many typographical or other formatting recommendations in the literature which it felt had a lesser or uncertain effect on readability. And because briefs filed under the pilot program, with larger margins and decreased line spacing, cannot be measured by the conventional 50 double-spaced pages, the proposal contains a word limit for these briefs, rather than a page limit. Considerable effort was made to find a word limit that closely approximated the current 50-page limit. We believe judges' experience in reading these briefs on electronic devices will be essential in crafting any final rule change.

The subcommittee's e-briefing pilot program proposal was recently submitted to the Court of Appeals Rules Committee for its consideration. Please watch for more information on the proposed e-briefing pilot program to be posted on the Appellate Practice Section SBM Connect webpage, and in the next edition of the Appellate Practice Section Journal.

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Recommended Reading for the Appellate Lawyer

By Mary Massaron

When I started the book reviews for this issue, I planned to focus on books about art law. In recent years, I have spent much of my free time at the Detroit Institute of Arts listening to lectures about art, attending receptions and dinners for opening exhibitions, and traveling with some of the many DIA auxiliary groups, such as the European Paintings Council, the American Art Wing Auxiliary, and the Visiting Committee on European Sculpture and Decorative Arts. And as I have attended lectures and events, my interest in art and in the legal issues arising out of art and museums has increased. The first review in this issue is of a general interest book about art law.

But as I was finishing the reviews over the weekend of March 24th, the news and social media began to focus on demonstrations around the country prompted by the Florida students from Parkland and their efforts to bring attention to nationwide gun violence and to urge what they characterize as "sensible gun laws." Several of my grandchildren marched in one of these demonstrations carrying their handmade signs seeking "books not bullets" in their schools. Unlike the relative security of my childhood in the 1950s when we had fire and tornado drills but never feared gun violence, young people today regularly practice emergency procedures to lockdown or exit their schools in the event of a shooter or other violent incident. For those of us who grew up before these events had become so commonplace that schools began to drill to practice for them, it is hard to imagine the changed worldview of today.

If you have ever lost someone – a brother, sister, friend – suddenly and without warning, you have some appreciation for the shock, grief, and trauma that follows. I confess to struggling to hold back tears every time I watch one of these national tragedies play out over the days and weeks following a mass shooting, especially one in a classroom. And whether you agree or disagree with the specific proposals that these young people are offering, I think we can all be inspired by their typically-American way of organizing to make legislative change.

So – inspired by their actions – I decided that, rather than finish the reviews looking at art law books, I would write about several books dealing with the Second Amendment and gun control in the hope of adding to the national conversation in a way that lends light – and not heat. The other three reviews therefore discuss books that offer an enlightening perspective on gun control and the Second Amendment.

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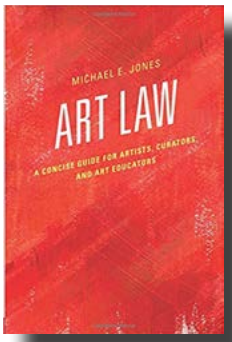


Art Law: A Concise Guide for Artists, Curators, and Art Educators

Michael E. Jones (Rowman & Littifield 2016)

This book is written for a broad general audience that includes "art and museum studies students, art educators, museum curators, collectors, patrons, gallery directors, museum trustees, and of course, artists." The author recognizes that the subject of art law embraces multiple legal subjects "related to creating, acquiring, collecting, lending, installing, exhibiting, marketing, dismantling, and disposing of art…" The legal issues that arise may be decided by analysis of contracts, commercial transactions, torts, taxes, international treaties, and intellectual property laws.

From discussions of the land use and zoning issues that arise from various zoning schemes permitting artists to work in loft apartments in commercial areas to explication of income tax issues arising from whether the artist is pursuing a hobby or business, the author offers an interesting overview of the legal issues that arise and the legal principles that may resolve them. Legal issues also frequently arise when art is donated – since donations are not typically just a charitable impulse but also result in complex legal issues about how to value the donations since this question controls all sorts of legal outcomes, from estate planning, with all of its financial and tax consequences, to insurance coverage, and how much can be paid if the donated art is lost or destroyed.

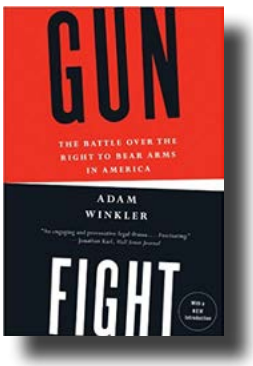
Because the book was written for a general audience, the author does not delve in depth into any of the points discussed. So sometimes, I wished for more detail to illuminate the discussion. For example, in the chapter on the relationship between museums and artists, the author leaps from an abbreviated discussion of an early Chicago Art Institute exhibition of Picasso to the City of Detroit's bankruptcy and its potential for requiring the sale of Detroit Institute of Arts works to pay off city creditors. Both of these subjects are used to illustrate a point – but are discussed so fleetingly – that it left this reader somewhat annoyed. But if you can overlook the loose organization and brevity of discussion, you might enjoy this book. It lifts the curtain to let the reader see the many legal issues that arise behind the scenes of every art auction or new exhibit.

The area of art acquisitions is increasingly fraught because of the risk of forgery, the difficulties with authentication, and the many art objects with a muddled or unclear provenance (or chain of ownership). These difficulties can arise when a work is purchased as an authentic work of art by an important artist only to have it challenged as a forgery or as inaccurately attributed to the artist. For modern pieces purchased directly from a living artist's studio, a painting is easy to authenticate. But for a Rembrandt, whose work is both expensive and old, and who worked in studios with students who copied his works and also worked with him on works, it can be difficult to be sure.

In addition, disputes arise out of claims by some governments over ownership of antiquities and culturally significant artifacts captured in war. Russia still has today in the State Hermitage Museum, art that was captured during World War II and taken back to Moscow. In addition, the Nazi looting of art has caused difficulties. Many of you undoubtedly saw the movie about Gustav Klimt's famous painting that was fought over in lengthy litigation debating whether the Vienna art museum which displayed it had a right to ownership, or whether it should be returned to its original owners, from whom the Nazis acquired it. Dealers, collectors, and museums acquired art at far below market values during that time because Jewish owners were forced to sell at bargain prices as they fled the country or went into hiding. Today, those whose art was confiscated or who were forced to sell, are, not surprisingly arguing (and bringing legal actions) to require that the art be returned to them or that they be paid its fair value.

The final two chapters in the book also discuss copyrights and reproduction rights, issues around First Amendment protections and privacy rights, and the funding of the arts, through grants, and foundations and the government.

Jones' book has basic information about legal issues that arise in the art world. It serves as a decent introduction to the field. But it offers only an overview. If, like me, you find it only awakens your curiosity, then you may want to search out other books, some of which I plan to review in a future issue.



Gunfight: The Battle Over the Right to Bear Arms in America

Adam Winkler

(W.W. Norton & Company 2013)

Adam Winkler describes the current gun debate as one "in which the terms are set by extremists on both sides." It was this criticism that first prompted me to pick up this book and read further.

Winkler's view emphatically differs: "gun rights and gun control are not mutually exclusive. We can have both." He characterizes the actual "story of guns in America [as] one

of balancing gun rights with public safety, respecting the rights of individuals to have guns and the ability of lawmakers to impose reasonable restrictions on guns to enhance the public safety." He offers a well-written account of the Supreme Court's landmark decision, *District of Columbia v. Heller*, which is interwoven with an evocative and enlightening discussion of gun legislation throughout American history. Winkler explains who pushed it, who opposed it, and what was regulated during changing political times. He makes clear from the outset that his book is neither pro- nor anti-guns. In a chapter on "Gun Grabbers" and one on "Gun Nuts," he points out many of the misconceptions, myths, or inaccuracies used by each side to support their positions in their battles over gun regulation. These offer a fascinating perspective on a debate that all too often is based on facts taken out of context or anecdotes or partial history. A rigorous approach to logic and evidence, as offered by Winkler, may change the parameters of the debate in surprising ways. The book is worth reading for that alone.

But Winkler's account of the history of the *Heller* case, including spot-on descriptions of the politics over who would argue for both sides in the Supreme Court, his analysis of the legal issues, his use of striking details to bring the courtroom argument alive, and his thoughtful perspective on the opinion are a joy to read, especially for any appellate lawyer. Those of us who have been in the Supreme Court (to argue or to watch) or who know any of the brilliant lawyers involved (such as Walter Dellinger, Paul Clement, or Alan Morrison) will enjoy learning more about the months leading up to the argument as various individuals and forces tried to control who would argue for each side and what would be said. From Winkler's description of Dellinger riding his bicycle to court, to the crowds waiting outside hoping to be in the courtroom in one of the public seats and chanting and counter-chanting at each other throughout the night, to the Solicitor General Paul Clement's amicus brief (which supported an individual's right to bear arms while emphasizing the right was not inconsistent with fairly strict regulation) and its critics, the book is a masterful account.

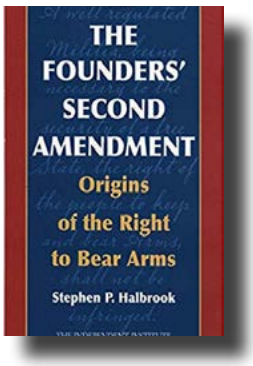
Winkler's historical discussion is also fascinating and, at least to this reader, often surprising. Winkler reviews gun legislation from the Revolutionary War era to the Wild West, shattering numerous myths about gun control in these times. But Winkler is no ideologue. He offers an independent perspective. For example, he describes research by an academic, Michael Bellesiles, into gun ownership during the Revolutionary era that was seized on by gun control proponents. Bellesiles's book, *Arming America*, gained attention around the country because it shattered common perceptions about early American gun ownership. Using probate records from the late 1700s and early 1800s, the professor wrote that only about 15% of those records reflected guns as part of the property and of those, more than half were described as damaged or inoperable. But Winkler reports that despite the large amounts of data and heavy footnoting of Bellesile's book, later academics debunked his research and demonstrated that it had serious discrepancies. One academic concluded that he had "misclassified over 60% of the inventories." And he was later forced to resign because his data was falsified.

As in this example, Winkler points out that "[f]acts about gun control are easily and often misconstrued by gun controllers." He disagrees with the assertion that high gun ownership in a society equates to high rates of gun crime pointing out that Switzerland offers a counter-example. There, the country relies on a citizen militia for national defense and so young men are required to keep a military weapon and be trained to use it yet gun crime in the country is almost nonexistent. According to Winkler, more than half of all gun fatalities in the U.S. are not associated with crime but occur when someone commits suicide using a firearm. He repeatedly follows the evidence regardless of whose "ox is being gored," an aspect of his writing that makes the book far more useful to any reader trying to genuinely understand the issues.

Winkler does not ignore the critical role that race and racism played in gun law during and after the Civil War, with the Ku Klux Klan making its "first objective [after the Civil War] the confiscation of all guns from newly freed blacks who gained access to guns in service to the Union Army." He recounts the changes over time by setting forth some of the same conservative groups' efforts today to fight against gun laws. Winkler also spends time talking about the modern repetition of this when the Black Panthers in the 1960s publicized their right to bear arms in self-defense as part of their mission and public image, an approach that stimulated efforts to enact gun laws restricting gun ownership all over again. Ronald Reagan, among others, promoted new restrictions on gun law in response to these events during the 1960s.

Winkler also debunks popular mythology about the lack of gun control in the Western frontier towns. He found both far less actual gun violence than popular mythology and movies would suggest and far more gun laws. According to Winkler, the "law often forbade people from toting their guns around." One scholar determined that most frontier towns had laws prohibiting the carrying of weapons by anyone except for law enforcement officers. And in fact, signs were posted in Wichita, Kansas in 1873 telling visitors to leave their guns with the police. Who knew?

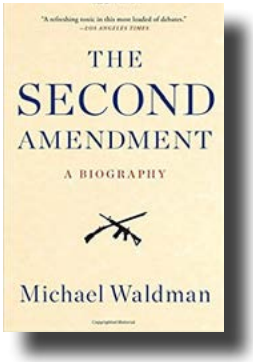
Winkler's book is awash with fascinating and little-known historical details. And his account of the *Heller* litigation is not to be missed. If you were picking only one book to read on this topic, I would suggest this one.



The Founders' Second Amendment: Origins of the Right to Bear Arms

Stephen P. Halbrook (Ivan R. Dee, Publisher 2008)

and



The Second Amendment: A Biography

Michael Waldman (Simon & Schuster)

This final review offers a discussion of two books on the Second Amendment, one by a scholar who seems to be a proponent of gun control legislation and the other by a scholar who offers an originalist depiction of the Second Amendment that drew praise from Justice Clarence Thomas. Both are interesting to read if only to see the many historical points on which they agree.

Stephen Halbrook's account of the Second Amendment focuses on the views of the Founders, from the pre-Revolutionary days through the passing of that generation. He recounts their views by examining newspapers, correspondence, debates, and resolutions. Halbrook recounts British efforts to prohibit all private arms, seize gun power in the powder houses, and generally bar colonists from attempting to get and distribute arms. According to Halbrook, the "shot heard round the world" occurred when the British tried to seize arms being kept by militiamen who then repulsed the British using their own muskets and sporting arms, an effort that led to British General Gage's effort to confiscate all the private arms held by Boston's citizens.

Halbrook also looks to the debates over the enactment of the Constitution for evidence regarding the early views about a right to bear arms. This analysis of constitutional ratification debates in the various states is enlightening and useful in trying to understand any originalist analysis of the Second Amendment. Halbrook also devotes attention to the Founders' understanding of the role of the well-regulated militia, and to distinguishing such groups from armies. One aspect of this history is Halbrook's explanation of how the Founders' views changed after the Revolutionary War when they had been tested by war and by their efforts to defend the nation under the Articles of Incorporation.

He also recounts aspects of the NRA's history, including its formation by militia and army veterans as a group to train men to handle guns and shoot more accurately. He recalls that in its early history the NRA did not oppose the initial federal gun control legislation, and quotes its chief lobbyist's testimony that "I have never believed in the general practice of carrying weapons…. I think it should be sharply restricted and only under licenses." The NRA's early history and its evolution to what it is today is fascinating to trace, and Halbrook does a good job of tracing it. And Habrook spends time reviewing the numerous lawsuits that the NRA filed in the wake of the *Heller* decision attempting to strike down gun control laws around the country. Anyone seeking a deeper understanding of the constitutional history would benefit from reading this book.

Waldman similarly begins with a discussion of the Revolutionary War era militias and of and their role during that time and during the French and Indian War of 1754-63. His recounts the romantic misty view of the militia as a democratic alternative to the king's army, but also explains that these men "pulled away from home, carrying their own weapon" could not match the professionalism of a well-trained fighting force, a fact which soon became clear. The war taught "harsh lessons" to the leaders of that time. Washington, for example, wrote that "The place any dependence upon Militia, is, assuredly, resting upon a broken staff." Washington saw that men in these militia were likely to desert and were unable to form a strong force.

Waldman also reviews the history of the ratification debates over the U.S. Constitution, examining what light it sheds on the language and meaning of the Second Amendment. He notes that one loud argument against its adoption was the notion that it allowed for a powerful standing army capable of crushing citizen militias. Waldman too recounts the concern about maintaining rights and the fact that gun regulations at the time were common.

And Waldman discusses the litigation in the wake of the *Heller* decision. After noting the shifting politician tides regarding gun control, Waldman observes that the Supreme Court decision was issued at "an odd moment: a time when there are reasons to think the push for gun rights might otherwise lose some of its potency." Waldman points out that while the number of guns in private ownership has grown, the number of gun owners has "dropped sharply." And he offers a perspective about the kind of research that might be helpful as well as the most promising measures to curb gun violence. His book is worth reading as well for those trying to understand the current debates.

***Mary Massaron**, a former chair of the Michigan State Bar Appellate Practice Section, co-chair of the Michigan Appellate Bench Bar Conference Foundation, and Chair of the Michigan Supreme Court Historical Society Advocates Guild, has focused her practice on appellate law in state and federal appellate courts for decades. She is a Fellow in the American Academy of Appellate Lawyers and a former President of DRI-The Voice of the Defense Bar.*

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.

***Trinity Health-Warde Lab LLC v Charter Twp of Pittsfield;* SC 154952, COA 328092**

Municipal/Tax Law: The Supreme Court requested briefing on whether the Court of Appeals erred when it held that the petitioner, Trinity Health-Warde Lab LLC, a "for-profit limited liability company – a wholly owned subsidiary of tax-exempt Trinity Health Michigan – was not entitled to a property tax exemption under MCL 211.7o and MCL 211.7r."

***TM v MZ;* SC 155398, COA 329190**

Family Law: Whether an appeal from a personal protection order is necessarily rendered moot by the fact of its expiration.

***Blackwell v Franchi;* SC 155413, COA 328929**

Premises Liability: In a published opinion, the Court of Appeals held that a question of fact was presented regarding whether an eight-inch drop-off into an unlighted mud room was open and obvious. The Supreme Court requested briefing on whether the premises owner owed a duty to warn the plaintiff of this condition, given the general rule that a "landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved."

***People v Bentz;* SC 155361, COA 329016**

Criminal Law: In a case of alleged criminal sexual conduct involving a victim under 13 years of age, whether the defendant was denied the effective assistance of counsel where defense counsel failed to object to the testimony of a physician regarding her physical examination of the victim and whether there is a reasonable probability that the outcome of the trial would have been different.

***People v Washington, Tarone;* SC 156283, COA 330345**

Criminal Law: Whether the crime of maintaining a drug house (a misdemeanor punishable by up to two years in prison) many serve as the predicate felony from a conviction of possessing a firearm during the commission of a felony.

***Michigan Gun Owners, Inc v Ann Arbor Public Schools;* SC 155196, COA 329632**

***Michigan Open Carry, Inc v Clio Area School District;* SC 155204, COA 329418**

Municipal Law: In two separate published opinions, the Court of Appeals held that state law does not preempts the defendant school district policies of banning the possession of firearms in schools and at school-sponsored events. The Supreme Court consolidated these cases and directed the parties to address the following issues: "(1) whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted; (2) if so, whether the Court of Appeals properly analyzed the *Llewellyn* factors; and (3) whether the Court of Appeals correctly held that the school district's policies are not preempted."

***People v Straughter;* SC 156198, COA 328956**

Criminal Law: The defendant was convicted of carjacking, armed robbery, conspiracy to commit armed robbery, second-degree home invasion, and unlawful imprisonment. The defendant was sentenced as a habitual offender. The Court of Appeals affirmed the convictions, but vacated the sentence and remanded for resentencing where there was no written proof of service that the prosecutor had served the habitual offender notice upon the defendant. The Supreme Court requested that the parties address (1) whether the harmless error tests articulated in MCR 2.613 and MCL 769.26 apply to violations of the habitual offender notice requirements set forth in MCL 769.13; (2) whether the prosecutor may establish that a defendant received a habitual offender notice at any time before the 21-day time limit in MCL 769.13 by any means other than a proof of service; and (3) whether providing a habitual offender notice in district

court satisfies the requirement set forth in MCL 769.13 that the habitual offender notice be served within 21 days after the defendant's arraignment on the information.

***North American Brokers, LLC v Howell Public Schools;* SC 155496, COA 330126**

Statutory Construction: Whether promissory estoppel is an exception to the statute of frauds.

***McQueer v Perfect Fence Company;* SC 153829, COA 325619**

Worker's Compensation: Issues include: (1) whether the statutory employer provision of MCL 418.171 is applicable to the plaintiff's claims; and (2) if so, whether the plaintiff has established a genuine issue of material fact sufficient to avoid summary disposition; and (3) whether the Court of Appeals erred by reversing the trial court's order denying, on the basis of futility, the plaintiff's motion to amend his complaint to add an intentional tort claim.

***Harrison v Vanderkooi;* SC 156058, COA 330537**

Constitutional Law: The case involves the application of the Grand Rapids Police Department's "photograph and print" procedure during a field interrogation of a minor who lacked official identification. The Supreme Court requested briefing on "whether any alleged violation of the plaintiffs' constitutional rights were the result of a policy or custom instituted or executed by the defendant City of Grand Rapids."

***People v Kavanaugh;* SC 156408, COA 330359**

Criminal Law: Issues include: "(1) what deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court; (2) what evidence may be considered in determining whether there was clear error in the trial court's factual findings; and (3) what standard of review is to be applied under such circumstances."

***People v Washington, Gregory;* SC 156648, COA 336050**

Criminal Law: Issues include: (1) whether the trial court's action of resentencing the defendant while an application for leave to appeal was pending in the Supreme Court was a jurisdictional defect, and (2) if so, whether the defendant could properly raise the jurisdictional defect in a successive motion for relief from judgment.

***Kendzierski v Macomb County;* SC 156086, COA 329576**

Municipal Law: In this class action, at issue was whether the defendant was permitted to make unilateral changes to retiree healthcare benefits outlined in several collective bargaining agreements. The Court of Appeals held that the plaintiffs had a vested right to lifetime healthcare benefits and that those benefits could not be modified without the plaintiffs' consent. Without specifying any particular issues, the Supreme Court ordered oral argument to determine whether to grant the defendant's application or take other action.

***Sejasmi Industries, Inc v A+ Mold, Inc;* SC 156341, COA 336205**

Statutory Construction: This matter concerns the interpretation and application of the molder's lien act, MCL 445.611 *et seq*., pertaining to "ownership rights in dies, molds, and forms for use in the fabrication of plastic parts under certain conditions," along with the establishment of liens on "certain dies, molds, and forms." Without specifying any particular issues, the Supreme Court ordered oral argument to determine whether to grant the application or take other action.

***Jones Family Trust v Saginaw County Land Bank Authority;* SC 155863, COA 329442**

Municipal Law/Negligence: This lawsuit arises out of damage to the plaintiff's house during the demolition of a house on an abutting property. The abutting property was owned by the defendant land bank with the demolition performed by the defendant contractors. The Supreme Court granted oral argument, requesting briefing on (1) whether the trial court erred in granting summary disposition in favor of the defendant land bank on the plaintiff's inverse condemnation claim; and (2) whether the measure of damages on the plaintiff's breach of third-party contract claim is the same as the measure of damages on a tort claim for the negligent destruction of property.

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Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Published Decisions

Record on appeal - video evidence

People v Kavanagh
___ Mich ___ (Docket no. 156408, rel'd 1/24/18)

Panel: Supreme Court
Trial court: Berrien Circuit Court

In *People v Kavanagh*, ___ Mich App ___ (Docket No. 330359, rel'd 7/6/17), the Court of Appeals reversed the defendant's conviction based on an allegedly-illegal search of his car after a traffic stop, which was recorded on "dash cam" video. At the suppression hearing, the defense informed the trial court the video existed, but did not request that the court view it. Later, after the court had denied the defendant's motion to suppress, it did watch the video but confirmed its initial decision. The defendant was convicted and appealed. The Court of Appeals panel "watched and listened to the recording" and stated that "[h]aving done so, we need not rely on the trial court's conclusions as to what the video contains." The Supreme Court granted oral argument on the prosecution's application for leave to appeal. It directed the parties to brief "(1) what deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court; (2) what evidence may be considered in determining whether there was clear error in the trial court's factual findings; and (3) what standard of review is to be applied under such circumstances."

Appellate jurisdiction - administrative appeal

Prime Time Int'l Distributing, Inc, v Treasury Dep't
___ Mich App ___ (Docket No. 335913, rel'd 11/16/17)

Panel:Beckering, O'Brien, Cameron
Trial court: Court of Claims

In a dispute over untaxed tobacco products, several defendants appealed to circuit court from hearings in the Department of Treasury. The defendant contended jurisdiction belonged exclusively in the Court of Claims. The Court of Appeals held that "MCL 600.6419(5) applies, the circuit court has exclusive jurisdiction over plaintiffs' appeals . . ." The panel also rejected the defendant's argument that the proceedings were not "appeals" but "original actions." "[E]ach plaintiff received a 'final determination' from an inferior tribunal—defendant's hearing division—and sought review in another tribunal." The fact that some trial court powers were available did not affect the outcome; "[a]lthough the reviewing court will conduct 'discovery, motion practice, and trials' . . . in order to resolve the dispute, the procedure does not change the review process into an original action."

Appellate jurisdiction - interlocutory order

In re Trump
___ F3d ___ (No. 17-510/5830, rel'd 11/1/17)

Panel: McKeague, White, Hood
Trial court: United States District Court for the Western District of Kentucky

During the campaign, several protesters were injured at a Trump rally when they were assaulted by supporters of the candidate. They sued in state court alleging "incitement to riot." The case was removed. The district court denied the defendant's motion to dismiss and certified the order for interlocutory appeal under 28 USC 1292(b). By then, the defendant had been elected and assumed office. The Sixth Circuit granted his petition for leave to appeal. The panel stated that the criteria for interlocutory appeal in the statute "should be treated as *guiding criteria* rather than *jurisdictional* requisites" (emphasis original) Noting that the plaintiffs "apparently sought expansive discovery," the panel agreed that "this court should ensure that the Kentucky claim rests on a solid footing before permitting litigation to continue."

Appellate jurisdiction - cross-appeal

Bays v Montmorency Co
___ F3d ___, Docket no. 16-2761/17-1215, rel'd 10/20/17

Panel: Clay, Rogers, Sutton
Trial court: United States District Court for the Eastern District of Michigan

In a §1983 case arising out of a jail suicide, the plain-

tiff's parents sued a nurse for "deliberate indifference" and the county for "failure to train." The district court denied the nurse's motion for summary judgment but granted the county's. The nurse appealed and the plaintiffs cross-appealed. The Sixth Circuit affirmed the ruling as to the nurse but dismissed the cross-appeal by the parents for lack of appellate jurisdiction. Noting that the parents "have no standalone right to an interlocutory appeal" and did not "ask[] the district court to enter final judgment with respect to this claim," the panel held that the decision on the county's "failure to train" its employees was not "inextricably intertwined" with the nurse's qualified immunity. "Our review of [the] qualified-immunity claim does not necessarily decide whether the [plaintiffs] produced enough evidence to save their claim against the County."

Appellate jurisdiction - late appeal

Martin v Sullivan
___ F3d ___ (Docket no. 17-1897, rel'd 11/22/17)

Panel: Keith, Cook, Thapar
Trial court: United States District Court for the Eastern District of Michigan

The plaintiff filed a notice of appeal more than 30 days after the judgment. He alleged that he did not receive notice of the judgment in time. The Sixth Circuit dismissed the appeal. Federal Rule of Appellate Procedure 4(a)(6) "requires that a party file a motion before the district court to reopen the time to file an appeal," and the appellant's pro se emergency notice of appeal was not a "motion."

Preservation - lack of authority

Mays v Snyder
___ Mich App ___ (Docket No. 335555, rel'd 1/25/18)

Panel: Jansen, Fort Hood, Riordan
Trial court: Court of Claims

In one of several suits arising out of the Flint water crisis, the Court of Claims granted partial summary disposition to the Governor and two former emergency managers. Among many issues addressed in the extensive opinion was the "capacity" of those defendants. In a footnote, the panel noted that the appellants "instruct this Court to 'see' . . . provisions of the [applicable act], but provide nothing in the way of argument supporting their conclusory assertion . . ." The court, however, briefly reviewed the argument despite the lack of discussion.

Right result - alternate grounds
Preservation - issues not decided
Precedent - plurality opinion

Meisner Law Group PC v Weston Downs Condominium Ass'n
___ Mich App ___ (Docket No. 332815, rel'd 10/24/17)

Panel: Beckering, Markey, Riordan
Trial court: Oakland Circuit Court

In a contract dispute between a law firm and a client, the plaintiff filed suit in circuit court for unpaid legal fees that totaled less than the jurisdictional amount. The trial court granted summary disposition to the defendant (without prejudice) under MCR 2.116(C)(4) (lack of jurisdiction) and did not address the defendant's arguments for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). On appeal, the defendant "present[ed] [those arguments] as alternative grounds to affirm," but the Court of Appeals "declined to consider" them. "[A]ffirming the circuit court . . . would grant defendant more relief than [it] obtained in the circuit court." The panel also found that the plaintiff had failed to preserve an argument that its quantum meruit claim was "equitable," and so within the circuit court jurisdiction, but went on to discuss it anyway. It rejected application of a Supreme Court plurality opinion as "not binding precedent because it does not represent a majority opinion of the Court."

Unpublished Cases

Mootness
Argument unsupported

AFSCME Council 25 Local 3317 v Wayne Co
Docket no. 334638, rel'd 12/28/17

Panel: Murray, K.F. Kelly, Fort Hood
Trial court: Wayne Circuit Court

The plaintiff, a public employee union, filed a petition for arbitration with the Michigan Employment Relations Council, but later dismissed it and signed a "Memorandum of Understanding" with the county that would allow the petition to be filed later. After the petition was filed, however, the county went into a fiscal emergency and the county executive, acting under his emergency powers, moved to dismiss the MERC petition. The union filed suit for breach of contract. The MERC petition was dismissed while the circuit court case was pending. The union filed a petition in the Court of Appeals to review the MERC decision, but later withdrew it and the appeal was dismissed. The circuit court dismissed the breach of contract claim on the basis that the MERC's dismissal of the petition for arbitration was res judicata. The Court of Appeals held the appeal was moot. "It is impossible for this

Court or the circuit court to order defendants to participate in nonexistent proceedings." The court also noted that the union had not provided support for its argument that it was entitled to damages, rather than only injunctive relief, in the circuit court.

Record on appeal - lack of factual record in trial court

Allen Park v Gerisch Estate
Docket no. 334969, rel'd 12/19/17

Panel: Talbot, Borella, Riordan
Trial court: Wayne Circuit Court

The city filed a complaint to have the defendant's house demolished as a "public nuisance." The trial court held three show-cause hearings, but neither an evidentiary hearing or a bench trial. Neither side moved for summary disposition. The trial court granted the city's show cause motion and the estate appealed. The Court of Appeals vacated the order. The panel "[was] forced to conclude that the trial court's rulings were clearly erroneous" because "there are no findings of fact or law from which this Court can glean the basis for the trial court's decision."

Appellate jurisdiction - probate court order

In re Erber Minors
Docket no. 338759, rel'd 12/14/17

Panel: Jansen, Cavanagh, Cameron
Trial court: Genesee Probate Court

The petitioner's children were under guardianship. He filed a motion to modify parenting time. It had not been heard when he filed a petition to terminate the guardianship. The trial court issued a written order, which included a new date for a hearing on the petition. The Court of Appeals held the order was not a "final order" for purposes of the 2016 amendments to MCL 600.308(1)/MCR 5.801 (appeals from probate court). "[B]ecause the probate court has not yet actually ruled on [either the petition or the motion], petitioner cannot demonstrate that he has sustained injury from the 'actions of the trial court.'" The court dismissed the appeal, but directed the probate court to rule on the petition "without further delay."

Appellate jurisdiction - final order

Burnett v Ahola
Docket no. 338618, rel'd 12/7/17

Panel: Meter, Borello, Riordan
Trial court: Genesee Circuit Court

The plaintiff was the biological father of a child born while the defendants were married. The trial court granted his motion for a determination of paternity, which the defendants appealed. While the appeal was pending, the trial court entered two orders allowing parenting time for the plaintiff. The parties eventually stipulated to a custody and parenting time agreement, but very soon after that, the defendants moved for relief from judgment alleging that the plaintiff had committed fraud during the underlying bench trial. The trial court denied the defendants' motion for relief from judgment. The Court of Appeals held first that the order was one "affecting custody," and therefore a "final order" under MCR 7.202(6)(a)(iii), because if the motion for relief from judgment had been granted, the net effect would have been the plaintiff's total loss of custody of the child.

Jurisdiction - lower court post-appeal

Brief on appeal - new authority

Campbell v U-Win Properties
Docket no. 333429, rel'd 11/21/17

Panel: Meter, Borrello, Riordan
Trial court: Wayne Circuit Court

The plaintiffs were vendees on a land contract. The defendant, the landlord, obtained an order of eviction in district court. The plaintiffs' appeal was dismissed and reinstated, but by then the landlord had already executed the writ. The plaintiffs sued, alleging wrongful eviction and fraud. The Court of Appeals held that the dismissal of the appeal revested jurisdiction in the district court where the defendants had properly acted on the order of eviction. In a footnote, the panel rejected the plaintiffs' argument ("based on nonbinding case law") that the appellees could not present "authorities and legal arguments" not presented below. "[Appellees] are not attempting to raise any new issues but are simply supporting the issues at hand."

Appellate Practice Section Mission Statement

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Brief on appeal - issues not presented

Comerica Bank v Revely
Docket no. 333358, rel'd 11/16/17

Panel: Murray, Talbot, Gleicher
Trial court: Wayne Circuit Court

The defendant in a contract case appealed, *in pro per*. His brief cited no authority and included exhibits which were apparently not part of the trial court record. The panel concluded "[e]ven granting the leeway often afforded to parties appearing *in propria persona* . . . we find [the] presentation of his appeal wholly insufficient."

Preservation - argument not raised

Standard of review - reconsideration

Crandall Office Furniture Inc v Carroll
Docket no. 335746, rel'd 1/11/18

Panel: Meter, Borrello, Boonstra
Trial court: Kent Circuit Court

In a commercial breach of contract dispute, the defendant, who was not an attorney, represented himself. He did not appear at a summary disposition hearing, allegedly because he did not receive notice of it by e-mail, and the trial court granted summary disposition to the plaintiff on two of the counts. He moved to "set aside a default," which the court told him to convert into a motion for reconsideration but later denied. He appealed; the plaintiff cross-appealed. The defendant argued that some of the plaintiff's exhibits "were not authenticated," but the Court of Appeals held that he had not raised the issue in the trial court and noted that the defendant himself had "based many of his arguments to the trial court on evidence that he now argues was inadmissible." The panel also noted, in a footnote, that it would review the court's ruling on the defendant's motion for reconsideration as though they were made in response to the motion for summary disposition, in part because the trial court's opinion included "an in-depth analysis" of the defendant's arguments.

Issued waived - no record, not included in questions presented

Preservation - no motion in trial court

Warren v Barnett
Docket no. 335192 , rel'd 12/14/17

Panel: Markey, Hoekstra, Ronayne Krause
Trial court: Calhoun Circuit Court

The plaintiff was convicted of multiple felonies in 1995. He filed suit against his lawyer and the prosecutor, alleging vague constitutional claims. The case was assigned to the prosecutor, who had become a judge; he recused himself and it was reassigned. The trial court granted summary disposition to the defendants. The trial court ordered that "all future pleadings" should be reviewed to determine "if they will

be accepted for filing." It later rejected a proposed amended complaint. The plaintiff appealed but did not produce the hearing transcript, despite two notices from the clerk's office. The Court of Appeals held he had waived the issue. Without the transcript, "we cannot conclude that the trial court erred." One of the plaintiff's arguments "was difficult to follow" because of "myriad procedural and substantive deficiencies;" the court dealt with it by "not[ing] that [appellant] failed to include this issue in his statement of the questions presented." Finally, the panel held that the plaintiff had failed to preserve an argument regarding the reassignment of the case by not making a motion in the trial court, although the opinion went on to reject the arguments made anyway.

Law of the case

Droomers Estate v Musilli
Docket no. 333691, rel'd 12/17/17

Panel: Shapiro, Hoekstra, M.J. Kelly
Trial court: Oakland Circuit Court

The case originated as a fee dispute between two law firms. The plaintiff (the estate of one lawyer) finally obtained a writ of garnishment against the other lawyer; the trial court also imposed sanctions against him and his lawyer, the other appellant. There had been three prior appeals relating to a finding of contempt and related sanctions against the appellants. At several points along the way, in both the Court of Appeals and on remand to a new trial court judge, the appellants had argued that the underlying settlement extinguished the plaintiff's (the referring attorney) claim. In the present appeal, they cited the settlement agreement itself, which apparently had not been made part of the prior record(s), as a basis for attacking the original contempt order. The Court of Appeals dismissed one argument because the appellant "does not address the trial court's reasoning in his brief on appeal" and it "amount[s] to an impermissible collateral attack on the [original] contempt order." The court also held that the law of the case doctrine precluded review because "this Court has repeatedly rejected" the appellant's attempt to make that argument and found it frivolous in the most recent preceding appeal.

Law of the case

Great Lakes Eye Inst v Krebs
Docket no. 335405, rel'd 1/918

Panel: O'Connell, Hoekstra, Swartzle
Trial court: Saginaw Circuit Court

The case was a contract dispute relating to a noncompete agreement. In an earlier appeal, the Court of Appeals reversed summary disposition for the plaintiff, finding that the agreement could not be enforced based on one section of the contract. The case returned to the trial court where the defendant moved for contractual attorney fees. The plaintiff relied on a different section of the contract in response. The Court of Appeals held the la-of-the-case doctrine did not apply. "[T]he issue of plaintiff's *liability* as a successor to the employment contract, as opposed to plaintiff's *right* to enforce a specific provision of the contract as an assignee of those rights, was never before the prior panel." The panel also held that judicial estoppel did not apply, because the plaintiff's position in the first appeal was not "wholly" inconsistent with its position in the second.

Precedent - dicta

Fisher Sand & Gravel Co v Sweebe
Docket no. 334569, rel'd 12/21/17

Panel: Murphy, M.J. Kelly, Swartzle
Trial court: Midland Circuit Court

The defendant appealed from a bench verdict for the plaintiff. In a prior appeal, the Supreme Court had held that a specific statute of limitations applied to the claim. It discussed the accrual date, but did not directly address it. The defendant argued that the discussion was *dicta*, but the Court of Appeals held that the issue was "germane to the controversy" and that the Supreme Court "intentionally took up the discussion, discussed, it and decided it." Thus, the discussion was binding on the Court of Appeals.

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